

Fordham International Law Journal

Volume 21, Issue 5

1997

Article 9

Combating India's Heroin Trade Through Anti-Money Laundering Legislation

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Kavita Natarajan

Abstract

This Note discusses the history behind the global war on drug-related money laundering, and India's efforts at joining the movement. Part I will describe the nature of money laundering as well as various international and national attempts to combat it. Part II will explore arguments for and against India's use of anti-money laundering legislation as a method of controlling the growing heroin trade. The Note concludes that it is imperative that India implement a comprehensive anti-money laundering regime, which includes compliance programs and bilateral and multilateral agreements on mutual legal assistance in order to suppress its growing heroin trade.

COMBATTING INDIA'S HEROIN TRADE THROUGH ANTI-MONEY LAUNDERING LEGISLATION

Kavita Natarajan*

INTRODUCTION

Drugs and money laundering are inextricably linked.¹ Drug trafficking and abuse now plague the global community.² Few individuals will dispute that narcotics trafficking has become one of the most lucrative underground economies, generating billions of dollars annually.³ The war against drugs has risen to such a paramount concern that it has brought law enforcement officials around the world together in an effort to control drug trafficking.⁴

Law enforcement organizations are attempting to curb the escalating levels of narcotics trafficking by gaining some control over money laundering practices.⁵ Law enforcement officials hope that if the proceeds of drug trafficking cannot find their way back to narcotics producers, then the importation of drugs

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1. See, e.g., Berta Esperanza Hernandez, *RIP to IRP - Money Laundering and Drug Trafficking Controls Score a Knockout Victory Over Bank Secrecy*, 18 N.C. J. INT'L L. & COM. REG. 235, 235-39 (1993) (discussing nexus between illicit drug trafficking and money laundering).

2. See Bruce Zagaris, *Developments in International Judicial Assistance and Related Matters*, 18 DENV. J. INT'L L. & POL'Y 339 (1990) (stating that international drug trade has penetrated fabric of society throughout world).

3. See Peter J. Quirk, *Money Laundering: Muddying the Macroeconomy*, FINANCE AND DEVELOPMENT, Mar. 1997, at 8 (stating that approximate US\$500 billion of illicitly obtained funds pass through international banking system annually); see also Hernandez, *supra* note 1, at 235-36 (estimating that US\$300 billion are laundered each year through international banking system).

4. See, e.g., The United Nations Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances, UN doc. E/CONF. 82/15, *reprinted in* 28 I.L.M. 493 (1989) [hereinafter Vienna Convention]. The Vienna Convention represents an international response to the awakened need for "concerted and more effective action" to harness money laundering. See David P. Stewart, *Internationalizing the War on Drugs: The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 18 DENV. J. INT'L L. & POL'Y 387, 387 (1990).

5. See Abraham Abramovsky, *Money Laundering and Narcotics Prosecution*, 54 FORDHAM L. REV. 471, 472 (1986) (discussing how U.S. government is trying to gain some control over money laundering practices in effort to combat illegal importation of narcotics into United States).

may decline.⁶ As a result, countries heavily involved in narcotics trafficking are slowly instituting anti-money laundering statutes in an effort to combat narcotics trafficking and abuse.⁷

India is no exception to this trend.⁸ India is currently suffering from a burgeoning narcotics trade⁹ and the crimes associated with it.¹⁰ This Note discusses the history behind the global war on drug-related money laundering, and India's efforts at joining the movement. Part I will describe the nature of money laundering as well as various international and national attempts to combat it. Part II will explore arguments for and against India's use of anti-money laundering legislation as a method of controlling the growing heroin trade. The Note concludes that it is imperative that India implement a comprehensive anti-money laundering regime, which includes compliance programs and bilateral and multilateral agreements on mutual legal assistance in order to suppress its growing heroin trade.

6. See *id.* (stating hope among government authorities that if "drug money cannot find its way back to narcotics producers, then the importation of drugs may decline.").

7. See, e.g., Initiative by the Organization of American States to Prepare Model Regulations on the Laundering of Property and Proceeds Related to Drug Trafficking: Articles Considered by the Inter-American Group of Experts, Dec. 9-13, 1991, OEA/Ser. L/XIV, 4.4, CIDAD/GT. Lavex/doc. 20/19 [hereinafter OAS Laundering Regulations], reprinted in INTERNATIONAL EFFORTS TO COMBAT MONEY LAUNDERING 4 et seq (Dr. W.C. Gilmore, ed., 1992) [hereinafter INTERNATIONAL EFFORTS]. The Model Regulations represent a multilateral effort by the countries of Latin America and the Caribbean to effectively combat drug-related money laundering. See CHARLES INTRIAGO, INTERNATIONAL MONEY LAUNDERING 38-42 (1991) (discussing initiatives taken by Organization of American States to combat money laundering in Latin America and Caribbean); Lawrence L.C. Lee, Note, *Combating Illicit Narcotics Traffic in Taiwan: The Proposed Money Laundering Control Act*, 4 TUL. J. INT'L & COMP. L. 189, 211 (1996) (discussing Money Laundering Control Act in Taiwan); Paulina J. Jerez, *Proposed Brazilian Money Laundering Legislation: Analysis and Recommendations*, 12 AM. U. J. INT'L L. & POL'Y 329, 352-54 (1997) (discussing Brazil's proposed anti-money laundering legislation).

8. See *Letter From the President to the Chairmen and Ranking Members of the House Committees on Appropriations and International Relations and the Senate Committees on Appropriations and Foreign Relations*, Nov. 10, 1997, available in Westlaw WL 702614 (White House) (citing India as one among group of major illicit drug-producing or drug-transit countries).

9. *Id.*

10. *Id.*

I. THE CRIME OF MONEY LAUNDERING AND ATTEMPTS TO COMBAT IT

Money laundering is a problem that concerns the world.¹¹ While once thought to be a relatively small problem,¹² global money laundering has now reached astounding levels.¹³ It is now estimated that some US\$500 billion dollars of illegally obtained funds is laundered throughout the world every year.¹⁴ As a result of the recent international explosion in global money laundering, countries such as India are attempting to develop methods to control and eliminate money laundering.¹⁵

A. The Crime of Money Laundering

Money laundering is the process by which one disguises the existence, illegal source, or illegal application of income in an effort to make the funds appear legitimate.¹⁶ Money laundering is an integral part of a drug operation, and as the lifeblood of narcotics trafficking, money laundering allows for the use of

11. See INTRIAGO, *supra* note 7, at 2-4 (describing money laundering as crime that transcends domestic and international boundaries).

12. See *id.* at 2 (describing international explosion of narcotics trafficking as single most important catalyst to world's late awakening to money laundering). Although money laundering activity has existed for years, government enacted relatively little legislation to counter money laundering until recently. *Id.* at 3. For example, governments knew that the Sicilian Mafia and its U.S. counterparts amassed substantial profits from their illegal activities, which they subsequently injected into the financial system. *Id.* Governments failed to take action against money laundering until they witnessed the effects upon society of the growing international narcotics trade. *Id.*

13. *Id.*

14. See Quirk, *supra* note 3, at 8 (estimating that US\$500 billion of illegally obtained funds enter the financial system every year). *Id.* Estimates vary as to exactly how much money is laundered annually through financial system. The large variation in estimates has resulted in reliance on consensus numbers. *Id.* On October 18, 1994, the Financial Times released this "consensus number" which was based on recent estimates by U.K. and U.S. officials. *Id.* The foundation of this number was not released. *Id.* The estimate may have been derived from an informal updating and generalization of earlier Financial Action Task Force micro-based estimates. *Id.*

15. See *Record Number of Nations Battle Laundering, U.S. Says*, MONEY LAUNDERING ALERT, May 1, 1993, at 1 (noting that in 1993 money laundering had become major area of concern for Indian government, whereas it was not major concern three years ago).

16. See Duncan E. Alford, *Anti-Money Laundering Regulations: A Burden On Financial Institutions*, 19 N.C. J. INT'L & COM. REG. 437, 437 (1994) (offering definition of money laundering); see also Nicholas Clark, *The Impact of Recent Money Laundering Legislation on Financial Intermediaries*, 14 DICK J. INT'L L. 467, 469 (defining money laundering as "the process by which the proceeds of crime or fraud are made to appear as if they have emanated from a legitimate source.").

funds generated through drug sales in the legitimate economy.¹⁷ Without cleansing its profits, a narcotics operations would find it difficult if not impossible to flourish.¹⁸ In an effort to counter money laundering, many of countries have joined together in international and regional efforts to effectively control money laundering and eliminate drug trafficking.¹⁹ Several countries have also developed their own domestic strategies aimed at countering money laundering.²⁰

1. Background

While no two money laundering systems are the same, the money laundering process essentially consists of three stages, namely the placement of money, the layering of money, and the integration of money.²¹ Placement refers to the physical disposal of illicitly obtained cash into a financial institution.²² The layering of money refers to the movement of money through several accounts or institutions in an effort to separate the money from its illegal source.²³ Integration refers to the re-introduction of funds into the legitimate economy.²⁴

In the placement stage, the money launderer transforms il-

17. See Alford, *supra* note 16, at 437 (describing how money laundering is essential component of drug trafficking operations).

18. See *id.* (discussing importance of money laundering to successful narcotics trafficking operation). Money laundering is an integral part of criminal operations, because it hides the illegal source of criminal proceeds. *Id.* Money laundering provides those involved with drug trafficking and other criminal activities with the ability to place the proceeds of their crime into the financial system unnoticed. *Id.*

19. See Lee, *supra* note 7, at 200 (discussing success of intergovernmental regimes at combating money laundering).

20. See Clark, *supra* note 16, at 470 (stating that only when country has sound anti-money laundering policies in place will war against drugs be successful).

21. See *id.* at 470 (describing various stages of money laundering).

22. *Id.* The money laundering process is most susceptible to detection during the placement stage when the money is first deposited into a bank or other financial institution. See Alford, *supra* note 16, at 439 (discussing how money laundering process is particularly susceptible to detection during placement stage); see also Clark, *supra* note 16, at 470-71 (citing entry of cash into financial system as stage in typical laundering process that is particularly susceptible to recognition). It is during this initial stage that United States law enforcement officials have targeted their efforts by requiring financial institutions to make currency transaction reports when cash is deposited. See, e.g. 31 U.S.C. § 5313 (imposing currency transaction reporting requirement upon financial institutions for transactions in excess of US\$10,000).

23. See Clark, *supra* note 16, at 470 (describing layering stage of money laundering process).

24. *Id.*

licit funds into more flexible and less suspicious forms.²⁵ Once transformed, the money launderer deposits the funds into a financial institution. The money laundering process is particularly vulnerable to recognition by law enforcement authorities during the placement stage.²⁶ The largest hurdle faced by the money launderer in this stage of the money laundering process is the practical one of how to move the money into the layering stage.²⁷ Cognizant of the preference among money launderers for depositing such large sums, those countries that have instituted anti-money laundering statutes have focused on requiring banks and various deposit taking bodies to report unusual transactions.²⁸ Such statutes compel professional money launderers to find alternative methods to introduce the funds into the mainstream financial system.²⁹

As a result of continually evolving modern technology and the ever increasing scope of global banking, the layering phase of money laundering has proven to be far more resistant against

25. See Scott Sultzer, Note, *Money Laundering: The Scope of the Problem and Attempts to Combat It*, 63 TENN. L. REV. 143, 149 (1995) (discussing various techniques used by money launderers during placement stage of money laundering process). During the placement stage, money launderers often convert illicit proceeds into negotiable instruments such as money orders or cashier's checks. *Id.* The ability to transform a large quantity of cash into a smaller quantity of negotiable instruments renders the illicit proceeds easier to smuggle. *Id.* Perhaps even more important, once the cash has been converted into negotiable instruments, it can be readily deposited into the mainstream financial system without setting off any alarms that money laundering enforcement techniques are designed to detect. *Id.*

26. See Alford, *supra* note 16, at 439 (discussing difficulties faced by money launderers during placement stage). The money laundering process is most vulnerable to detection when the large sums of money derived from illicit activity are deposited into a financial institution. *Id.* This is because law enforcement authorities require banks to report transactions in excess of a certain amount when cash is deposited into a bank. *Id.*

27. See Sultzer, *supra* note 25, at 149 (stating that most convenient solution would be to deposit money directly into bank, or other financial institution, and then reroute funds through wire transfers).

28. See Clark, *supra* note 16, at 470-71 (stating that if all banks and financial institutions are forced to report their suspicions to law enforcement authorities, money launderer will find his task more difficult); see also European Community Council Directive on Prevention of the Use of the Financial System for the Purpose of Money Laundering, Council Directive 91/308, O.J.L 166/77 (1991) [hereinafter Council Directive] (stating that "ensuring that credit and financial institutions examine with special attention any transaction which they regard as particularly likely, by its nature to be related to money laundering is necessary in order to preserve the integrity and the soundness of the financial system as well as contribute to combating this phenomenon.").

29. See Sultzer, *supra* note 25, at 149 (stating that no matter what avenue of placement money launderer chooses, ultimate goal is to introduce funds so that their source can be disguised through layering process).

law enforcement efforts.³⁰ Layering illicit funds is often accomplished through wire transferring funds through offshore banking havens such as Mauritius, Austria, and Hong Kong.³¹ When funds are placed in a country that has stringent bank secrecy laws, the origin of the funds becomes extremely difficult to trace.³²

There are various other methods through which money launderers can hide the origin of illicitly earned money.³³ As banks in several countries are compelled to report currency transactions over a certain amount, money launderers often use wire transfers to hide the source of funds.³⁴ Real estate transactions provide yet another method of repatriating illicitly earned cash into the legitimate economy.³⁵ Other methods include the

30. See Alford, *supra* note 16, at 439-40 (discussing various techniques used by money launderer to hide illegal source of funds). Techniques used during the layering stage include international wire transfers through offshore fictitious entities, and the use of companies that are exempt from currency transaction reporting requirements. *Id.* By depositing the illicit proceeds in an offshore entity, the funds often become beyond the legal reach of the law enforcement authorities in the jurisdiction where the activity giving rise to the money occurred. See Barry A. K. Rider, *The Wages of Sin—Taking the Profit Out of Corruption— a British Perspective*, 13 DICK. J. INT'L L. 391, 400 (1995) (discussing benefits of moving proceeds of crime offshore). Even if the relevant laws can be applied, involving another jurisdiction creates significant practical barriers for investigators in securing evidence that would be admissible before a court. *Id.* The use of counterbalancing loan schemes adds additional layers of complexity in the layering stage. See Sultzer, *supra* note 25, at 150 (defining counterbalancing loan scheme as placing illicit funds in offshore bank while using value of account as collateral for bank loan in another country).

31. See *New MLATs Extend U.S. Laundering Effort*, MONEY LAUNDERING ALERT, June 1, 1997, available in Westlaw, WL 9476403 (stating that U.S. has recently signed Mutual Legal Assistance Treaties with Austria and Hong Kong, both of which are pending ratification). When and if ratified, it is likely that wire transfers to these countries as a method of layering funds will decrease. *Id.*

32. See Alford, *supra* note 16, at 441 (discussing use of financial institutions in countries with strong bank secrecy laws as method of avoiding detection by law enforcement authorities in other jurisdictions). Bank Secrecy laws generally preclude a bank from providing information on a customer's account to anyone, including law enforcement agencies, without the specific authorization of the client. *Id.*

33. See Alford, *supra* note 16, at 440 (observing that there are methods available to money launderers to hide their identity as well as origin of illicit funds). One such method includes the establishment of a trust, where only the bank knows of the trustee's identity. *Id.*

34. See *id.* at 439-40 (stating that bank-to-bank transfers of legitimate funds are virtually impossible to discern from transfers of illegal funds).

35. See *id.* (noting that real estate transactions and real estate developments represent method of repatriating funds from abroad).

establishment of boutique banks³⁶ and front companies.³⁷

There are also several mechanisms by which an individual engaged in money laundering activity can disguise his identity.³⁸ A fairly common vehicle for money laundering operations is the use of numbered accounts in certain foreign countries with stringent bank secrecy policies.³⁹ It is also possible for a depositor to set up a trust,⁴⁰ or what is known as a paper corporation⁴¹ which issues bearer shares.⁴²

Once sufficiently layered through a series of complex transactions, the illegally obtained funds can be integrated into the legitimate financial world.⁴³ There are a number of ways in which these funds can reenter the financial world.⁴⁴ Once the

36. *See id.* (stating that boutique banks interact with larger commercial banks and wire money through several accounts in order to avoid recognition by law enforcement authorities); *see also* Patrick O'Brien, *Tracking Narco Dollars: The Evolution of a Potent Weapon in the Drug War*, 21 INTER-AM. L.R. 637, 671 (1990) (discussing use of boutique banks as method of laundering proceeds of drug trafficking).

37. *See* Alford, *supra* note 16, at 439-40 (stating that front companies used by money launderers are often exempt from currency reporting requirements, and consequently are able to take in large amounts of drug money). The use of companies exempt from currency reporting requirements has enabled banks to become the unwitting accomplices to money laundering. *Id.* Once the funds are taken in by a front corporation, they are intermingled with funds from other legitimate business ventures. *Id.* Once the drug proceeds are mixed with the legitimate funds, they are then placed in financial institutions. *Id.*

38. *See id.* (discussing methods used by money launderers to hide their identity). The concealment of a money launderer's identity provides yet another layer of complexity, separating the funds from its illegal source. *Id.*

39. *See id.* (stating that in these jurisdictions, only form of contact that depositor has with bank is through account manager). Furthermore, all communication between the account manager and the depositor is conducted by reference to the account number rather than a name. *See id.* (discussing use of numbered accounts as vehicle to launder money).

40. *See id.* at 440 (noting that with trust, only bank is aware of trustee's identification).

41. *See id.* (stating that with these paper corporations, only attorney that creates corporation is aware of identity of shareholders).

42. *See id.* at 468 n.30 (defining bearer shares as shares of equity stock that are not registered in shareholder's name, but rather, can be redeemed or sold by bearer with no further owner identification). The benefit to bearer shares is anonymity. *Id.*

43. *See* INTRIAGO, *supra* note 7, at 10, (stating that integration stage is final macro stage in money laundering process). The integration stage of the money laundering process places the laundered proceeds of crime back into the economy in such a manner as to make it appear as legitimate business earnings. *Id.*

44. *See id.* (describing various means of integrating proceeds of crime back into economy). Real estate transactions represent the traditional means of redirecting illegal proceeds into the economy. *Id.* Property can be bought by a shell corporation and then sold. *Id.* Other methods of integration include the use of false invoices by import-

funds are integrated back into the financial system, the money is accessible from anywhere in the world, while the original source of the funds remains unknown.⁴⁵

Within India, the system of money laundering is further complicated by the ancient underground form of banking known as Hawala.⁴⁶ Hawala, which means providing a code, was established centuries before the financial systems of the West.⁴⁷ Created as a means to facilitate the secure and convenient flow of funds, the system has become increasingly popular over the past few decades.⁴⁸

Under the present-day Hawala system, a person wishing to transfer funds to another country deposits the money with a Hawala dealer.⁴⁹ The depositor also gives the dealer a code,⁵⁰ which must be given by anyone trying to access the funds.⁵¹ Through the use of corporate accounts, the dealer is able to move the funds to one of the dealer's agents in another country.⁵² Armed with the code, the intended recipient of the money is able to obtain it from the dealer's agent.⁵³ With its lack of governmental supervision, the Hawala system allows individuals to make deposits and withdrawals through Hawala dealers rather than financial institutions.⁵⁴

export companies, whereby overvaluation of entry documents enables a money launderer to later justify additional funds deposited into a financial institution. *Id.*

45. *See id.* (stating that detection at integration stage is possible only through use of undercover infiltration and informant assistance).

46. *See Rider, supra* note 30, at 404 (stating that in some societies, underground banking systems rival conventional banking systems in terms of efficiency and capability).

47. *Ancient Underground Banking System, Hawala, Surfaces in U.S.*, MONEY LAUNDERING ALERT, June 1, 1996, at 1 (defining term hawala as "providing a code").

48. *Id.* Merchant traders located abroad were the traditional system users. *Id.* A merchant wishing to send money to his homeland would deposit the funds with a Hawala banker, who most likely owned a trading business. *Id.* For a fee, the banker would arrange for the money to be available for withdrawal from another banker, most likely a trader, in another country. *Id.* Upon withdrawal, the two bankers would settle their accounts through trade. *Id.*

49. *Id.*

50. *See India Cash Market Tied to Burgeoning Scandal*, CHI. TRIB., Jan. 21, 1996, at 14 (stating that codes can be as simple as "three pigs" or "five hens").

51. *Id.*

52. *Id.*

53. *See Ancient Underground Banking System, Hawala, Surfaces in U.S.*, *supra* note 48, at 1 (stating that because Hawala system operates without any governmental supervision, it is believed to have become more appealing to money launderers).

54. *Id.*

Traditionally, Indians living abroad used the Hawala system to funnel money back to their families.⁵⁵ As the Hawala system avoids the use of traditional financial institutions, those who use it are able to avoid fees charged by banks for wire transfers.⁵⁶ In recent years, however, the Hawala system has become increasingly susceptible to the laundering of illicit funds.⁵⁷ As anti-money laundering legislation has proliferated around the world, the unregulated Hawala system has become a more appealing alternative for money launderers.⁵⁸

Regardless of the type of financial intermediary that is used, it is inevitable that a financial institution will be necessary for any successful money laundering operation.⁵⁹ It, therefore, seems almost inescapable that law enforcement authorities will focus on financial institutions that are actively involved, albeit often unintentionally, in money laundering.⁶⁰ Authorities hope that if all financial institutions are required to report their suspicions, then potential money launderers will find the crime that much harder to commit.⁶¹

55. *Id.*

56. See Rider, *supra* note 30, at 404 (stating that efficiency of paperless and virtually recordless banking system that is capable of transferring significant amounts of wealth is an obvious attraction for money launderers).

57. See *Ancient Underground Banking System, Hawala, Surfaces in U.S.*, *supra* note 48, at 1 (discussing how increasing number of money launderers are using Hawala system to launder illicit proceeds).

58. *Id.* The case of *United States v. Singh* illustrates the use of the Hawala system as a means of laundering the proceeds of crime. *United States v. Singh*, No. 95 CR 152 (D. N.J. May 1995). The case revealed the establishment branches of the age-old system, within the United States. See *Ancient Underground Banking System, Hawala, Surfaces in U.S.*, *supra* note 48, at 1 (discussing facts *U.S. v. Singh*). In *United States v. Singh*, two Indian nationals were convicted of laundering over US\$5 million of alleged drug money to India. *Id.* After receiving the illicit funds, the Indian nationals would wire it to Hong Kong and Singapore through corporate accounts. *Id.* Their counterparts in those countries used the money to buy gold, which they smuggled into India. *Id.* Once in India, they sold the gold at a profit. *Id.* The money was then distributed as directed by the U.S. depositors. *Id.* The Indian nationals benefited from the fees charged for their services as well as the profits made from the sale of the gold. *Id.*

59. See Clark, *supra* note 16, at 470 (stating that financial intermediary of some sort is necessary component of successful money laundering operation).

60. See Alford, *supra* note 16, at 439 (stating that money laundering process is most vulnerable to detection during placement stage when money is first deposited in financial institution).

61. See Clark, *supra* note 16, at 470 (noting that if governments require all financial intermediaries to report all suspicious transactions, it will become increasingly difficult to launder money). Law enforcement authorities have also decided to target financial intermediaries because they have recognized that there are certain phases of money

The rise in global money laundering has created an emerging criminal class⁶² who are uninvolved with the underlying crimes that generate the illicit proceeds.⁶³ This new class of criminals consists of professional money launderers who aid and abet criminals through financial activities.⁶⁴ For these individuals, money laundering is a lucrative practice, whereby they can earn proceeds ranging from anywhere between two and twenty percent of the cash they launder.⁶⁵ It is because of these inherent dangers to the financial services sector that governments are now targeting the financial industry.⁶⁶ Many governments fear that when credit and financial institutions are used to launder the proceeds of crime, the stability of the system as well as consumer confidence will systematically erode.⁶⁷

2. International Efforts to Combat Money Laundering

International regimes attempt to monitor or regulate certain international relations and activities.⁶⁸ By establishing

laundering that are more vulnerable to detection. *Id.* These stages include cross the entry of cash into the financial system, cross-border flows of cash, and wire transfers within and from the financial system. *Id.* These stages cannot be conducted without the use of a bank or other deposit taking body. *Id.* As a result, law enforcement officials are placing a tremendous amount of pressure on financial intermediaries to report any suspicious transactions. *Id.* The concern among law enforcement officials around the world is that if the transactions are not detected at these critical points, they will go undiscovered. *Id.* at 471.

62. *See id.* (observing that new class of criminals need not become involved with underlying criminal activity beyond concealing and transferring proceeds that result from it).

63. *See id.* (commenting on how money laundering is extremely lucrative criminal enterprise in its own right).

64. *See id.* (stating that new class of criminals are individuals who are involved in what society considers legitimate professions). They are bankers, accountants, lawyers, and various other professionals with financial acumen. *Id.* There are tremendous benefits to money launderers in using professionals who are bound by a code of ethic to keep their dealings with clients confidential. *See id.* at 472 (discussing strength of privilege that attaches to lawyer-client privilege).

65. *Id.*

66. *See* Alford, *supra* note 16, at 445 (stating that any association on part of banks with criminal activity will undermine confidence in soundness and integrity of banking system).

67. *See* Council Directive, *supra* note 28, O.J.L 166/77 (1991) (concluding that where "credit and financial institutions are used to launder proceeds from criminal activities . . . the soundness and stability of the institution concerned and confidence in the financial system as a whole could be seriously jeopardized, thereby losing the trust of the public.").

68. *See* Bruce Zagaris & Sheila M. Castilla, *Constructing an International Financial*

norms, rules, and procedures agreed to in order to regulate money laundering, international regimes reduce the disparities between divergent legal systems.⁶⁹ Members of international money laundering regimes obtain benefits through explicit or tacit cooperation with each other.⁷⁰ The United Nations Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances⁷¹ is an example of an international effort that established a new international legal regime for combatting drug trafficking.⁷² In addition, intergovernmental groups such as the Financial Action Task Force⁷³ have created a general framework for countries to follow in establishing an anti-money laundering regime.⁷⁴ Organizations such as the Basle Committee on Banking Regulations and Supervisory Practices⁷⁵ have also aided in the international fight against money laundering by providing a framework for financial institutions to follow.⁷⁶ Finally, international law enforcement organizations such as the International Criminal Police Organization⁷⁷ have proven instru-

Enforcement Subregime: the Implementation of Anti-Money Laundering Policy, 19 BROOK J. INT'L L. 871, 881 (1993) (discussing purpose of international regimes aimed at controlling money laundering).

69. See Lee, *supra* note 7, at 200 (opining that intergovernmental regimes established to deal with criminal activities have been minimizing disparities between divergent legal systems).

70. See Zagaris & Castilla, *supra* note 68, at 881 (discussing benefits obtained by members of international regimes).

71. United Nations Convention Against Illicit Traffic in Narcotics and Psychotropic Substances, *supra* note 4; see also INTERNATIONAL EFFORTS, *supra* note 7, at xi (stating that Convention represents major breakthrough in effort to address concerns involved with international cooperation in drug money laundering cases).

72. See Stewart, *supra* note 4, at 387 (opining that recent adoption of U.N. Convention Against Illicit Traffic in Narcotics and Psychotropic Substances constitutes significant step by world community towards establishing effective law enforcement measures against international narcotics traffickers).

73. See Group of Seven Economic Declaration of 16 July 1989, *reprinted in* INTERNATIONAL EFFORTS, *supra* note 7, at 3.

74. See WILLIAM C. GILMORE, DIRTY MONEY THE EVOLUTION OF MONEY LAUNDERING COUNTER MEASURES, 100 (1995) [hereinafter DIRTY MONEY] (stating that Financial Action Task force has established minimal standards in fight against money laundering).

75. See Committee on Banking Regulations and supervisory practices, Basle Concordat on Principles for the Supervision of Foreign Banks, *reprinted in* INTERNATIONAL MONETARY FUND, OCCASIONAL PAPER NO. 7, INTERNATIONAL CAPITAL MARKETS: RECENT DEVELOPMENTS AND SHORT TERM PROSPECTS, 29-32 (1981) [hereinafter the Basle Concordat].

76. See INTRIAGO, *supra* note 7, at 29 (discussing development of Basle Committee on Banking Regulations and Supervisory Practices).

77. See *id.* at 42 (stating that International Criminal Police Organization has been

mental in combating money laundering by promoting mutual legal assistance among law enforcement authorities around the world.⁷⁸

a. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

India's urgent need to control drug trafficking reflects growing awareness within the international community that drug trafficking and money laundering must be suppressed.⁷⁹ The United Nations ("U.N.") has played an integral role in the global community's fight against illicit drug trafficking and money laundering.⁸⁰ In 1988, the U.N. passed the U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("Vienna Convention").⁸¹ Superseding the Single Convention on Narcotic Drugs of 1961,⁸² the Vienna Convention is an important new weapon against narcotics trafficking and money laundering.⁸³ The Vienna Convention created internationally acknowledged drug trafficking offenses to be criminalized under the domestic laws of signatory countries.⁸⁴ Moreover, the Vienna Convention has embraced a framework for international cooperation that seeks to penalize drug traffickers as well as those who accept drug trafficking proceeds.⁸⁵

Under Article 3(1)(a) of the Vienna Convention, the U.N.

"key behind-the-scenes catalyst" in most international attempts to establish money laundering controls).

78. *Id.*

79. *See id.* at 2 (attributing dramatic increase in international narcotics trafficking as main catalyst for enactment of anti-money laundering statutes).

80. *See* DIRTY MONEY, *supra* note 74, at 61 (opining that United Nations' broad mandate provided basis for creation of comprehensive and multifaceted strategy aimed at combating drug trafficking and money laundering).

81. Vienna Convention, *supra* note 4; *see also* Stewart, *supra* note 4, at 388 (opining that Vienna Convention is among most detailed and far-reaching instruments ever adopted in field of international criminal law).

82. Single Convention on Narcotic Drugs of 1961, entered into force Dec. 13, 1964, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 151.

83. *See* Bruce Zagaris, *Dollar Diplomacy: International Enforcement of Money Movement and Related Matters—a United States Perspective*, 22 GEO. WASH. J. INT'L. & ECON. 465, 523 (1989) (stating that Vienna Convention is sure to affect money movement in international business transactions); *see also* INTERNATIONAL EFFORTS, *supra* note 7, at xi (discussing how Vienna Convention has had substantial impact on subsequent international initiatives directed at controlling money laundering).

84. *See* INTERNATIONAL EFFORTS, *supra* note 7, at xi (discussing accomplishments of Vienna Convention).

85. *See* Vienna Convention, *supra* note 4, art. 3, 28 I.L.M. at 499-503.

requests that its members to adopt a system of criminal offenses under their domestic laws that address all facets of illicit drug trafficking.⁸⁶ Included among this provision's list of offenses are matters such as the manufacture, distribution, or sale of illicit drugs and the organization, management, or financing of illicit trafficking activities.⁸⁷

Article 3(1)(b) of the Vienna Convention⁸⁸ specifically addresses the problem of money laundering, requiring all parties to the agreement to formally establish money laundering as a criminal offense.⁸⁹ This provision also criminalizes the conversion or transfer of property derived from drug related money laundering, as well as the concealment or disguise of its true nature or source.⁹⁰ The obligation to establish these money laundering related offenses is, however, subject to the constitutional principles and legal systems of each member state.⁹¹

In addition, Article 5 of the Vienna Convention⁹² requests

86. See Vienna Convention, *supra* note 4, art. 3(1)(a), 28 I.L.M. at 500-01. Article 3 of the Vienna Conference, hailed by several as the "cornerstone of the Convention," represents the end-product of detailed deliberations as to which specific elements should be encompassed in an effective regime aimed at countering drug trafficking. See International Efforts, *supra* note 7, at xi (discussing the importance of Article 3).

87. See Vienna Convention, *supra* note 4, art. 3(1)(a), 28 I.L.M. at 500-01. Article 3(1)(a)(i) prohibits:

The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance . . .

Id.

88. *Id.*, art. 3(1)(b), 28 I.L.M. at 501.

89. *Id.* Article 3(1)(b)(ii) prohibits:

The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offen[se] or offen[ses] established in accordance with [Article 3(1)(a)]. . . or from an act of participation in such an offen[se] or offen[ses].

Id.

90. *Id.* A substantial amount of the language in Article 3(1)(b) was derived from the U.S. anti-money laundering laws, in particular 18 U.S.C. §§1956-57. See Stewart, *supra* note 4, at 404 n.18 (noting similarities between U.S. anti-money laundering legislation and Article 3(1)(b) of Vienna Convention).

91. See Vienna Convention, *supra* note 4, art. 3(1)(c), 28 I.L.M. at 500. This limitation upon the requirements of Article 3(1)(b) is due largely to the difficulties encountered between the negotiators at the Vienna Conference in designing precise definitions that were acceptable to differing legal systems. See David P. Stewart, *supra* note 4, at 393 (discussing difficulties encountered by negotiators in agreeing upon precise definitions).

92. Vienna Convention, *supra* note 4, art. 5., 28 I.L.M. at 504.

that members empower their courts and other relevant authorities to freeze or seize the proceeds or converted property derived from drug trafficking.⁹³ This article further proposes that signatories authorize their courts and other competent authorities to order that bank, financial, or commercial records are available to law enforcement authorities.⁹⁴ Under this provision, a party who fails to make such records available to law enforcement authorities faces the penalty of seizure.⁹⁵ The Vienna Convention also calls for its members to afford one another the widest measure of mutual legal assistance possible in investigations, prosecutions, and judicial proceedings relating to drug trafficking and money laundering offenses.⁹⁶

b. Financial Action Task Force on Money Laundering

Intergovernmental groups have also taken action against the rising levels of global money laundering.⁹⁷ The creation of the Financial Action Task Force on Money Laundering ("FATF") by the G-7 countries is yet another example of a globally orches-

93. *Id.*, art. 5(4)(b), 28 I.L.M. at 504-05. Article 5(4)(b) provides that upon request by another party having jurisdiction over an offense established in accordance with Article 3(1) that the requested party shall "take measures to identify, trace, and freeze or seize proceeds, property instrumentalities . . . for the purpose of eventual confiscation." *Id.*

94. *Id.* art. 5(3), 28 I.L.M. at 504. Under this provision, a party may not decline to comply with this paragraph on the grounds of bank secrecy. *Id.* The inclusion of this affirmative obligation has been characterized by many as a major breakthrough in anti-money laundering legislation. See INTERNATIONAL EFFORTS, *supra* note 7, at xiii (noting significance of Article 5(3)).

95. Vienna Convention, art. 5(3), *supra* note 4, 28 I.L.M. at 504.

96. *Id.* art. 7(1), 28 I.L.M. at 507. According to Article 7(1), mutual legal assistance is to be provided for any of the following purposes: a) taking evidence or statements from persons; b) effecting service of judicial documents; c) executing searches and seizures; d) examining objects and sites; e) providing information and evidentiary items; f) providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records; and g) identifying or tracing proceeds, property, instrumentalities or other things for evidentiary purposes. *Id.* at art. 7(2), 28 I.L.M. at 508. From the law enforcement perspective, perhaps the most significant provision of the Vienna Convention can be found in Article 7(5) which prohibits signatories from declining to provide mutual legal assistance on the grounds of bank secrecy. *Id.* art. 7(5), 28 I.L.M. at 509. Thus, bank secrecy may not be used as a justification for refusing to provide legal assistance under the Vienna Convention or any of the bilateral treaties affected by its provisions. See Stewart, *supra* note 4, at 399 (characterizing Article 7(5) as one of most significant provisions of Vienna conference, and examining likely effects of such provision).

97. See Lee, *supra* note 7, at 200-01 (describing intergovernmental anti-money laundering regimes as establishing minimum standards for its members to adopt).

trated effort to curb the occurrence of money laundering.⁹⁸ The FATF currently consists of twenty-six countries⁹⁹ and two international organizations.¹⁰⁰ The FATF is an intergovernmental organization whose purpose is to develop and promote policies to counter money laundering.¹⁰¹

In an effort to create anti-money laundering policies that cover all relevant aspects of money laundering, the FATF created the Forty FATF Recommendations ("Recommendations").¹⁰² The Recommendations are measures that all member countries of the FATF have agreed to implement, and that all other countries are encouraged to adopt.¹⁰³ Designed to be universal in application, the recommendations set forth a general framework for anti-money laundering efforts.¹⁰⁴

The Recommendations reflect the fact that different countries have diverse legal and financial systems and cannot implement identical measures.¹⁰⁵ The Recommendations constitute principles for action in the area of money laundering prevention which countries can tailor to their particular constitutional frameworks.¹⁰⁶ This allows countries a degree of flexibility

98. See Alford, *supra* note 16, at 446 (discussing establishment of FATF). The G-7 countries created the FATF in the summit communiqué at the 1989 Economic Summit held in Paris. Paris Economic Summit: Economic Declaration, July 16, 1989, *reprinted in* 28 I.L.M. 1293, 1299 (1989).

99. See The Forty Recommendations of the Financial Action Task Force on Money Laundering, *reprinted in* 35 I.L.M. 1291 (1996) [hereinafter Recommendations]. The member countries of Financial Action Task Force on Money Laundering ("FATF") are: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Hong Kong, Iceland, Ireland, Italy, Japan, Luxembourg, the Kingdom of the Netherlands, New Zealand, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States). *Id.* at 35 I.L.M. 1291 n.1.

100. See *id.* at n.2 (stating that two International organizations that are members of FATF are European Commission and Gulf Cooperation Council).

101. See 35 I.L.M. 1291 at introduction (stating purpose of FATF).

102. See Recommendations, *supra* note 99; see also *DIRTY MONEY*, *supra* note 74, at 100 (describing Recommendations as setting minimal standard in fight against money laundering).

103. See *id.* (discussing flexible nature of Recommendations). As the Recommendations represent minimal standards that members should adhere to, members may institute more stringent standards if they so choose. *Id.*

104. See *id.* (stating that in recognition of fact that differences exist among legal systems in various countries, Recommendations lay down general principles for countering money laundering rather than prescribing in great detail what ought to be done).

105. *Id.*

106. See Recommendations, *supra* note 99, 35 I.L.M. 1291 at 1293.

rather than stipulating every detail.¹⁰⁷

c. Basle Committee Minimum Standards

The Basle Committee on Banking Regulations and Supervisory Practices¹⁰⁸ ("Basle Committee") consists of officials from the central banks and supervisory authorities of eleven major industrialized nations and Luxembourg.¹⁰⁹ In 1988, the Basle Committee adopted a statement of principles that targeted money laundering.¹¹⁰ Through the issuance of the Statement of Principles, the Basle Committee sought to raise existing sub-par banking regulations in order to meet the increasing risk of financial crisis caused by the globalization of banking.¹¹¹

The Basle Committee announced that banks should attempt to find the true identity of their clients.¹¹² This principle is commonly known as the know your customer rule.¹¹³ The rule gives money launderers less incentive to use banks because domestic and international banks require information regarding a customer's true identity and the nature of the funds being de-

107. *Id.*

108. See Duncan E. Alford, *Basle Committee Minimum Standards: International Regulatory Response to the Failure of BCCI*, 26 GEO. WASH. J. INT'L L. & ECON. 241, 247 (1992) (discussing development of Basle Committee). The collapse of the Herstatt Bank in Germany in 1974 led to the establishment of the Basle Committee on Banking Regulations and Supervisory Practices ("Basle Committee") and the issuance of the Basle Concordat, the Basle Committee's first agreement on bank supervision. *Id.*

109. See *id.*, at 291 n.1 (listing the twelve nations involved in Basle Committee). The Basle Committee consists of banking regulators from: Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Sweden, Switzerland, the United Kingdom, and the United States. *Id.*

110. Basle Committee on Banking Regulations and Supervisory Practices December 1988 Statement on Prevention of Criminal Use of the Banking System, *reprinted in* INTERNATIONAL EFFORTS, *supra* note 7, at 273-77 [hereinafter Statement of Principles]; see also INTRIAGO, *supra* note 7, at 29 (stating that statement of principles contained recommendations aimed at preventing use of banks as "intermediaries for transfer or deposit of funds derived from criminal activity.").

111. See Alford, *supra* note 16, at 444-45 (discussing fear on part of Basle Committee that if banks engaged in money laundering, public confidence in banking system would erode).

112. See *id.* (discussing recommendations made by Basle Committee in its Statement of Principles regarding money laundering).

113. See *id.* at 445 (stating that Statement of Principles further suggested that banks should explicitly state that they will refuse to conduct business with customers lacking adequate identification). The "know your customer" rule further suggests that when banks suspect that a deposit is the proceeds of criminal activity, they should take appropriate measures. *Id.* Such measures include severing relations with the customer, or freezing or closing the affected accounts. *Id.*

posited.¹¹⁴

In 1992, the Basle Committee issued new minimum standards¹¹⁵ ("New Minimum Standards") with respect to governmental supervision and regulation of international banks.¹¹⁶ The distinguishing elements of the New Minimum standards are that all international banks and banking groups should receive consolidated supervision by a home country regulator,¹¹⁷ international banks should obtain the prior consent of both host and home regulators before opening a branch or other banking establishment in a foreign country,¹¹⁸ banking regulators should have the right to collect information from international banks, if a bank fails to meet the minimum standards, a host regulator may impose sanctions against the bank, and information exchanges between banking regulators in different countries

114. See *id.* (noting that if banks require evidence of true identity of customers, depositors of illicit proceeds will look elsewhere to launder their money).

115. See Basle Committee on Banking Supervision, Minimum Standards for the Supervision of International Banking Groups and Their Cross-Border Establishments (June 1992) [hereinafter New Minimum Standards] (on file with the *Fordham International Law Journal*).

116. See Alford *supra* note 108, at 241 (analyzing formation of new minimum standards). The Basle Committee created the New Minimum Standards as a result of the closure of the Bank of Credit and Commerce International ("BCCI") on July 5, 1991. *Id.* The closure of the US\$20 billion bank represents one of the largest bank failures in international banking history. *Id.* The immediate reason for the closure of BCCI was a report received by the Bank of England, which was prepared by Price Waterhouse, detailing massive fraud allegedly committed by senior officials at BCCI. *Id.* at 258. The bank suffered tremendous losses. *Id.* In order to cover these losses, senior managers at BCCI siphoned off deposits to cover these losses. *Id.* The report also stated that several senior officials at BCCI made fictitious loans, failed to record deposits, and dealt in their own shares in an effort to manufacture profits. *Id.* BCCI officials hid the losses caused by fraudulent practices, bad trades, and unpaid loans by shifting assets between subsidiaries. *Id.*; see also *All Things to All Men*, *ECONOMIST*, July 27, 1991, at 67-68 (describing events leading to BCCI failure).

117. See New Minimum Standards, *supra* note 115, at 3. Consolidated supervision requires the submission of reliable evidence regarding the global operations of the particular international bank. *Id.* Under the New Minimum Standards, a home country regulator can prevent the establishment of banking operations in foreign jurisdictions, if for example they are unsatisfied with the host country regulator's supervision of foreign banks. *Id.*; see also Alford, *supra* note 108, at 267 (explaining concept of consolidated supervision). In deciding whether to approve a foreign operation, the host country regulator may assess the bank's strength of capital, organization, and operating procedures for risk management. See New Minimum Standards, *supra* note 115, at 4.

118. See New Minimum Standards, *supra* note 115, at 4; see also Alford, *supra* note 108, at 270 (stating that most important change provided in New Minimum Standards is formalization of principle that international bank must receive approval of both home and host regulators before it can establish foreign banking operation).

should continue to be encouraged.¹¹⁹

Albeit a vast improvement in the area of bank regulation,¹²⁰ the New Minimum Standards contain gaps that banks could exploit in an effort to escape regulation.¹²¹ One such weakness is the fact that the standards target the creation new branches, but do not explicitly apply to existing branches.¹²²

Moreover, the New Minimum Standards are not a treaty and consequently lack the force of law.¹²³ As a result, the Basle Committee must rely on regulators' moral authority and informal pressure to enforce the standards.¹²⁴ Finally, the New Minimum Standards encourage countries to implement standards independently, thus making it difficult for continuity to develop among nations.¹²⁵

119. See New Minimum Standards, *supra* note 115, at 1; see also Alford, *supra* note 108, at 266-67 (explaining objectives of new minimum standards).

120. See Alford, *supra* note 108, at 271 (stating that New Minimum Standards represent improvement in area of international banking regulation).

121. *Id.* at 270-74 (discussing weaknesses of New Minimum Standards). Under the New Minimum Standards, a host country regulator is only required to institute restrictions which it deems are "necessary and appropriate" on a financial institution. *Id.* at 271. For example, a host regulator can choose to permit a foreign banking institution to operate in the country in spite of the home country regulator's non-compliance with the Minimum Standards. *Id.*

122. *Id.* While such standards may be useful in preventing the entry of an unsuitable new financial institution into the international banking industry, a bank that is likely to collapse may in fact already be in operation. *Id.* The New Minimum Standards may not adequately police the activity of existing financial institutions. *Id.* Without an explicit statement regarding the scope of application, retroactive application of the New Minimum Standards will differ from country to country. *Id.* The New Minimum Standards, however, do actively encourage the flow of information among bank regulators. *Id.* They are structured in such a manner as to increase cooperation between home-country and host-country regulators. *Id.* Their successful implementation could serve as an early warning system which could determine problematic banks more quickly. *Id.*

123. *Id.* at 272.

124. See *id.* (discussing weaknesses of New Minimum Standards with respect to voluntary compliance). Not only do the New Minimum Standards lack the force of law, but also, they do not affect entire segments of the international banking community. *Id.* The Basle Committee represents banking regulators from only 12 countries. *Id.* at 241 n.1. The New minimum standards apply only to those countries. *Id.* Thus the New minimum Standards do not govern a significant portion of the world's banking assets. *Id.* at 273.

125. *Id.* at 272. The problems of voluntary compliance allow for discrepancies as to enforcement techniques among nations. *Id.* For example, penalties for a violation banking laws or regulations which are structured on the standards will be determined by individual nations. *Id.* As a result, sanctions in certain nations may be more severe than in others. *Id.*

The potential advantages of the standards are further complicated by the fact that

d. Interpol

International organizations aimed at combating global crimes now also play a larger role in drug and money laundering enforcement.¹²⁶ National governments often fail to comprehend or appreciate the role played by international organizations in the enforcement of money movement.¹²⁷ This lack of understanding results, in part, from the fact that the political rewards for developing a framework for international cooperation with respect to criminal activity are few.¹²⁸ Domestic governments have also avoided the work of international criminal organizations because of a widely held misperception that such organizations attempt to undermine governmental enforcement mechanisms.¹²⁹ Recently, however, several governments have come to appreciate the need for building a strong global framework in combating money laundering and other financial crimes.¹³⁰ This awareness has resulted in a proliferation of legislation, supporting strengthened multilateral cooperation.¹³¹

The International Criminal Police Organization¹³² (“In-

implementation of the standards may require that certain nations alter their domestic laws. *Id.* Although the standards encourage the free flow of information between regulators in one country to those in another, stringent bank secrecy laws in certain countries may prevent such an exchange. *Id.*

126. *See Zagaris, supra* note 83, at 526 (noting that intergovernmental organizations play active role in establishing framework for international cooperation through drafting of principles and conventions).

127. *See id.* (stating that domestic governments and legal practitioners rarely appreciate role played by international organizations in enforcing money movement regulations).

128. *See id.* at 526-27 (opining that rather than drafting principles and organizing conferences devoted to international criminal cooperation, politicians, and constituents often focus on domestic activities, particularly those that result in large seizures or sensational prosecutions).

129. *See id.* (explaining reasons why national governments have traditionally eschewed work of international organizations).

130. *See id.* (stating that it appears that domestic governments are beginning to recognize importance of regional and international organizations in dealing with money laundering). As a result, international organizations dealing with enforcement no longer prefer secrecy and now allocate more resources to informing the public of their activities. *Id.* These organizations now realize the importance of public relations to their survival and growth. *Id.*

131. *Id.*; *see e.g.*, Anti Drug Abuse Act of 1988, Public Law No. 100-690, § 4701, 102 Stat 4181 (supporting establishment of International Currency Control Agency and calling for enhanced multilateral cooperation in order to counter money laundering).

132. *See INTRIAGO, supra* note 7, at 42 (opining that International Criminal Police Organization (“Interpol”) has been one most effective protagonists of strong money laundering controls and legislation). Since 1972, Interpol has actively advocated the

terpol") is an international organization that promotes mutual assistance among criminal police authorities around the world.¹³³ Established in 1923, Interpol has continued to grow over the years and now has a membership of 177 member countries.¹³⁴ Through its expanded membership and vast resources, Interpol has increased its activities to effectively combat the crime of money laundering.¹³⁵ In recent years, Interpol has proven instrumental in combating money laundering in areas such as the Caribbean and Latin America.¹³⁶

Interpol provides training and technical assistance to law enforcement officials, in order to better educate them about money laundering.¹³⁷ Its current initiatives in this area include the development of a new criminal information system which will include increased information on topics such as money laundering and other financial crimes.¹³⁸ Interpol plans to link all 177 member countries to the criminal information system, giv-

efficacy of tracing and confiscating the proceeds of crime as an effective method of controlling profited-motivated crime. *Id.*

133. *Id.* Interpol has its international headquarters in Lyons, France. *Id.* at 43. Interpol consists of representatives of law enforcement agencies from every country that is a member of the organization. *Id.*

134. See C.T. Mahabharat, *India Hooks into Interpol*, NEWSBYTES NEWS NETWORK, Mar. 24, 1997, available in Westlaw, 1997 WL 10170139 (stating that as of March 1997, 177 countries belonged to Interpol).

135. See Zagaris, *supra* note 83, at 527-38 (discussing Interpol's accomplishments in orchestrating international efforts to control money laundering).

136. See *id.* at 528-30 (discussing Interpol's accomplishments in combating money laundering in the Caribbean and Latin America). At the Eleventh American Regional Conference in Panama City, held in April 1987, Interpol adopted a resolution to establish police training seminars on financial investigations in the Caribbean and Latin America. See *id.* (discussing Eleventh American Regional Conference). Interpol's Caribbean and Latin America working groups have successfully drafted model legislation on money laundering, which provides local law enforcement authorities access to financial records in investigations and prosecutions indictable offenses. See *A Law to Facilitate the Obtaining of Evidence Required in and For the Purpose of Criminal Investigations and for the Purpose of Forfeiting the Proceeds of Crimes* [hereinafter Interpol Model Legislation] (on file with *Fordham International Law Journal*). The Interpol Model Legislation had a significant impact on the U.N. Convention. See *U.N. Report of the Secretary General on Implementation and Development of International Instruments on the Control of Narcotic Drugs and Psychotropic Substances*, U.N. Doc. E/CN.7/1987/2 (1986).

137. See Zagaris, *supra* note 83, at 528 (stating that Interpol has been instrumental in providing technical assistance and training to combat money laundering).

138. See Mahabharat, *supra* note 135 (stating that new criminal information system will enable national law enforcement agencies to access all information maintained in database maintained at Interpol headquarters in Lyons, France). The Central Bureau of Investigation ("CBI") in India also plans to build its own national database which will connect all branches of the CBI and thereby facilitate the exchange of information

ing member countries greater access to information than they may be able to obtain through nationally maintained databases.¹³⁹

Interpol's thirteen member executive committee, to which India is a member, recently decided to undertake a special study dedicated to money laundering in Asia.¹⁴⁰ Known as Asiawatch,¹⁴¹ the study will place a strong emphasis on money laundering in the Indian subcontinent.¹⁴² The study will also include a detailed look at commercial and trade activities that may be closely linked with money laundering.¹⁴³ In addition, the Criminal Funds Investigation Group¹⁴⁴ ("FOPAC") at Interpol also intends to launch a year long study on Hawala the underground banking system that has been in place in India for centuries.¹⁴⁵ FOPAC hopes that by tracing the funds derived from criminal activities such as drug trafficking, it may be able to better identify the heads of organized crime groups and drug rings.¹⁴⁶

between different branches. *Id.* The proposed database will contain information about all current as well as past criminal investigation undertaken by the CBI. *Id.*

139. *Id.*

140. See Vinay Kumar, *Focus on Money Laundering in Asia*, THE HINDU, Sept. 19, 1997 available in Westlaw, WL 14058349 (discussing Interpol's intentions further assess problem of money laundering in Asian countries).

141. *Id.*

142. *Id.*

143. *Id.*

144. See INTRIAGO, *supra* note 7 at 42 (discussing creation of Criminal Funds Investigation Group). Interpol created the Fonds Provenant d'Activites Criminelles ("FOPAC") in 1983 to investigate the financial assets of organized crime. See Zagaris, *supra* note 81, at 552 n.31. (discussing reasons for establishing FOPAC). FOPAC's responsibilities include studying existing, and developing new, mechanisms for the gathering of financial information connected with, arising from, related to, or resulting from narcotics transactions and other crimes; developing proposals for the sharing of such financial information between countries for the use by, among others, their respective law enforcement authorities; and developing a proposal and implementation plan for creating, within an appropriate international body, a clearing-house for the receipt, coordination and execution of requests for such information. See ICPO-Interpol General Assembly Resolution on Money Laundering and Related Matters, AGN/58/RES/4 (Nov. 1989) reprinted in INTERNATIONAL EFFORTS, *supra* note 7, at 278. "Fonds Provenant d'Activites Criminelles" means "funds derived from criminal activities." See Zagaris, *supra* note 83, at 552 n.431 (providing English translation of Fonds Provenant d'Activites Criminelles).

145. See Kumar, *supra* note 140 (stating that FOPAC intends to study Hawala system in order to develop recommendations for combatting money laundering that occurs through underground banking system).

146. *Id.* FOPAC was able to identify and arrest 12 individuals in a large scale money laundering operation in Kiev last year as a result of the increased cooperation

3. Selected Regional Anti-Money Laundering Regimes

Beyond the internationally orchestrated efforts at combating money laundering, several regional anti-money laundering efforts have burgeoned over the years.¹⁴⁷ These regional regimes tend to concentrate on the similarities between the cultures, traditions and legal systems of its member states.¹⁴⁸ In addition, these regional anti-money laundering regimes have facilitated the convergence of international attempts to counter money laundering.¹⁴⁹ The Organization of American States¹⁵⁰ ("OAS") is an example of a regional organization that has taken important steps towards eliminating money laundering in Latin America and the Caribbean.¹⁵¹ The European Union¹⁵² has also taken significant steps towards the elimination of money laundering in Europe.¹⁵³

a. Organization of American States

The OAS is a multinational organization that is dedicated to

between the European Liaison office of Interpol and the authorities of Belgium and the Ukraine. *Id.*

147. See Lee, *supra* note 7, at 204 (discussing importance of regional anti-money laundering regimes in effectively controlling crime of money laundering).

148. *Id.*

149. *Id.*

150. See Lee, *supra* note 7, at 243 n.60 (discussing creation of OAS). The OAS was created in 1948 after the ninth Pan-American Conference. *Id.* The Purpose of the OAS is to increase security in the Western Hemisphere, to settle controversies between members, and to encourage the cooperation of economy, culture, and society within the member states. See Charter of Organization of American States, arts. I & IV, T.I.A.S. No. 2361; see also YEARBOOK OF INT'L ORGANIZATION, (Union of Int'l Organization ed., 1995/96) (stating primary goals of OAS). As of 1995, the OAS had thirty-five members including Antigua and Barbuda, Argentina, the Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Columbia, Costa Rica, Cuba (participation was suspended in 1962), Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Surinam, Trinidad and Tobago, the United States, Uruguay, and Venezuela. See THE WORLD FACTBOOK 507 app. C (1995).

151. See INTRIAGO, *supra* note 7, at 38-42 (discussing accomplishments of Organization of American States ("OAS") in combating money laundering).

152. Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 (amending Treaty Establishing European Economic Community, Mar. 25, 1857, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (CMD. 5179-II)), as amended by Single European Act. O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741, in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987)).

153. See INTRIAGO, *supra* note 7, at 31-38 (describing actions taken by European Union to combat money laundering and reduce levels of drug trafficking in Europe).

the development and preservation of peace in the Americas.¹⁵⁴ Actively supported by the G-7 countries, the OAS encourages its signatories to embrace the standards of the 1988 United Nations Convention and the Recommendations as models upon which they can base their own anti-money laundering legislation.¹⁵⁵

The OAS established the Inter-American Drug Abuse Control Commission¹⁵⁶ ("CIDAD") in order to draft a number of regulations and administrative recommendations dealing with money laundering control and asset forfeiture of the proceeds of drug trafficking in OAS countries.¹⁵⁷ In March 1992, CIDAD examined and approved the Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Related Offenses ("OAS Laundering Regulations").¹⁵⁸ The OAS Laundering Regulations are designed to complement Latin American civil and common law legal regimes.¹⁵⁹

The OAS Laundering Regulations define money laundering related activities, formally establish money laundering as a crime, and call for the seizure of property and proceeds both

154. See INTRIAGO, *supra* note 7, at 38 (stating that most experts believe that cause of global money laundering problem is in Western Hemisphere and that without attention to problem there, no solution can be found).

155. *Id.*

156. See Jerez, *supra* note 7, at 344 n.102. (noting that CIDAD is abbreviation for Commission Interamericana Para el Control del Abuso de Drogas (Inter-American Drug Abuse Commission)). CIDAD is an "autonomous regional organization" within the OAS. *Id.* To draft the regulations, CIDAD gathered a group of experts from thirteen of the participating countries. See INTRIAGO, *supra* note 7, at 39 (discussing efforts made by CIDAD at drafting regulations and administrative recommendations regarding money laundering control and asset forfeiture). The Group of experts met several times during 1990 and 1991 to draft the regulations. *Id.* In March 1991, the group of experts completed the process of drafting the regulations and passed them on to the OAS member states for approval. *Id.*

157. *Id.*

158. See OAS Laundering Regulations, *supra* note 7; see also Declaration and Program of Action of Ixtapa, OEA/ser.K/XXVIII.2.1, RM/NARCO/doc. 29/90 (1990), reprinted in INTERNATIONAL EFFORTS, *supra* note 7, at 290. The Model Regulations were actually first conceived of at the Inter-American Meeting of Ministers in Ixtapa Mexico in 1990. *Id.* The OAS representatives recommended that an Inter-American group of experts draft model legislation that would conform with the 1988 United Nations Convention. See Jerez, *supra* note 7, at 344-45 (discussing impetus behind creation of OAS Laundering Regulations). They further suggested that the model regulations, once drafted, be sent to the United Nations General Assembly for Consideration by the Expert Group on Money Laundering. *Id.* at 345.

159. See *id.* (noting that OAS Laundering Regulations complement civil and legal conditions that are specific to Latin American countries).

within and outside the region.¹⁶⁰ In addition, the OAS Laundering Regulations also require that signatory countries relax any existing stringent bank secrecy laws.¹⁶¹ Furthermore, the OAS Laundering Regulations also provide detailed techniques for co-operation among international institutions in enforcing foreign judgments.¹⁶²

The OAS Laundering Regulations are a statutory model structured to enable the adoption of anti-money laundering legislation.¹⁶³ They permit countries, lacking the resources and requisite legal infrastructure, to develop their own legislation.¹⁶⁴ Like the Basle Committee's New Minimum Standards, however, the OAS Laundering Regulations are not a treaty.¹⁶⁵ As such, they do not have the necessary force of law.¹⁶⁶ Consequently, the success of such anti-money laundering strategies is contingent upon whether the individual signatories adopt the regulations domestically.¹⁶⁷

b. European Union

Europe is an area of the world that is extremely concerned with the growing money laundering problem.¹⁶⁸ This concern is

160. See INTRIAGO, *supra* note 7, at 40 (discussing provisions of OAS Laundering Regulations). According to the OAS Laundering Regulations, a crime is committed whenever anyone "transfers, converts, acquires, possesses, uses, and conceals or disguises the nature, source, location, disposition, movement, rights, or ownership of property that he or she knows or should have known is the proceeds of an illicit traffic offense or an offense related thereto." *Id.*

161. See Lisa Barbot, Note, *Money Laundering: an International Challenge*, 3 TUL. J. INT'L & COMP. L. 161, 176 (1994) (stating that OAS Laundering Regulations also apply to virtually all types of financial institutions).

162. See INTRIAGO, *supra* note 7, at 42 (observing that OAS Laundering Regulations suggest detailed steps for activating multilateral cooperation including that which pertains to foreign judgments in courts of another country).

163. See Jerez, *supra* note 7, at 348 (discussing how there is no mandatory compliance requirement with OAS Laundering Regulations for signatories); See also Phyllis Solomon, Note, *Are Money Launderers All Washed Up in the Western Hemisphere? The OAS Model Regulations*, 17 HASTINGS INT'L & COMP. L. REV. 433, 453 (1992) (stating that OAS Laundering Regulations are only suggested framework for anti-money laundering legislation).

164. See Jerez, *supra* note 7, at 348 (discussing how Latin American countries benefit from OAS Laundering Regulations).

165. See *id.* (explaining weaknesses of OAS Laundering Regulations).

166. *Id.*

167. See Zagari & Castilla, *supra* note 68, at 906 (stating that it is likely that OAS Laundering Regulations will be emulated by member states).

168. See INTRIAGO, *supra* note 7, at 30 (opining that that "there is probably no area

largely due the fact that number of drug-related deaths in Europe increased dramatically over the past few years.¹⁶⁹ In addition, Member States of the European Union fear that the elimination of restraints on capital movement between countries will facilitate money laundering activities.¹⁷⁰ Because of the very real dangers posed to the European Union by the rise in global money laundering, the European Union has become one of the leaders in the international movement against money laundering.¹⁷¹ Through initiatives such as the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime,¹⁷² ("Council of Europe Convention") and Council Directive 91/308/EEC on the Prevention of the Use of the Financial System for the Purpose of Money Laundering,¹⁷³ ("Council Directive") the European Union has made significant advances in building an effective regional anti-money laundering regime.¹⁷⁴

i. Convention on Laundering, Search, Seizure and Confiscation from Proceeds of Crime

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime¹⁷⁵ represents a major effort by the EU Member States to combat the escalating problem of money laundering.¹⁷⁶ Whereas the UN Convention focuses on money laundering only as it is connected with narcotics trafficking, the Council of Europe Convention criminalizes money laundering as it relates to a broad range of illicit activi-

of the world more apprehensive about growing drug menace and money laundering activities it drives than Europe, both east and west.").

169. *See id.* (stating that Europe is now experiencing rude awakening to magnitude and effects of global narcotics trafficking).

170. *See* INTRIAGO, *supra* note 7, at 31 (discussing fear that removal of trade and other economic barriers may facilitate money laundering).

171. *See id.* (citing the European Union as one of leaders in international movement to combat money laundering).

172. Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime, Sept. 12, 1990, Europ. T.S. No. 141, *reprinted in* 30 I.L.M. 148 (1991) [hereinafter Council of Europe Convention].

173. Council Directive, *supra* note 28, O.J.L 166/77 (1991).

174. *See* INTRIAGO, *supra* note 7 at 30-38 (discussing steps taken by European Union to counter global money laundering).

175. Council of Europe Convention, *supra* note 172.

176. *See* DIRTY MONEY, *supra* note 74, at 137 (describing Council of Europe Convention as "important and innovative" tool in global anti-money laundering campaign).

ties.¹⁷⁷ The Council of Europe Convention seeks to promote international cooperation with respect to the prevention of all serious crimes and offenses which generate large profits.¹⁷⁸

The Council of Europe Convention requires parties to implement legislation that will enable domestic law enforcement authorities to confiscate the proceeds from crime.¹⁷⁹ Furthermore, the Council of Europe Convention requires signatories to enact legislation that criminalizes the knowing conversion or transfer of proceeds from crime, or assisting a person in such conversion or transfer,¹⁸⁰ the knowing concealment or disguise of the nature, source location, movement or ownership of such property,¹⁸¹ acquisition, possession or use of such illicitly gained proceeds,¹⁸² and participation in, facilitation of, counseling of or conspiracy to commit or attempt to commit the above offenses.¹⁸³ The Council of Europe Convention also requires its signatories to cooperate and assist each other in investigations, as well as to share information about illicitly gained property with each other.¹⁸⁴

While the Council of Europe Convention prescribes a tremendous amount of cooperation and assistance among its members, it has its limitations.¹⁸⁵ For example, signatories are not

177. Explanatory Report on the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime [hereinafter Explanatory Report], *reprinted in* INTERNATIONAL EFFORTS, *supra* note 7, at 192; *see also* Barbot, *supra* note 161, at 177-78 (explaining how Council of Europe Convention expands range of criminal activities considered under category of money laundering).

178. *See* Explanatory Report, *supra* note 177, at 193 (stating that one of purposes of Council of Europe Convention is "to facilitate international cooperation as regards investigative assistance, search, seizure and confiscation of proceeds from all types of criminality, especially serious crimes, and in particular drug offences, arms dealing, terrorist offences trafficking in children and young women. . . and other offences which generate large profits.").

179. Council of Europe Convention, *supra* note 172, art. 2(1), 30 I.L.M. at 151. Member nation may, however, limit this articles scope of application to certain types of offenses. *Id.* art. 2(2), 30 I.L.M. at 151.

180. *Id.* art. 6(1)(a), 30 I.L.M. at 152.

181. *Id.* art. 6(1)(b), 30 I.L.M. at 152.

182. *Id.* art. 6(1)(c), 30 I.L.M. at 152.

183. *Id.* art. 6(1)(d), 30 I.L.M. at 152.

184. *Id.* arts. 7, 8, 13, 30 I.L.M. at 153, 154. The EC Convention also requires that signatories, at the request of another party who has instituted criminal proceedings, to take the necessary provisional measures, such as freezing or seizing assets, in order to prevent the transfer or disposal of such property. *Id.* art. 11, 30 I.L.M. at 153-54.

185. *See* Barbot, *supra* note 161, at 179 (discussing gaps in Council of Europe Convention).

required to criminalize the act of money laundering if in doing so, it would be acting contrary to the basic tenets of its legal system or constitution.¹⁸⁶ It is important to note, however, that where the enactment of anti-money laundering legislation would not undermine basic constitutional principles, countries are obligated to impose such legislation.¹⁸⁷

ii. Council Directive 91/308/EEC, On Prevention of the Use of the Financial System for the Purpose of Money Laundering

Council Directive 91/308/EEC, On Prevention of the Use of the Financial System for the Purpose of Money Laundering,¹⁸⁸ represents a yet another international effort at combating money laundering.¹⁸⁹ Under the Council Directive, the burden of detecting money launderers is placed upon the financial institutions.¹⁹⁰ Cognizant of the danger that money laundering poses to the soundness and stability of financial institutions, the drafters of the Council Directive sought to combat money laundering through international cooperation and coordination.¹⁹¹ Like the Council of Europe Convention, the Council Directive criminalizes money laundering as it relates to all criminal activity, rather than just narcotics trafficking.¹⁹²

Similar to other internationally orchestrated efforts aimed

186. See Council of Europe Convention, *supra* note 172, art. 6, 30 I.L.M. at 152. In addition, the EC Convention permits a country to postpone or refuse to cooperate if the proposed cooperation would jeopardize sovereignty or security of a party or if the request for cooperation would amount to a political or fiscal offense in that country. *Id.* art. 18, 30 I.L.M. at 155-56.

187. See Explanatory Report, *supra* note 177, at 196 (stating that one of principal purposes of Council of Europe Convention is to provide instrument obliging states to adopt efficient measures in their national laws to combat serious crime and to deprive criminals of fruits of their illicit activities).

188. Council Directive, *supra* note 28, O.J.L 166/77 (1991).

189. See INTERNATIONAL EFFORTS, *supra* note 7, at xviii (stating that primary objective of Council Directive is one of preventing abuse of financial system and detecting money laundering, as opposed to enhancing international cooperation regarding punishment of offenders and confiscation of proceeds of their crimes).

190. See Council Directive, *supra* note 28, pmbl, O.J. L 166/77, at 77 (1991) (stating that financial institutions are an effective tool in anti-money laundering efforts).

191. *Id.*

192. *Id.* The Council Directive uses the definition of money laundering adopted by the Vienna Convention. *Id.*, art. 1, O.J. L 166/77, at 79 (1991). Because money laundering occurs in relation other forms of criminal activity, such as organized crime and terrorism, it directs member states to extend the effects of the Directive to include the proceeds of such activities. *Id.*

at controlling money laundering, the Council Directive offers Member States a tremendous amount of flexibility with respect to enacting legislation.¹⁹³ The Council Directive permits each Member State to determine the penalties to be imposed upon those charged with money laundering.¹⁹⁴

The Council Directive follows the recommendations of the Basle Committee, in that they require Member States to impose know-your-customer rules upon credit and financial institutions.¹⁹⁵ The identification requirement automatically applies to any transactions which exceed 15,000 ECU, whether the transaction is carried out in a single operation, or in several operations which seem to be linked.¹⁹⁶ In addition the Council Directive requires countries to ensure that financial institutions report any suspicious transactions to law enforcement authorities.¹⁹⁷

Similar to other regional efforts aimed at controlling money laundering,¹⁹⁸ there are limits to the effectiveness of the Council

193. *See id.*, art. 15, O.J. L 166/77 at 81 (1991) (enabling Member States to adopt or retain in force stricter provisions to counter money laundering than those provided in Council Directive).

194. *Id.*, art. 14, O.J. L 166/77, at 81 (1991).

195. *Id.* art 3(1), O.J. L 166/77, at 79 (1991). The Council Directive defines credit institution as "an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own accounts." *Id.*, art. 1, O.J. L 166/77, at 79(1991). It also includes branch offices, located within the European Community, of foreign credit institutions. *Id.*

The Directive defines "financial institution" as:

an undertaking other than a credit institution whose principal activity is to carry out one or more of the following operations: 1) acceptance of deposits and other repayable funds from the public; 2) lending; 3) financial leasing; 4) money transmission services; 5) issuing and administering means of payment; 6) guarantees and commitments; 7) trading for its own account or for the accounts of customers in money market instruments; foreign exchange; financial futures and options; exchange and interest rate instruments; or transferable securities; 8) participation in share issues and the provisions of services related to such issues; 9) advice to undertakings on capital structure industrial strategy and related questions and advice and services relating to mergers and the purchase of undertakings; 10) money brokering; 11) portfolio management and advice; 12) safekeeping and administration of securities; 13) credit reference services; and 14) safe custody services.

Id. art. 1, O.J. L 166/77, at 79 (1991).

196. *Id.*, art. 3(2), O.J. L 166/77, at 79 (1991).

197. *Id.*, art. 3(6), O.J. L 166/77, at 80 (1991). Under the Council Directive, financial institutions are required to report all suspicious transactions regardless of whether they exceed the ECU 15,000 threshold. *Id.*

198. *See, e.g.*, OAS Laundering Regulations, *supra* note 7.

Directive.¹⁹⁹ There are gaps in the Council Directive that may enable a money launderer to circumvent its rigorous applications.²⁰⁰ For example, Article 3 provides that credit and financial institutions shall not be subject to the identification requirement where the customer is also a credit or financial institution covered by the Council Directive.²⁰¹ This exception, enables a money launderer who has successfully deposited illicit funds to remain undetected.²⁰²

4. Selected National Regimes

National anti-money laundering regimes represent the most basic level of anti-money laundering efforts in the international campaign against money laundering.²⁰³ International and regional drug regimes generally require signatory countries to establish criminal offenses and penalties for drug-related crimes under their domestic laws.²⁰⁴ Thus, the success of international and regional efforts at combatting money laundering depends upon the implementation of sound domestic anti-money laundering legislation.²⁰⁵ The United States serves as an example of a country that has had significant experience in enacting anti-money laundering legislation.²⁰⁶ The United Kingdom has also had a great deal of success in enacting anti-money laundering legislation.²⁰⁷

a. The United States

The United States is an example of a country with a compre-

199. See Alford, *supra* note 16, at 451-52 (discussing gaps in Council Directive).

200. *Id.*

201. See *id.* (noting that failure to impose identification requirement on bank-to-bank transactions creates possible loophole for money launderers, enabling them to launder funds through interbank transfers).

202. *Id.*

203. See Lee, *supra* note 7, at 205-06 (stating that national regime is "the basic combat unit against domestic and international drug problems.").

204. See, e.g., Vienna Convention, *supra* note 4, art. 3(1)(b), 28 I.L.M. at 501 (requiring member states to formally establish money laundering as criminal offense).

205. See Lee, *supra* note 7, at 206 (stating that only when national strategy is sound will international war against drugs and money laundering be successful).

206. See INTRIAGO, *supra* note 7, at 46 (naming United States as founder of money laundering controls).

207. See Zagaris & Castilla, *supra* note 68, at 934 (opining that England has led Europe in enacting anti-money laundering laws and to date has comprehensive and extensive legislation in place for combatting money laundering).

hensive anti-money laundering regime.²⁰⁸ The impetus for enacting U.S. anti-money laundering legislation was the need to control the growing narcotics trafficking problem in the United States.²⁰⁹ Through the Bank Secrecy Act²¹⁰ ("BSA"), the U.S. government sought to prevent the use of the U.S. banking system as a depository for the proceeds of the drug trafficking.²¹¹ The BSA established currency reporting requirements for all domestic financial institutions.²¹² In addition, the BSA requires U.S. citizens conducting business outside of the United States to maintain records as to the identity of interested parties as well as detailed descriptions of all transactions exceeding the congressionally established threshold of US\$10,000.²¹³

As the loopholes in the BSA became apparent, Congress took further action to control the increasingly prevalent crime of money laundering.²¹⁴ Cognizant of the low levels of compliance

208. See Alford, *supra* note 16, at 456 (stating that in 1980s, United States led world in enacting comprehensive legislation to combat money laundering). Anti-money laundering initiatives in the United States developed as early as 1970. See e.g., Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 114 (codified as amended at 31 U.S.C. §§ 5311-5314, 5316-5324). As the drug trade in the United States burgeoned, so did the use of the U.S. banking system as a means of depositing illicit funds into the financial system. See Sultzer, *supra* note 25, at 156 (discussing background behind enactment of Bank Secrecy Act). The congressional response to this mounting phenomenon culminated in the enactment of the Bank Secrecy Act. Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 114 (codified as amended at 31 U.S.C. §§5311-5314, 5316-5324) [hereinafter BSA]. The congressional intent behind this legislation was to "require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 31 U.S.C. §5311. The vital component of the Bank Secrecy Act is a requirement that financial institutions file an IRS Form 4789, Currency Transaction Report ("CTR"), whenever a person participates in one or more cash transactions in a single day, that exceed, in total, US\$10,000. See Sultzer, *supra* note 25, at 152-67 (discussing provisions of BSA). In enacting this legislation, Congress had hoped to create a paper trail that would lead law enforcement authorities to potential money laundering operations. *Id.* at 153. Congress also hoped that the BSA would serve as an effective instrument in prosecuting money launderers, by imposing civil as well as criminal sanctions for non-compliance. *Id.*

209. See *id.* at 151-52 (citing growing drug trade in United States as major reason for enacting BSA).

210. BSA, *supra* note 208.

211. See Barbot, *supra* note 161, at 184 (stating that Congress had found that laundering of proceeds from narcotics trafficking, especially when it involves U.S. currency, threatens national security of U.S.).

212. See BSA, *supra* note 208 (requiring domestic financial institutions to report cash transactions in excess of US\$10,000 to Secretary of Treasury).

213. See Barbot, *supra* note 161, at 185-86 (discussing various provisions of BSA).

214. See Sultzer, *supra* note 25, at 158-59 (discussing weaknesses of BSA which led Congress to enact further legislation). Prosecutors were finding it difficult to prosecute

with the BSA, due to the obvious gaps in the legislation, Congress responded by enacting the Money Laundering Control Act ("MLCA").²¹⁵

The centerpiece of the MLCA was the criminalization of the act of money laundering itself.²¹⁶ This enabled authorities to prosecute individuals for the actual act of money laundering rather than for violations of the reporting requirement of the BSA.²¹⁷ It further prohibited the structuring of transactions in order to circumvent reporting requirements, and provided for civil and criminal forfeiture of property or proceeds involved in the alleged laundering.²¹⁸

i. 18 U.S.C. Section 1956

18 U.S.C. Section 1956²¹⁹ ("Section 1956"), prohibits individuals from concealing the nature of illicit funds or from using such funds to further criminal activity.²²⁰ Section 1956 divides the crime of money laundering into three general categories.²²¹ Where money is laundered through one or a series of financial transactions, Section 1956 imposes a fine of up to the greater of US\$500,000 or twice the value of the property involved in the transaction.²²² Section 1956 (a)(2) imposes identical penalties where monetary instruments are used to launder money across

money launderers based upon the failure to file a CTR. *Id.* at 158. Furthermore, there were methods of circumventing the reporting requirement. *Id.* For example, a financial institution could satisfy the reporting requirement of the BSA by filing a CTR on laundered money. *Id.* Such conduct would seldom lead to detection and subsequent investigation by law enforcement authorities. *Id.* Other methods of circumvention included structuring the transactions so that they did not trigger the reporting requirement, by depositing smaller sums. *Id.* at 159. Furthermore, financial institutions were not obligated to inquire into the source of funds deposited. *Id.*

215. Money Laundering Control Act, Pub. L. No. 99-570, 100 Stat. 3207-18 (codified as amended at 18 U.S.C. §§1956-1957, 31 U.S.C. 5324-26) [hereinafter MLCA]; see also Alford, *supra* note 16, at 456 (characterizing Money Laundering Control Act ("MLCA") as one of two most important statutes in U.S. anti-money laundering legislation).

216. *Id.* at 457.

217. See *id.* at 457-58 (stating that in passing MLCA, Congress intended to make proceeds of drug crimes worthless by imposing criminal liability on anyone dealing with drug proceeds).

218. MLCA, *supra* note 215.

219. 18 U.S.C. § 1956 (1994).

220. *Id.*

221. *Id.*

222. 18 U.S.C. § 1956(a)(1).

U.S. borders.²²³ Section 1956 (a)(3) pertains to law enforcement sting operations.²²⁴

a. Section 1956 (a)(1)

Section 1956(a)(1) penalizes the conduct of anyone who partakes in a financial transaction,²²⁵ knowing that the property involved represented the proceeds from a specified unlawful activity.²²⁶ The term specified unlawful activity, as defined in the statute, covers a broad range of illicit activity including drug trafficking, food stamp fraud, and various environmental crimes.²²⁷

In order to prove a violation of Section 1956, the government must go beyond proving that a defendant has no legitimate source of income.²²⁸ It is important to note, however, that in order to violate Section 1956, the alleged offender must know that the property involved in the transaction represents the pro-

223. 18 U.S.C. § 1956 (a)(2).

224. 18 U.S.C. § 1956 (a)(3).

225. For the purposes of 18 U.S.C. §1956, a "transaction" includes:

a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected.

18 U.S.C. § 1956 (c)(3)

The term "financial transaction" is defined as:

A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer or title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the other activities of which affect, interstate or foreign commerce in any way or degree.

18 U.S.C. § 1956(c)(4)

226. 18 U.S.C. § 1956 (a)(1).

227. See 18 U.S.C. § 1956 (c)(7) (listing various crimes which constitute specified unlawful activity for purposes of 18 U.S.C. § 1956 ("Section 1956")).

228. See *United States v. Blackman*, 897 F.2d 309, 317 (8th Cir. 1990) (noting that burden of proof is not so stringent that it requires the government to trace funds back to a specific crime). For instance, "evidence of a defendant's use of wire service to transfer cash to Haiti rather than a bank, combined with evidence of a defendant's drug trafficking is sufficient to establish a conviction of money laundering under 18 U.S.C. § 1956 (a)(1)(B)(i)." See *Blackman*, 897 F.2d at 317. If the government can show that the defendant is making use of property bought with the proceeds of a "specified unlawful activity," or that the defendant's bank account contains commingled funds, only part of which can be traced to unlawful activity, then the government has established a § 1956 (a)(1) violation. See Sultzer, *supra* note 25, at 160-61 (discussing government's burden of proof in proving § 1956 (a)(1) violation).

ceeds of some form of specified unlawful activity.²²⁹ In order to prove this knowledge component, the government may use circumstantial evidence to infer the offender's knowledge or willful blindness²³⁰ to the fact that he engaged in a transaction designed to launder the proceeds of some form of illicit activity.²³¹

In order to violate Section 1956 (a)(1), a potential offender must engage in or attempt to engage in a financial transaction with funds that which he knew originated from some unlawful activity and in fact stemmed from one of the specified unlawful activities.²³² Because the statute is relatively broad in its construction, courts have loosely interpreted the term financial transaction to include virtually any use of illicit funds which can be remotely connected to interstate commerce.²³³ Where the actual transaction was attempted but not actually conducted, the government must show that the defendant engaged in more than mere preparation.²³⁴ In order to violate Section 1956(a)(1), the defendant must take affirmative steps towards

229. 18 U.S.C. § 1956 (a)(1). In order to prove this knowledge component of the statute, the government does not need to prove that the offender actually knew of the specific crime from which the proceeds arose. *Id.* Rather it means that "the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law." 18 U.S.C. § 1956 (c)(1).

230. *See, e.g., United States v. Campbell*, 977 F.2d 854, 857 (4th Cir. 1992) (noting that under doctrine of willful blindness, government must prove more than simply that defendant was negligent or even reckless and "should have known"; rather it requires government to prove beyond reasonable doubt that defendant purposely and deliberately contrived to avoid learning facts about what would have otherwise been obvious to her).

231. *See Sultzer, supra* note 25, at 161-62 (discussing government's burden in proving that defendant had knowledge that property involved in alleged financial transaction arose from proceeds of some form of "specified unlawful activity").

232. 18 U.S.C. § 1956(a)(1).

233. *See* 18 U.S.C. § 1956(c)(4) (defining term financial transaction for purposes of statute). Thus a broad range of acts can be considered a "financial transaction" under § 1956. *Id.* For example, the mailing of proceeds from illicit activity from one state to another is deemed a "financial transaction." *See, e.g., United States v. Hamilton*, 931 F.2d 1046, 1051-52 (5th cir. 1991) (concluding that defendant's effort to mail proceeds of narcotics transaction from Mississippi to California amounted to money laundering under 18 U.S.C. 1956).

234. *See Sultzer, supra* note 25, at 163 (noting that there must be substantial step taken towards commission of crime, such as where defendant creates elaborate plan to launder money through use of complicated financial transactions, and is subsequently apprehended with money he intends to launder).

committing the crime.²³⁵

b. Section 1956(a)(2): Money Laundering Involving the
Transportation of Monetary Instruments Across
U.S. Borders

Section 1956(a)(2) criminalizes the acts of anyone who transports, transmits, or transfers a monetary instrument to or from the United States, or attempts to do so, where the instrument represents the proceeds of some form of unlawful activity, or where such act is intended to conceal the nature of the funds or to avoid a transaction reporting requirement.²³⁶ The statute defines the term monetary instrument quite broadly to include a range of financial products.²³⁷ Courts have interpreted the words transport, transmit, or transfer liberally enough to include virtually any cross-border movement of funds into or out of the United States.²³⁸

Where the U.S. government charges an individual with transporting funds across U.S. borders with the intent of concealing the nature of the funds or evading reporting requirements, it must prove the same components as those that are required by Section 1956(a)(1).²³⁹ The government must show

235. Compare *United States v. Fuller*, 974 F.2d 1474, 1477-78 (5th cir. 1992) (stating that defendant who structured plan to launder illicit proceeds had attempted to conduct financial transaction within meaning of 18 U.S.C. § 1956(a) when he was arrested while leaving hotel just after receiving money which he intended to launder) with *United States v. Ramirez*, 954 F.2d 1035, 1039-40 (5th cir. 1992) (holding that mere possession of illicit funds does not create inference of intent to engage in financial transaction).

236. 18 U.S.C. § 1956(a)(2).

237. 18 U.S.C. § 1956(c)(5). The term monetary instruments means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery. *Id.*

238. 18 U.S.C. § 1956(c)(5). As a result of this broad interpretation, this statute proscribes a range of activities, from smuggling to wire transfers. See, e.g., *United States v. Ortiz*, 738 F. Supp. 1394 (S.D. Fla. 1990) (holding that defendant who attempted to smuggle illicit proceeds out of United States in water heater destined for air shipment to Columbia was guilty of money laundering pursuant to 18 U.S.C. § 1956(a)(2)(B)(ii) by attempting to transport funds across U.S. borders with intent to evade reporting requirements). As cross border transfers of funds are generally unambiguous acts, it is generally easy for the government to prove that the defendant engaged in or attempted such proscribed conduct. See Sultzer, *supra* note 24, at 165 (discussing range of conduct that constitutes money laundering under 18 U.S.C. § 1956(a)(2)).

239. See Sultzer, *supra* note 25, at 166 (noting that intent standard for violation of Section 1956(a)(2) mirrors that of Section 1956(a)(1)).

that the sum involved can be traced back to a specified unlawful activity, and that the offender knew that the funds originated from some form of illicit activity.²⁴⁰ The proof requirement is relaxed, however, where the government charges that such activity was conducted with the intent to promote the commission of specified unlawful activity.²⁴¹ Under such a charge, mere intent is sufficient to prove a violation.²⁴² The offender need not know that the funds originated from unlawful activity, nor does the government need to prove that the funds were derived from a specified unlawful activity.²⁴³

c. Section 1956(a)(3): Law Enforcement Operations Directed at Money Laundering

The third category of money laundering offenses created under Section 1956 deals with law enforcement operations aimed at controlling money laundering.²⁴⁴ The components of a money laundering offense under this category generally resemble those of a violation under Section 1956(a)(1).²⁴⁵ The categories are different, however, in that the funds do not actually have to stem from illicit activity.²⁴⁶ All that is required is that a law enforcement officer represents, and the offender believes, that the funds originated from unlawful activity.²⁴⁷

ii. 18 U.S.C. Section 1957: Engaging in Monetary Transactions in Property Derived From Specified Unlawful Activity

18 U.S.C. Section 1957²⁴⁸ ("Section 1957") exponentially expands the reach of Section 1956's prohibition on money laun-

240. 18 U.S.C. § 1956(a)(2)(B).

241. *Id.*

242. *Id.*

243. 18 U.S.C. § 1956(a)(2)(A).

244. 18 U.S.C. § 1956(a)(3).

245. Compare 18 U.S.C. § 1956(a)(1) (prohibiting anyone from engaging in or attempting to engage in financial transaction with funds which he knew originated from specified unlawful activity) with 18 U.S.C. § 1956(a)(3) (prohibiting anyone from engaging in or attempting to engage in financial transaction with funds represented to be proceeds of specified unlawful activity).

246. 18 U.S.C. § 1956(a)(3).

247. 18 U.S.C. § 1956(a)(3)(C). The statute defines the term represented as any representation made by a law enforcement officer or by any other person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of Section 1956. *Id.*

248. 18 U.S.C. § 1957 (1994) ("Section 1957").

dering.²⁴⁹ This section criminalizes the mere acceptance of funds, in excess of US\$10,000, that a defendant knows are derived from unlawful activity.²⁵⁰ To prosecute under this statute, the government need not meet the sometimes stringent standards of proof required by Section 1956.²⁵¹ There is no intent component to this statute.²⁵² The government need only prove that an offender knowingly engaged or attempted to engage in a monetary transaction in criminally derived property that is of a value exceeding US\$10,000 and that traces back to a specified unlawful activity.²⁵³

In addition to establishing the crime of money laundering, the MLCA also prohibited the structuring, attempted structuring, and aiding and abetting in structuring transactions for the purpose of avoiding reporting requirements.²⁵⁴ The MLCA subjects potential offenders to significant fines and possible imprisonment for period not to exceed ten years.²⁵⁵

The MLCA also contains major provisions designed to attack criminal proceeds.²⁵⁶ Convinced that targeting the proceeds of drugs is the most effective method of controlling drug trafficking,²⁵⁷ Congress enacted certain provisions which call for

249. See Sultzer, *supra* note 25, at 167 (noting that § 1957 greatly extends potential scope of Section 1956's criminal prohibition against money laundering to cover situations in which defendants only bad act is having accepted funds in excess US\$10,000, which he knows are tainted).

250. 18 U.S.C. § 1957(a).

251. *Id.*; see also Sultzer, *supra* note 25, at 167 (discussing how government is not constrained by having to prove any of impermissible intentions found in 18 U.S.C. § 1956).

252. 18 U.S.C. § 1957(a).

253. *Id.*

254. 31 U.S.C. § 5324 (1988).

255. *Id.* The Supreme Court recently interpreted this statute in *Ratzlaf v. United States*, 114 S.Ct. 655 (1994). In *Ratzlaf*, the defendants intentionally structured a cash transaction amounting to US\$100,000, to pay off a gambling debt at a casino, to avoid triggering the reporting requirement of the BSA. *Id.* at 657. The court concluded that the willfulness component of the statute required that a defendant be aware of the illegal nature of his actions. *Id.* at 663. In interpreting the statute, the Court observed that Congress could have eliminated the references to willfulness, but neglected to do so. *Id.* at 662. In response to the *Ratzlaf* decision, Congress amended the statute and eliminated the willfulness component. Money Laundering Suppression Act of 1994, Pub. L. No. 103-325 §411, 108 Stat. 2160, 2253 (1994).

256. 18 U.S.C. §§ 981, 982 (1988).

257. See Federal Government's Response to Money Laundering: Hearings Before Committee on Banking, Finance & Urban Affairs, 103d Cong., 1st Sess. 200-01 (1993) (testimony of Frederick B. Verinder, Deputy Assistant Director, Criminal Investigative Division, FBI) (opining that use of money laundering statutes reduces profitability of

the civil and criminal forfeiture of property, real or personal, involved in a transaction in violation of the money laundering statutes,²⁵⁸ the structuring statute,²⁵⁹ or the currency transaction reporting statute.²⁶⁰

5. The Annunzio-Wylie Anti-Money Laundering Act of 1992

The Annunzio-Wylie Anti Money Laundering Act of 1992²⁶¹ ("The Annunzio-Wylie Act"), serves as a supplement to prior anti-money laundering legislation.²⁶² Enacted largely as a response to the BCCI Scandal,²⁶³ these statutes call for the termination of a bank's charter, its insurance, or its license to do business in the United States if it is charged with and subsequently convicted of money laundering violations.²⁶⁴

Under the Annunzio-Wylie Act, the sanctions for banks convicted of money laundering differ depending on whether the bank in question is domestic or a U.S.-based branch of a non-

criminal organizations through seizure and attacks underpinnings of enterprise by attacking organizational infrastructure which facilitates money laundering function).

258. 18 U.S.C. § 1956 and § 1957.

259. 31 U.S.C. § 5324 .

260. 31 U.S.C. § 5313

261. Pub. L. No. 102-550, 106 Stat. 4044 (codified as amended in scattered sections of 12 U.S.C., 18 U.S.C., 22 U.S.C., and 31 U.S.C.) ("Annunzio-Wylie Act").

262. See Alford, *supra* note 16, at 460 (stating that Annunzio-Wylie Act implements many of recommendations made by FATF).

263. See *id.* (citing BCCI failure as principal motivation behind enactment of Annunzio-Wylie Anti-Money Laundering Act). In addition to the BCCI failure, the implementation of the Annunzio-Wylie Act may also be attributed to the discovery that the United States Federal government lacked the authority to close BCCI's branch offices within the United States, despite BCCI's convictions for money laundering violations. *Id.*

264. 12 U.S.C. §§ 93, 1818, 3105 (1994). Under 12 U.S.C. § 1818, where a domestic bank is convicted of money laundering a bank regulator must conduct hearings to decide whether to revoke the bank's deposit insurance. 12 U.S.C. § 1818. This statute further provides that bank officials convicted of money laundering violations, may be banned entirely from the industry. *Id.* Under 12 U.S.C. § 93, the bank regulator may, in the alternative, consider revoking the bank's charter or appointing a conservator to take over and operate the bank. 12 U.S.C. § 93. With respect to branch offices of foreign banks located in the United States, the Federal Reserve Board must begin termination proceedings at once under 12 U.S.C. § 3105. 12 U.S.C. § 3105. When the banks in question is a domestic institution, the proposed sanctions in these statutes are not mandatory. See Alford, *supra* note 16, at 460 (noting that where domestic bank is convicted of money laundering, appropriate bank regulator must hold hearing to determine if bank should lose its charter or deposit insurance).

U.S. bank.²⁶⁵ A branch office of a non-U.S. bank convicted of money laundering may be shut down,²⁶⁶ while a domestic bank may face termination, or revocation of its deposit insurance.²⁶⁷

The Annunzio-Wylie Act addressed the problem of money laundering in non-bank financial institutions by extending the statute's application to all financial institutions.²⁶⁸ It further gave the U.S. Secretary of Treasury the authority to require all financial institutions, as opposed to just depository institutions, to report cash transactions in excess of US\$10,000 to the Internal Revenue Service.²⁶⁹ In addition, Congress gave the Department of Treasury the ability to promulgate know-your-customer rules, to be used by all financial institutions.²⁷⁰ These rules required financial institutions to inquire about the identity of all individuals and financial institutions it does business with.²⁷¹ The Annunzio-Wylie Act also called for financial institutions to report suspicious transactions to the Department of Treasury.²⁷²

265. See Alford, *supra* note 16, at 460-61 (discussing possible penalties for domestic banks found guilty of money laundering).

266. Annunzio-Wylie Act §1507, 12 U.S.C. § 3105 (Supp. IV 1992).

267. *Id.* §§ 1502, 1503, 12 U.S.C. §§ 93(c), 1818 (Supp. IV 1992); see also 138 Cong. Rec. §17, 912 (daily ed. Oct. 8, 1992). In order to avoid losing its charter or deposit insurance, a bank must show that it tried to the best of its ability to prevent money laundering from occurring. See Alford, *supra* note 15, at 461 (discussing alternatives available to domestic bank convicted of money laundering violations). The bank bears the burden of proving the degree of involvement of the bank's senior management in the money laundering activity; the bank's preventive measures against money laundering; the bank's level of cooperation with law enforcement authorities; the bank's new internal controls to prevent money laundering from occurring, which have been instituted since the offense; and the impact on the community if the bank is shut down. Annunzio-Wylie Act § 1501, 12 U.S.C. §1956 (Supp. IV 1992).

268. See Alford, *supra* note 16, at 463 (discussing impact of enactment of Annunzio-Wylie Act upon financial institutions).

269. 26 U.S.C. § 6501 (1988).

270. 12 U.S.C. § 5324 (Supp. IV 1992).

271. 31 U.S.C. § 5327 (Supp. IV 1992). These identification requirements apply to all parties doing business with a financial institution regardless of whether or not they hold an account. See Alford, *supra* note 16, at 461-64 (discussing provisions of Annunzio-Wylie Act).

272. 31 U.S.C. § 5324 (Supp. IV 1992). With the enactment of the Annunzio-Wylie Act, banks were posed with a dilemma when reporting suspicious transactions. See Alford, *supra* note 16, at 463-64 (discussing how Annunzio-Wylie Act has accentuated dilemma that banks face with respect to reporting suspicious transactions to law enforcement authorities). On the one hand, a failure to report enough information about a party they are doing business with, could result in a conviction for money laundering violations. *Id.* On the other hand, the disclosure of too much information could to civil liability, as customers may file suit against them for breach of confidentiality. *Id.* While this dilemma may have existed to some degree since the enactment of the Money

6. The Money Laundering Suppression Act of 1994

The U.S. anti-money laundering regime was further bolstered with the enactment of the Money Laundering Suppression Act of 1994 ("MLSA").²⁷³ Provisions of the MLSA call upon states to develop and implement laws in order to license and regulate businesses that provide check cashing, currency exchange, or money transmitting or remittance services, or issue or redeem money orders, travelers' checks, or other similar instruments.²⁷⁴ Under the MLSA, the states must proscribe criminal or civil penalties for variance from state licensing and federal BSA reporting requirements.

The MLSA also requires that all money transmitting businesses in the United States register with the Secretary of Treasury.²⁷⁵ Beyond the requirements posed by the BSA and the Internal Revenue Service code, the statute does not impose any new from of regulation on businesses.²⁷⁶ The MLSA does, how-

Laundrying Control Act, it was exacerbated by the Annunzio-Wylie Act and the stringent sanctions it imposed for banks involved in money laundering operations. *Id.*

The precarious position of banks was further complicated by the fact that several states have recognized that banks have a duty to maintain customer confidentiality, and cause of action for the breach of this duty. *See, e.g., Young v. Chemical Bank*, N.Y.L.J., Aug. 7, 1992, at 23 (*Supreme Court, New York County*) (holding that banks have duty of confidentiality to their customers).

The Annunzio-Wylie Act alleviates some of the concerns that banks hold with respect to liability for disclosure of customer information. *See* Alford, *supra* note 16, at 463 (discussing effects of Annunzio-Wylie Act upon bank disclosure of customer information). The statute provides that banks shall not be liable under federal or state laws for any customer information given to law enforcement authorities. 31 U.S.C. § 5318(g)(3). While this safe harbor provision shields banks from civil liability, it does not immunize them against criminal liability. *See* Mark Arend, *Money Laundering Law is (so far) Mostly a Blessing*, AM. BANKERS' ASS'N BANKING J., Feb. 1993, at 69. This protection against civil liability, however, is not a comprehensive one. *See* Alford, *supra* note 16, at 463-64 (discussing how Annunzio-Wylie Act offers limited protection against civil liability). As such, banks should carefully consider the degree of potential tort liability before disclosing customer information. *Id.* Nevertheless, while the Annunzio-Wylie Act increases the penalties for involvement in money laundering operations, it does offer banks some degree of protection for compliance. *Id.*

273. Public L. No. 103-325 §401-13, 108 Stat. 2160, 2243-55 (codified in scattered sections of 18 U.S.C. and 31 U.S.C.); *see also* Sultzer, *supra* note 25, at 216 (noting that Congress focused on controlling money laundering committed through non-bank financial institutions when creating the MLSA).

274. 31 U.S.C. § 5311.

275. 31 U.S.C. § 5330.

276. *See* Sultzer, *supra* note 25, at 217 (stating that MLSA does not impose any new regulations on businesses beyond those already established through BSA and IRS codes).

ever, explicitly provide that no businesses shall be exempted from existing or future state licensing or regulation requirements.²⁷⁷

b. United Kingdom Anti-Money Laundering Legislation

The United Kingdom has demonstrated a firm commitment to controlling global money laundering.²⁷⁸ As the largest financial center in Europe, the United Kingdom is highly susceptible to money laundering.²⁷⁹ It may be because of this vulnerability that the United Kingdom has served as the leader in Europe in enacting anti-money laundering legislation.²⁸⁰ The Drug Trafficking Offenses Act of 1986²⁸¹ marked the first major piece of anti-money laundering legislation in the United Kingdom.²⁸² The Drug Trafficking Act 1994²⁸³ consolidates the Drug Trafficking Offenses Act of 1986.²⁸⁴ The Proceeds of Crime Act 1995²⁸⁵ allows the U.K. to further combat money laundering by enabling courts to confiscate the proceeds of crime.²⁸⁶ Finally, the Money Laundering Regulations 1993²⁸⁷ provide guidelines for financial institutions to follow on order to prevent their use as a vehicle for money laundering activity.²⁸⁸

277. 31 U.S.C. § 5330. In addition the statute provides for civil penalties of up to US\$5,000 per day, for each day that a business operates without a license or with a license that contains fraudulent information. *Id.* In addition, the statute calls for criminal penalties of up to five years imprisonment and the possible application of criminal forfeiture provisions. *Id.*

278. See Zagaris & Castilla, *supra* note 68, at 934 (stating that United Kingdom's commitment to fighting money laundering is evidenced by its ratification of Vienna Convention, its drafting and signing of Council of Europe Convention, and its membership in organizations like FATF and Basle Committee).

279. *Id.* at 933-34.

280. See *id.* at 934 (stating that as of 1993, United Kingdom had most comprehensive and extensive anti-money laundering legislation).

281. Drug Trafficking Offenses Act of 1986, ch. 32 (Eng.).

282. See Rider, *supra* note 30, at 406-07 (discussing significance of Drug Trafficking Offenses Act of 1986).

283. Drug Trafficking Act 1994, ch. 37 (Eng.).

284. See Rider, *supra* note 30, at 407-08 (discussing significance of Drug Trafficking Act 1994 to United Kingdom anti-money laundering regime).

285. Proceeds of Crime (Scotland) Act, ch. 43 (Eng.).

286. See Clark, *supra* note 16, at 474 (stating that Proceeds of Crime Act broadens power of court to make confiscation orders).

287. Money Laundering Regulations 1993, SI 1993/1993 (Eng.).

288. See Lee, *supra* note 7, at 233 (discussing impetus for establishing Money Laundering Regulations 1993).

i. Drug Trafficking Offenses Act of 1986

U.K. legislation imposing criminal liability upon those involved in money laundering activity developed in the mid-1980s.²⁸⁹ Traditionally, the United Kingdom's method of approaching money laundering has focused on the three categories of drugs, terrorism, and other crimes.²⁹⁰ The crucial piece of legislation in U.K. anti-money laundering regime is the Drug Trafficking Offences Act of 1986²⁹¹ ("DTOA"), which made money laundering a crime.²⁹² The DTOA provides for the pre-arrest investigation of assets which are suspected to be derived from the proceeds of drug trafficking, the freezing of assets upon arrest or issuance of a summons, and the issuance of confiscation order after a conviction.²⁹³

Section 24 of the DTOA creates a criminal offense out of assisting a drug trafficker in retaining the proceeds of his crimes.²⁹⁴ The provision focuses upon those individuals who actually launder drug money and imposes stringent sanctions for

289. See Clark, *supra* note 16, at 473 (discussing impetus for developing anti-money laundering legislation in England). While legislation criminalizing money laundering was not developed in England until the 1980s, individuals involved in laundering the proceeds of crime, prior to this, were often prosecuted for violating Section 22(1) of the Theft Act 1968. *Id.* Theft Act 1968, §22(1) (Eng.). The Theft Act 1968 reflects the fact that Parliament realized the importance of imposing criminal penalties for those who facilitate the realization of stolen property. *Id.* Section 22(1) of the Theft Act 1968 provides that an individual is culpable of handling stolen goods if he "dishonestly undertakes or assists in their retention, removal, disposal or realization, by or for the benefit of any other person." Theft Act 1968, ch. 60, § 22(1) (Eng.). As this legislation was limited in scope to the handling of goods which are or represent stolen property, it prompted Parliament to enact further legislation. See Clark, *supra* note 16, at 470-71 (discussing reasons for enacting U.K. anti-money laundering legislation).

290. See Rider, *supra* note 30, at 407 (noting that Drug Trafficking Offenses Act 1986 and Drug Trafficking Act 1994 relate to money laundering in connection with drug trafficking). The Prevention of Terrorism Act of 1989 and the Northern Ireland Act 1991, pertain to money laundering offenses as they relate to terrorist activity. *Id.* at 410-11. The Criminal Justice Act of 1993 provides for money laundering offenses as they pertain to other crimes. *Id.* at 414.

291. Drug Trafficking Offenses Act 1986, ch. 32 (Eng.).

292. See Rider, *supra* note 30, at 406 (stating that prior to enactment of Drug Trafficking Offenses Act ("DTOA"), there was little discussion in Britain concerning money laundering). Prior to the enactment of the DTOA, discussion on money laundering centered on the need to reinforce provisions for confiscation and forfeiture of the proceeds of crime. *Id.* Similar legislation exists in Scotland, known as the Criminal Justice Act, 1987, ch. 41. Criminal Justice Act (Scot.)

293. See Lee, *supra* note 7, at 232 (discussing provisions of DTOA).

294. Drug Trafficking Offenses Act 1986, ch. 32, § 24 (a) (Eng.).

those who violate the law.²⁹⁵ A violation of the DTOA is punishable by fines, imprisonment of up to fourteen years, or both.²⁹⁶ A violation of the DTOA is committed when anyone who knowing, or suspecting that someone is a drug trafficker, either holds or controls the illicit proceeds, or places funds at the drug trafficker's disposal, or provides the individual with any assistance in investing those funds.²⁹⁷

The U.K. anti-money laundering regime underwent a major overhaul over the past eight years.²⁹⁸ A significant portion of the new legislation was devoted towards criminalizing the activities of those who assist in money laundering.²⁹⁹

ii. Drug Trafficking Act 1994

The Drug Trafficking Act 1994³⁰⁰ ("DTA") essentially consolidated the laws established under the Drug Trafficking Offenses Act 1986.³⁰¹ Similar to Section 24 of the DTOA, Section 50 of the DTA³⁰² established the crime of assisting another in retaining the benefits of drug trafficking.³⁰³ Under Section 50, anyone who enters into an arrangement to facilitate another's retention of drug money, and who knows or suspects that the

295. *Id.*

296. *Id.*

297. *Id.*

298. See Clark, *supra* note 16, at 476-77 (discussing Parliament's motives in enacting further anti-money laundering legislation). This increase in anti-money laundering legislation may be largely attributed to the realization in England that the narcotics trade within the nation was growing at exponential rates. *Id.* In 1989, the Home Affairs Committee of the House of Commons conducted a review of the effectiveness of the DTOA. *Id.* The Committee was distressed over estimates of at least £1.8 billion in drug proceeds being injected into the English financial system, as well as the growing concern among other countries that Britain was rapidly becoming an offshore banking system for drug money laundering. *Id.* After conducting the review, the Home Affairs Committee recommended that the government swiftly respond to the growing levels of money laundering through further legislation. See U.S. Senate Committee on Government Affairs, 1985, *reprinted in* ROWAN BOSWORTH-DAVIES & GRATHAM SALTMARSH, *MONEY LAUNDERING: A PRACTICAL GUIDE TO THE NEW LEGISLATION* 116 (describing Parliament's concerns which led to development of anti-money laundering legislation in 1990s).

299. See Clark, *supra* note 16, at 473-74 (stating that new legislation targeted those who benefit from money laundering rather than launderers themselves).

300. Drug Trafficking Act 1994, ch. 37 (Eng.).

301. See Clark, *supra* note 16, at 475 (stating that DTA essentially consolidates DTOA).

302. Drug Trafficking Act 1994, ch. 37, § 50 (Eng.).

303. *Id.*

individual is someone benefiting from drug trafficking is guilty of an offense.³⁰⁴

Section 51 of the DTA³⁰⁵ establishes the offense of knowingly acquiring or possessing property derived from drug trafficking.³⁰⁶ Expansive in its scope, the statute defines possession of property as committing any act in relation to it.³⁰⁷ As a result, criminally liability is extended to those who know that a particular person is involved in drug trafficking and acquires or uses property which represents the proceeds of the drug trafficking.³⁰⁸ It is important to note, however, that in order to commit an offense under this provision, the person involved must actually know that the property involved is derived from drug trafficking.³⁰⁹

Under the United Kingdom laws, the mere knowledge that an individual is or may be involved in laundering the proceeds of drug trafficking, in certain cases, is a criminal offense.³¹⁰ Under Section 52 of the DTA, a person is guilty of violating the

304. *Id.* This provision has a significant impact on financial intermediaries. *See* Clark, *supra* note 16, at 475 (discussing ramifications of this legislation for financial intermediaries). An intermediary who, acting on behalf of a client, enters into a transaction suspecting that the relevant funds are tainted faces criminal liability. *Id.* Penalties for a violation of the DTA include an unlimited fine, and fourteen years in prison. *Id.* In order to violate the DTA, it is enough that the person assisted received payment with respect to a third party's trafficking. *Id.* An offender need not have been directly involved himself. *See* Drug Trafficking Act 1994, ch. 37, §51 (Eng.) (stating that individual is guilty of offense if "knowing that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of drug trafficking, he acquires or uses that property or has possession of it."). It is a defense that the alleged assistor "acquired or used the property or had possession of it for adequate consideration." *Id.* at § 51(1)(c).

305. Drug Trafficking Act 1994, ch. 37, § 51 (Eng.).

306. *Id.*

307. *See* Drug Trafficking Act 1994, ch. 37, § 51(7) (Eng.) (defining term possession of property as doing anything in relation to it).

308. Drug Trafficking Act 1994, ch. 37, § 51(2) (Eng.). While it may be a defense to a violation of this provision to prove that the alleged offender has given adequate consideration for the property, Section 51(4) explicitly states that the provision of services which assist drug traffickers in their illegal operations do not constitute adequate consideration for the purposes of the statute. *Id.*

309. *See* Rider, *supra* note 30, at 409-10 (noting that mere suspicion that property in question is derived from drug trafficking is not enough to constitute violation of Section 51(1) of DTA).

310. *See* Drug Trafficking Act 1994, ch. 37, § 52(1) (stating that person is guilty of offense if he knows or suspects that another person is engaged in drug money laundering and fails to report information to law enforcement authorities, provided that information was obtained through course of his trade, business, or profession).

law if, in the course of business, trade, profession, or employment, he comes to know or suspect that someone is involved in money laundering, and fails to disclose the information to law enforcement authorities as soon as reasonably practicable.³¹¹ Under this law, to suspect that an individual is engaged in money laundering operations and fail to report those suspicions is a crime punishable with incarceration.³¹²

iii. Proceeds of Crime Act 1995

The Proceeds of Crime (Scotland) Act 1995,³¹³ ("PCA") a recent addition to Britain's anti-money laundering regime, reflects the widely held belief among law enforcement officials that the most effective method of fighting money laundering is through the confiscation of assets.³¹⁴ English courts have held the power to confiscate the proceeds of crime, following a conviction, for many years.³¹⁵ Until the enactment of the PCA, however, the courts rarely exercised this power.³¹⁶ In addition to broadening the court's power to make confiscation orders, the PCA imposes a duty upon courts to confiscate the proceeds of crime in certain cases.³¹⁷ Section 1 of the PCA³¹⁸ requires a court to confiscate the proceeds of a crime whenever a prosecutor makes a written request.³¹⁹ This requirement applies to all indictable offenses.³²⁰

Section 2 of the PCA³²¹ further empowers courts.³²² This

311. *Id.*

312. See Clark, *supra* note 16, at 477-78 (stating that Section 52 of Drug Trafficking Act 1994 may be most draconian of new anti-money laundering laws). The offense is punishable with a maximum of five years imprisonment. *Id.* Section 52 of the DTA places a substantial burden upon financial institutions to report any suspicions that they may have. *Id.*

313. Proceeds of Crime Act 1995 (Scotland), ch. 43 (Eng.) [hereinafter PCA].

314. See Clark, *supra* note 16, at 473-74 (discussing determination of British government to combat money laundering by confiscating end product).

315. See, e.g., Drug Trafficking Act 1994, ch. 37, § 19 (Eng.) (providing for issuance of confiscation orders where defendant had absconded or died).

316. See Clark, *supra* note 16, at 474 (noting that English courts had, in past, rarely used their power to confiscate proceeds of crime).

317. Proceeds of Crime Act 1995 (Scotland), ch. 43, § 1 (Eng.).

318. *Id.*

319. *Id.*

320. *Id.* at § 1(2)(a) (stating that the provision applies to any offense which has been prosecuted on indictment).

321. Proceeds of Crime (Scotland) Act 1995, ch. 43, § 2.

322. *Id.*

section allows courts to assume that all assets held by an offender upon conviction represent the proceeds of crime.³²³ Furthermore, it enables courts to also assume that any property acquired by the offender in the six years prior to the conviction also represents the proceeds of crime.³²⁴ These provisions are also mandatory.³²⁵

iv. Money Laundering Regulations 1993

The Money Laundering Regulations 1993³²⁶ ("1993 Regulations") were enacted in order to implement U.K. obligations with respect to the European Council's Directive on the Prevention of the Use of the Financial System for the Purpose of Money Laundering.³²⁷ The U.K. designed the 1993 Regulations with the objective of ensuring that financial institutions maintain internal systems to combat money laundering.³²⁸ The 1993 Regulations require that anyone involved in a financial business look into the identity of those they form a business relationship with.³²⁹ The 1993 Regulations further require that businesses keep records of all transactions for a period of five years.³³⁰ In addition, financial institutions must establish an internal system through which anyone with a suspicion of laundering may report their suspicion.³³¹ Financial institutions must also train their

323. *Id.* § 2(2)(a) (enabling court to assume that any property or other economic advantage which has been obtained by defendant since relevant date has been obtained in connection with commission of offense).

324. *Id.* at § 2(6).

325. *Id.* at § 2(4). An individual convicted of violating this act is offered slight degree of protection in that the statute only permits courts to make such an assumption where a prosecutor has given it written notice that such an assumption is appropriate. *Id.*

326. Money Laundering Regulations 1993, SI 1993/1993 (Eng.) [hereinafter the 1993 Regulations]. Promulgated on July 20, 1993, the 1993 Regulations became effective on April 1, 1994. *See Lee, supra* note 7, at 233 n.216 (noting that 1993 Regulations adopted the Council Directive). The United Kingdom was the first European Union Member to adopt the Council Directive. *Id.*

327. *See Lee, supra* note 7, at 233 (noting that United Kingdom was first European Union Member to adopt Council Directive).

328. *See Clark, supra* note 16, at 481 (discussing purpose in enacting 1993 regulations).

329. *Id.* at 481.

330. *Id.* Financial institutions must also hold on to the proof of identity offered by the parties with whom they conduct business. *Id.*

331. *Id.* Once a report is made to the designated officer of a company, he must have access to any records that may enable him to reach a decision as to whether to report the suspicion to the National Criminal Intelligence Service. *Id.*

staff to recognize money laundering techniques and teach them of their duties under the law.³³²

B. India

India has enacted a variety of measures to counter narcotics trafficking and money laundering.³³³ In recent years, India has become a significant money laundering concern for law enforcement officials.³³⁴ Scholars contend that India's efforts at combatting money laundering have, thus far, proved ineffective.³³⁵

1. The Heroin Problem

Over the past two decades, India has become a major transit point for narcotics trafficking, particularly for heroin.³³⁶ Situated between what are known as the Golden Crescent³³⁷ to the

332. *Id.* The regulations place a heavy burden upon financial institutions. *See id.* at 482 (discussing onerous burden placed upon financial institutions as result of Money Laundering Regulations). When introduced, the Regulations met a tremendous amount of disapproval from members of the financial industry. *See* Roger Fink, *UK Bankers Right to Worry about Directive*, FIN. TIMES, Nov. 8, 1994 at 16. Failure to implement adequate staff training is now a criminal offense, punishable with two years imprisonment. *See* 1993 Regulations § 5.

333. *See* FLETCHER N. BALDWIN, JR. & ROBERT J. MUNRO, *Money Laundering, Asset Forfeiture and International Financial Crimes*, in India 3 (1996) (discussing Indian laws aimed at money laundering and drug trafficking). Asset forfeiture legislation allows for the freezing of assets in domestic crimes. *Id.* India also freezes deposits of individuals convicted of narcotics trafficking in foreign countries. *See* Narcotics Drugs and Psychotropic Substances Act (1985) (India). Under the provisions of the Narcotics Drugs and Psychotropic Substances Act, law enforcement officials may freeze the assets of an individual convicted of narcotics trafficking. *See* BALDWIN AND MUNRO, at 3 (discussing provisions of Narcotics and Psychotropic Substances Act). Although India has an asset forfeiture law in place, it contains several loopholes and requires several years to prosecute as a criminal matter. *Id.* As a result, the law is virtually ineffective. *Id.*; *see also*, Zagaris, *supra* note 65 at 911-12 (discussing importance of asset forfeiture laws in effective anti-money laundering regime).

334. *Id.* at 6.

335. *Id.* at 4. For example, although drug-related money laundering is a crime, drug traffickers continue to launder their proceeds through various methods, including the purchase and sale of gold. *Id.* at 3. In order to circumvent the law, drug traffickers use their proceeds to buy gold in foreign countries which they then smuggle into India and sell at a higher price. *Id.*

336. *See* Letter From President to the Chairmen and Ranking Members of the House committee on Appropriations and International Relations and the Senate Committee on Appropriations and Foreign Relations, *supra* note 8, at *1 (naming India as major drug transit country).

337. *See* Senthil Ratnasabapathy, *Drugs-Afghanistan: Plant Something Else U.N. Tells Growers*, INTER PRESS SERVICE, NOV. 18, 1996, available in Westlaw 1996 WL 13589229

west, and the Golden Triangle³³⁸ to the east, the world's two largest opium poppy producing areas, India has unwittingly become a major transit point in the heroin trade.³³⁹ Every day, from points such as New Delhi and Bombay dozens of kilograms of pure grade heroin are shipped out of India, bound for destinations in Western Europe and the United States.³⁴⁰

India's involvement in the heroin trade with the Golden Crescent, which is comprised of Iran, Turkey, Pakistan, and Afghanistan, dates back to the late 1970s and early 1980s.³⁴¹ The preference for routing the heroin through India rather than by land into Western Europe resulted from strict border patrol in the area.³⁴² As a consequence of the wars under way in the region, borders activity in these countries was strictly monitored.³⁴³

The countries of the Golden Crescent have begun to establish other avenues for their heroin rather than routing it through India.³⁴⁴ In particular, with the emergence of the former Soviet Republics, and their growing drug mafias, the druglords of the Indian subcontinent have turned to much safer routes of transportation.³⁴⁵

(identifying Golden Crescent as opium producing region of Southwest Asia, comprised of Turkey, Iran, Afghanistan, and Pakistan).

338. See Rone Tempest, *India Emerging as a Major Hub of Heroin Trade*, L.A. TIMES, June 22, 1986, at 2 (identifying Golden Triangle as opium producing area situated to Southeast of India, comprised of Myanmar (formerly known as Burma), Laos, and Thailand).

339. See Tim McGirk, et al., *Heroin's Deadly Detour Smugglers are Now Sending the Drug Through India to the West—With Help from Crooked Police*, TIME INT'L, Dec. 20, 1996, at 30 [hereinafter *Heroin's Deadly Detour*].

340. *Id.*

341. See Ratnasabapathy, *supra* note 337. As this region of the world remained war torn for years, several of its poor turned to poppy cultivation as a means of sustenance in an era of economic strife. *Id.* The wars had destroyed much of the other agricultural products in the area, thereby making poppy cultivation one of the only ways for farmers to generate enough income. *Id.* As the violence and turbulence continued to plague the area, an increasing number of people turned to poppy cultivation. For example, in 1978 opium production in Afghanistan was at 200 metric tons per year. *Id.* By 1994, opium production had reached a staggering level of 3500 metric tons. *Id.* According to the United Nations Drug Control Program, there are in excess of 200,000 families in Afghanistan involved with opium production. *Id.*

342. See Sujay Mehdudia, *India: Drug Mafias Multiply, Change Tactics*, THE HINDU, May 7, 1997, at 16.

343. *Id.* The possibility of sending the heroin by land into Europe was further limited by the stricter narcotics policies and border control of the Communist regimes situated along the route to western Europe. *Id.*

344. *Id.*

345. See *Assessing the Current Trends in Opium Production and Heroin Trafficking: Ad-*

The decline in heroin entering India from the southwest, however, has not led to a decline in narcotics trafficking in India.³⁴⁶ As the heroin traffic from the Golden Crescent countries decreased, the amount of heroin entering India from its eastern neighbors increased exponentially.³⁴⁷ To the east of India lies the Golden Triangle. The countries of the Golden Triangle form the largest opium producing region in the world.³⁴⁸

In the past, the heroin produced in this Southeast Asian region was sent to the west from Thailand.³⁴⁹ Until recently, heroin flowed freely through the Thai borders, especially from Myanmar.³⁵⁰ Stricter patrol of the Thai borders, however, has resulted in a decline in the amount of heroin entering the country.³⁵¹ As an alternative to Thailand, the druglords of Southeast Asia have chosen India as the transit point for their large scale narcotics operations.³⁵²

Aided by Rangoon's military regime, the State Law and Or-

dress by Assistant Secretary for International Narcotics Matters Melvin Levitsky, June 15, 1992, U.S. Dep't St. Dispatch 468, available in Westlaw, 1992 WL 3118605 [hereinafter the Levitsky Address] (stating that breakup of Soviet Union has opened up number of safer land routes, through the countries, into Western Europe). International law enforcement officials fear that the dismantlement of the former Soviet Union could give rise to a new Baltic Route for smuggling heroin through northern Europe. *Id.*

346. See *Heroin's Deadly Detour*, *supra* note 339 (discussing increase in heroin coming into India from countries of Southeast Asia).

347. *Id.*

348. See *id.* (noting that Golden Triangle is comprised of 38 million hectares of poppy cultivated land, constituting over 60% of global opium supply).

349. See *id.* (discussing Thailand's role in global heroin trade).

350. *Id.*

351. *Id.*

352. *Id.* The choice to use India as a conduit for smuggling heroin is an obvious one. *Id.* The bulk of the world's illicit opium is grown in Myanmar (formerly known as Burma), India's northeastern neighbor. *Id.* With the possibility of sending its heroin to the east into Thailand thwarted, the Burmese turned to the west. *Id.* Myanmar's border with India, which spans 1,643 km through the dense jungles of the Himalayan foothills, is virtually impossible to patrol. *Id.* The border is simply too long and the terrain too rugged. *Id.* Moreover, relative to other countries in the region, India has a developed infrastructure and is well connected to major international destinations by way of roads, rail, sea and air. See Mehdudia, *supra* note 342. The ports and airports of India serve as a gateway to the west for these lesser developed, more isolated countries. *Id.*

The Burmese looked to history to establish their original heroin smuggling route. See Rupa Chinai & Rahul Goswami, *Health-Asia: Golden Triangle Heroin Trade Fuels HIV/AIDS*, INTER PRESS SERVICE, Apr. 28, 1997, available in Westlaw, 1997 WL 7075091 (noting that early Indo-Burmese heroin trade followed the old opium routes of British empire, which connected India and Burma through a series of roadways). Heroin was smuggled into India via "Highway 39," the roadway established by the British which runs along the Indo-Burmese border. See *Heroin's Deadly Detour*, *supra* note 339 (observ-

der Restoration Council³⁵³ ("SLORC"), opium travels freely in Myanmar towards the Indian border.³⁵⁴ Once in India, the heroin is shipped to destinations throughout the globe.³⁵⁵

A significant amount of the heroin remains within the country.³⁵⁶ India's growing role in the global narco-trade has given rise to a generation of people who have grown up with easy access to heroin.³⁵⁷ In a country that has long suffered from severe poverty, heroin is so cheap that it is accessible to even the poorest income groups.³⁵⁸ Drug abuse now plagues the Indian subcontinent.³⁵⁹

ing that drug smugglers now avoid using Highway 39, as Indian narcotics enforcement agents are now beginning to patrol area heavily).

353. See Levitsky Address, *supra* note 345 (stating that opium production in Burma is largely off limits to central government and in control of insurgent armies, with which Rangoon government has reached accommodations in order to finance its own activities).

354. See *Heroin's Deadly Detour*, *supra* note 339 (stating that opium is carried in government vehicles sporting official stickers on their windshields, to central city of Mandalay). It is suspected by most that the State Law and Order Restoration Council ("SLORC") uses the proceeds from the opium operation to buy illegal arms. *Id.* For the opium that has already been processed and turned into heroin, the shipments go straight across the border to the Indian state of Manipur. *Id.* The Heroin arrives in the town of Moreh, Manipur's main gateway to the Golden Triangle. See R. Dev Raj, *India-Narcotics: Heroin Trade Breeds HIV Infection*, INTER PRESS SERVICE, Oct. 1, 1997 available in Westlaw, 1997 WL 13256889 (discussing impact of Indo-Burmese heroin trade on northeastern India). Pure opium being smuggled from Mandalay is usually sent to the border towns to be processed in the laboratories that have emerged in recent years. See *Heroin's Deadly Detour*, *supra* note 339 (detailing process through which heroin is smuggled into India). Once converted into heroin, the drug is then hidden in everything from mattresses to cans of tuna, and then smuggled over to India by small scale smugglers. *Id.*

There are allegations of government corruption on the other side of the border as well. *Id.* While Indian Officials deny it, it is widely suspected that the Indian military is deeply entrenched in the lucrative narcotics trade. *Id.* In 1988, an army major was arrested for smuggling two kilograms of heroin across the Burmese border. *Id.* While his charges were subsequently dropped, there have been at least ten other high ranking military officials who have been arrested. *Id.* All of these individuals, however, have managed to extricate themselves of the charges. *Id.*

355. *Id.*

356. See Levitsky Address, *supra* note 345 (noting that India is experiencing explosive increase in heroin consumption).

357. See R. Dev Raj, *supra* note 354 (discussing local consumption of heroin in India).

358. See *India Emerging as a Major Hub of Heroin Trade*, *supra* note 338, at 2 (stating that Heroin sold for approximately US\$3 a gram on streets of India in 1986). By comparison, in the United States, one gram of heroin sold for more than US\$1200. *Id.*

359. See Chinai & Goswami, *supra* note 352 (discussing proliferation of HIV within India). The numbers are staggering. *Id.* Within the border state of Manipur a state with

2. Indian Initiatives to Combat Money Laundering

As the problems of narcotics trafficking and abuse within India escalate, combatting these problems through legislation and law enforcement have become an issue of paramount importance.³⁶⁰ Inadequate banking and monetary transaction legislation facilitates money laundering in India.³⁶¹ In addition, the reluctance on the part of Indian bank's to depart from their stringent bank secrecy policies, further enables individuals to launder money in India.³⁶² The money laundering problem in India is even further complicated by the ancient underground banking system of Hawala.³⁶³ Unless these financial crimes are strictly penalized, the enforcement of any anti-money laundering regime will prove extremely difficult.³⁶⁴ In an effort to eliminate money laundering, the Indian government drafted the Money

a population of less than two million, there are an estimated an estimated 40,000 intravenous heroin users. *Id.*

The proliferation of heroin abuse has had deadly consequences within India. *Id.* The burgeoning generation of heroin addicts in India has given rise to an increasing need for needles and syringes. *Id.* In an effort to control heroin abuse, the state of Manipur exercised a ban on the sale of hypodermic needles in 1990. *Id.* As a result, addicts began to share equipment. *Id.*

While the state has since repealed its ban on the sale of hypodermic needles, it has not escaped the consequences. *Id.* A state which houses approximately .2% of the country's population, Manipur is the home to 10% of the known HIV cases in India. *Id.* Whereas in 1989 the HIV infection rate among intravenous drug users was zero in 1990, it was estimated this year at 80.7%. *Id.*

360. See *Record Number of Nations Battle Laundering*, U.S. Says, 5/1/93 MONEY LAUNDERING ALERT, available in Westlaw 1993 WL 2782651 (discussing findings of International Narcotics Strategy Report stating that money laundering is growing concern in India, whereas it was not a concern in 1990).

361. *Id.*

362. See Ashutosh Kumar Sinha, *Banks Reluctant to Lift Veil of Secrecy on Errant Clients*, BUS. STANDARD, Mar. 10, 1997, at 12 (discussing difficulties investigative agencies are having in obtaining information about dubious transactions from public sector banks). Law enforcement officials note that foreign banks located in India are more forthcoming when similar information is sought from them. *Id.* India has a long tradition of customer confidentiality. *Id.* As such, banks are not subject to currency transaction reporting requirements. See Sarbajeet K. Sen, *India: RBI Against Compulsory Disclosure by Banks*, BUS. LINE (THE HINDU) Sept. 15, 1997, available in Westlaw, WL 13715822 (discussing RBI's Concerns about compulsory disclosure); see generally Zagaris & Castilla, *supra* note 68, at 909 (1993) (stating that principle of effective anti-money laundering law is erosion of right to financial secrecy).

363. See Rider, *supra* note 30, at 403-04 (discussing development of underground banking systems in certain societies).

364. See *id.* (discussing difficulties in combating underground banking systems).

Laundering Prevention Bill ("MLPB").³⁶⁵ It has also entered into agreements with certain countries to assist each other in money laundering investigations.³⁶⁶

a. The Money Laundering Prevention Bill

The Indian government recently drafted the MLPB.³⁶⁷ Expansive in its scope, the MLPB prohibits the laundering of the proceeds of a number of crimes.³⁶⁸ Modeled after the Criminal Justice Act of the United Kingdom,³⁶⁹ the proposed legislation imposes criminal liability on those who know or suspect that someone is involved in laundering the proceeds of crime and

365. See *India: Cabinet Approves Money Laundering Bill*, BUSINESS LINE (THE HINDU), Nov. 21, 1997, available in Westlaw, WL 15124928 (discussing provisions of bill).

366. See, e.g., *The Professional Newswire: a Roundup of Money Laundering News*, 7 NO. 10 MONEY LAUNDERING L. REP. 8 (May 1997) (discussing provisions of Indo-Pakistani agreement to cooperate in combatting drug trafficking and money laundering).

367. See *India: Cabinet Approves Money Laundering Bill*, *supra* note 361 (stating that Money Laundering Prevention Bill ("MLPB") was cleared by executive cabinet of Indian government on November 20, 1997, and currently awaits approval from Parliament). While proponents of the bill had anticipated that it would be introduced to Parliament at a much earlier date, disputes over the intended scope of the bill caused it to be delayed by several months. See *The Professional Newswire A Roundup of Money Laundering News*, 8 NO. 3 MONEY LAUNDERING L. REP. 8, (October 1997) (discussing reasons for why bill had yet to reach floor of legislature).

368. See *The Professional Newswire A Roundup of Money Laundering News*, *supra* note 363 (stating that major focus of deliberations of Committee of Secretaries that prepared bill was on definition of money laundering). Two clear strands of thinking emerged among the group charged with drafting the bill. *Id.* One group wanted to include all forms of economic offenses which lead to money laundering within the purview of the bill. *Id.* The other group wanted to limit the bill's application to a select number of activities such as narcotics trafficking, and illegal arms dealing. See Abhijit Doshi, *Money Laundering Bill: Still a Black Hole*, BUS. STANDARD, Sept. 25, 1997, at 13 (discussing differences among drafters with respect to how money laundering should be defined).

The bill finally defined money laundering as "engaging directly or indirectly in a transaction that involved property that is proceeds of crime, or receiving, possessing, disguising, transferring, converting, disposing of, removing from or bringing into the territory any property that is the proceeds of crime." See *Indian Money Laundering Law to Follow Commonwealth Draft*, ECON. TIMES, Mar. 18, 1997, at 22. The bill defined crime as all of the crimes included under the Indian Penal Code and certain crimes included under the Prevention of Corruption Act, Prevention of Crime Act (India); Narcotics Drugs and Psychotropic Substances Act 1985, Narcotics Drugs and Psychotropic Substances Act 1985 (India); and the Immoral Traffic Prevention Act, Immoral Traffic Prevention Act (India). See *India: Cabinet Approves Money Laundering Bill*, *supra* note 361. Offenses such as over-invoicing, under-invoicing have also been included in the bill as a means of plugging loopholes originating from the replacement of the Foreign Exchange Regulation Act with the Foreign Exchange Management Act. *Id.*

369. Criminal Justice Act 1993 (Eng.).

fail to report it.³⁷⁰

The MLPB imposes a good deal of responsibility upon financial institutions.³⁷¹ The MPLB proposed the enactment of a currency transaction reporting requirement under which banks would be required to report any transaction in excess of Rs. ₹ 10 million.³⁷² The Indian government included this provision in the MPLB despite the Reserve Bank of India's³⁷³ ("RBI") vehement disapproval.³⁷⁴ In addition, banks will be responsible for

370. See Doshi, *supra* note 368, at 13 (describing controversial provisions of proposed legislation). This provision, which places knowledge of money laundering activity on par with the actual perpetration of the crime itself, closely resembles Section 93 A of the England's Criminal Justice Act 1993. Criminal Justice Act 1993 (Eng.). Whereas in the United Kingdom there are three acts used to criminalize money laundering, the proposed Anti-Money Laundering Bill prohibits the laundering of proceeds derived from a number of different crimes. See Doshi, *supra* note 368, at 13. In this respect it is somewhat similar to the United States anti-money laundering laws. See 18 U.S.C. § 1956 (prohibiting laundering of funds derived from number of different sources).

371. See *India: Cabinet Clears Money Laundering Bill*, ASIA PULSE, Nov. 21, 1997, available in Westlaw, 1997 WL 13572525 (discussing RBI's opposition to currency transaction reporting requirement).

372. *Id.*

373. See Doshi, *supra* note 368, at 13 (discussing Reserve Bank of India ("RBI") opposition to MPLB).

374. See *id.* at 13 (stating that RBI opposed inclusion of such reporting requirement upon two grounds). It believed that such a requirement would undermine the long tradition in India of customer confidentiality. *Id.* The Public Financial Institutions Act of 1993 codifies India's tradition of maintaining confidentiality in bank transactions. Public Financial Institutions Act of 1993 (India). This reluctance to lift bank secrecy laws also stems from a fear on the part of the banking industry that to do so would lead to an erosion of customer confidence in the system and a possible decline in investment. See Doshi, *supra* note 368, at 13 (discussing RBI's opposition to reporting requirement). However, countries around the world have created similar legislation at the expense of banking secrecy. See Zagaris, *supra* note 68, at 909 (stating that exceptions to right of financial privacy have been imposed throughout world). Furthermore, the Reserve Bank's reluctance to comply with such a reporting requirement stands in direct violation of the spirit of the Vienna Convention, as it precludes countries from declining to act on the ground of bank secrecy. See Vienna Convention, *supra* note 4, art. 5, 28 I.L.M. at 504.

The RBI also objected to the reporting requirement on the ground that the current level of computerization among the banking industry was inadequate to handle such a burden. See *The Professional Newswire A Roundup of Money Laundering News*, 8 No. 3 MONEY LAUNDERING L. REP. 8 (Oct. 1997) (discussing RBI's opposition to the bill). However, the Committee of Secretaries charged with drafting the bill rejected this argument, noting that other countries are able to comply with such reporting requirements. *Id.* Under current law, banks in India are required to comply with a relatively relaxed set of Know-Your-Customer rules. See Doshi, *supra* note 364, at 13 (noting that banks are required to establish identity of their customers through evidence of names, addresses, and places of business). These current requirements, however, are not strictly enforced. *Id.* Effective know-your-customer rules are an essential part of an effective anti-

reporting any transactions which they suspect may represent the proceeds of crime, or are at all suspicious.³⁷⁵

The Committee of Secretaries had originally intended to introduce the MLPB to Parliament in the monsoon season of Parliament.³⁷⁶ Disagreements over definitions and the scope of the bill during the drafting stage, however, led to a delay of several months.³⁷⁷ Cleared by the executive cabinet in November of 1997, the bill was scheduled to be passed by Parliament in its winter session.³⁷⁸ Due to the current political instability in India, the bill has been placed on hold and is still pending parliamentary approval.³⁷⁹

b. Establishment of Bilateral Agreements

In attempting to accomplish the stated objectives of the Vienna Convention³⁸⁰ and the FATF recommendations,³⁸¹ India

money laundering regime. See Zagaris, *supra* note 68, at 909-10 (discussing importance of know your customer rules).

375. See Doshi, *supra* note 368, at 13 (discussing provision requiring banks to report suspicious transactions).

376. See India: FEMA, *Money Laundering Bill Under Fire*, HINDU, June 8, 1997, at 9 (stating that government officials anticipate that bill may be ready before Monsoon Season of Parliament).

377. See Doshi, *supra* note 368, at 13 (discussing problems drafters encountered in agreeing on definition for money laundering).

378. See India: Cabinet Approves Money Laundering Bill, *supra* note 342 (stating that Bill is slated for introduction and passing in Winter Session of Parliament).

379. See Indian Parliament is Dissolved; New Elections Will Delay Reforms, WALL ST. J., Dec. 5, 1997, at A15 (discussing how political situation in India led government to place bill on hold). In December of 1997, just weeks after the Bill was cleared by the executive cabinet of the government, India's president dissolved the Lokh Sabha, the lower of Parliament. *Id.* This action on the part of the President set the stage for India's second set of elections in two years. *Id.* The political crisis was prompted by allegations from the Congress Party that a party in the multi-party United Front coalition, the government ruling India at the time, supported guerilla groups linked to the 1991 assassination of the late Prime Minister Rajiv Gandhi. *Id.* The elections in most regions of India were held in February and March of this year. *Id.*

It seems as though the Hindu nationalist party the Bharatiya Janata Party ("BJP") has emerged as the victor of the recent elections. See Jonathan Karp, *Bharatiya Janata Party Prepares to Assemble Majority in Parliament*, ASIAN WALL ST. J., Mar. 11, 1998, at 4. While the BJP did not secure an absolute majority of the of the available 539 seats, it managed to gain control through a series of alliances with splinter political groups. *Id.* In 1996, the BJP had also won the elections and formed a minority government which lasted for 13 days before losing a vote of confidence. See Kenneth Cooper, *Narayanan Calls On Hindu Bloc; Party Asked to Show it could Rule India*, WASH. POST, Mar. 11, 1998, at A25. As a result of the India's tenuous political situation, the Bill will most likely be delayed by several months until the situation settles and stability is resumed. *Id.*

380. See Vienna Convention, *supra* note 4, art. 7(20), 28 I.L.M. at 511 (stating that

has recently began entering into bilateral agreements aimed at controlling drug trafficking and money laundering.³⁸² In April of 1995, India signed an agreement with Egypt to join efforts in combating drug-related money laundering in the two countries.³⁸³ The agreement allows for the exchange of operational intelligence, as well as the identification, freezing, and forfeiture of property used in connection with narcotics related money laundering.³⁸⁴

The Indian government entered into a similar, yet more comprehensive agreement with the Pakistani government in 1997.³⁸⁵ The countries agreed to institute several cooperative measures to control drug trafficking and money laundering, including the fast and efficient exchange of information.³⁸⁶ The governments also agreed to establish mechanisms for conducting joint financial investigations and information exchanges.³⁸⁷ The two countries recently underwent discussion on entering into a new agreement that would include other nations within the region.³⁸⁸

"parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements" that would serve purpose of enhancing mutual legal assistance among parties).

381. See FATF Recommendations, *supra* note 99, Recommendation 33, 35 I.L.M. at 1299 (providing that international cooperation should be supported by network of bilateral and multilateral agreements and arrangements based on generally shared legal concepts with aim of providing practical measures to affect widest possible range of mutual assistance).

382. See Zagaris, *supra* note 67, at 906-08 (opining that bilateral agreements are effective instrument in combating money laundering because they can be tailored to fit circumstances of two contracting parties). Unlike multilateral conventions, which often must find a low common denominator between its members, bilateral agreements allow for the establishment of a more specific regime. *Id.*

383. See *The Professional Newswire A Roundup of Money Laundering News*, 5 No. 10 MONEY LAUNDERING L. REP. 8 (May 1995) (discussing provisions of agreement).

384. *Id.*

385. See *The Professional Newswire A Roundup of Money Laundering News*, *supra* note 362 (discussing provisions and goals of Indo-Pakistani accord). The agreement between India and Pakistan was entered into effect on April 25, 1997. See *India-Pakistan Accord Takes Direct Aim at Heroin Trade*, CHI. TRIB., Apr. 26, 1997, at 18.

386. *Id.*

387. *Id.* Both countries also agreed to strengthen their respective anti-money laundering regimes. *Id.*

388. See *India: Money Laundering: Talks With Pakistan for Sharing Information*, BUSINESS LINE (THE HINDU) Mar. 5, 1998, available in Westlaw, 1998 WL 7701775 (stating that Indian and Pakistani government officials intend to direct their efforts towards broader regional regime where members would share information and investigative capabilities with each other).

c. Mutual Legal Assistance Treaties

India has begun to enter into mutual legal assistance agreements with other countries as well.³⁸⁹ In 1997, the Indian government entered into an extradition treaty and mutual legal assistance agreement with Russia.³⁹⁰ Mutual legal assistance agreements facilitate the investigation of money laundering operations in these countries by compelling the production of a wide array of information often vital in money laundering prosecutions.³⁹¹ This agreement will no doubt prove invaluable in future investigations, given the growing amount of narcotics smuggled from India through Eastern Europe.³⁹²

Most recently the Indian government held a regional conference on money laundering, bringing together many of the countries of Southwest and Southeast Asia.³⁹³ The conference was the product of a joint effort between the Indian government, the Global Programme Against Money Laundering and the United Nations International Drug Control Programme.³⁹⁴ One stated objective of the conference was to increase commitment

389. See, e.g., Mutual Cooperation Agreement Between Government of United States of America and Government of India for Reducing Demand, Preventing Illicit Use of and Traffic in Drugs and For Matters Relating to Licit Trade in Opiates, *available in* Westlaw, 1990 WL 484505. India already has a mutual cooperation agreement with the United States for preventing drug trafficking and for matters relating to licit trade in opiates. *Id.* The agreement was signed and entered into force on March 29, 1990. *Id.*

390. See Vladimir Radyuhin, *Ahmadi for Close Judicial Interaction With Russia*, *THE HINDU*, Feb. 20, 1997, at 14 (discussing provisions of agreement and objectives of contracting parties).

391. See *New MLATs Extend U.S. Laundering Effort*, *supra* note 30 (discussing how mutual legal assistance treaties can facilitate money laundering investigations). Mutual legal assistance Agreements often have a provision that enables a party to notify another when it has reason to suspect that proceeds or instrumentalities of crime are located within the territory of the other party. See Zagaris, *supra* note 67, at 906-08 (explaining how MLATs are vital component of effective anti-money laundering regime). With mutual legal assistance agreements, the parties are required to help each other to the extent permitted by their respective domestic laws, in procedures relating to the immobilization, seizure, and confiscation of proceeds or instrumentalities of crime. *Id.*

392. See Levitsky Address, *supra* note 345 (stating that dismantlement of Soviet Union and establishment of independent states in Eastern Europe and Central Asia have resulted in development of new drug routes into Europe).

393. See *India: International Meet on Money Laundering*, *THE HINDU*, Feb. 26, 1998, *available in* Westlaw, 1998 WL 7732458 (stating that conference brought together approximately 30 government experts from Bangladesh, Bhutan, Iran, India, Maldives, Myanmar, Nepal, Pakistan, Sri Lanka, and Thailand).

394. *Id.*

within the region to combat money laundering by introducing the necessary countermeasures. The conference also sought to promote the harmonization of domestic strategies.³⁹⁵ The fact that India was one of the co-sponsors of the conference demonstrates to its neighboring countries its determination to combat money laundering.

Many groups have widely criticized the Indian government's initiatives in developing its anti-money laundering regime, particularly for the role the government intends to assign to banks.³⁹⁶ In requiring banks to report all transactions that exceed a certain limit or that appear suspicious, Indian banks will have to eliminate or radically alter their long established tradition of bank secrecy.³⁹⁷ In fact, virtually all countries that have enacted comprehensive anti-money laundering legislation have drastically reduced a person's right to financial privacy.³⁹⁸

II. ARGUMENTS CONCERNING INDIA'S USE OF ANTI-MONEY LAUNDERING LEGISLATION TO COMBAT ITS HEROIN TRADE

Many countries are trying to control escalating levels of drug trafficking through anti-money laundering legislation.³⁹⁹ In enacting anti-money laundering laws, these countries have placed regulations upon their domestic financial industries.⁴⁰⁰

395. *Id.*

396. *See, e.g.,* Doshi, *supra* note 368, at 13 (discussing RBI's concerns about MLPB).

397. *See id.* (discussing practice among banks of maintaining customer confidentiality). The Public Financial Institutions Act of 1993 codifies India's long established tradition of confidentiality in financial transactions. Public Financial Institutions Act of 1993 (India).

398. *See* Zagaris, *supra* note 68, at 909 (stating that erosion of financial secrecy is principle of anti-money laundering law). Exceptions to the right to financial privacy have been imposed in several countries as a method of combatting drug-related money laundering. *Id.* For example, in the United States, under the BSA, banks must file a Currency Transaction Report whenever a person engages in one or more cash transactions in a day which exceeds in total US\$10,000. Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 114 (codified as amended at 31 U.S.C. §§ 5311-5314, 5216-5324). Even Switzerland, a country long known for its stringent bank secrecy policies, has relaxed its bank secrecy laws in an attempt to control escalating levels of money laundering. *See* Hernandez, *supra* note 1, at 276-77 (noting that under recently enacted anti-money laundering laws, banker who fails to conduct proper due diligence with respect to financial transactions may face up to one year of imprisonment).

399. *See, e.g.,* Drug Trafficking Act 1994, ch. 37 (Eng.).

400. *See id.* at § 50 (imposing criminal liability on anyone who enters arrangement

As money laundering transactions are particularly vulnerable to detection during stages that require a financial intermediary of some sort, government officials in many countries have concluded that strictly monitoring financial institutions will reduce global money laundering and consequently drug trafficking.⁴⁰¹ The strict regulation of the financial sector, however, is a method of combatting money laundering that many are opposed to.⁴⁰²

A. Arguments Against Enacting Anti-Money Laundering Legislation That Imposes Stringent Regulations on the Financial Industry

Perhaps one of the strongest arguments against instituting anti-money laundering laws which heavily regulate banks and financial institutions is that such laws unduly erode the right of the individual to financial privacy.⁴⁰³ The basic philosophy of bank secrecy regulation is that banks and financial institutions must keep confidential any information relating to their clients' property.⁴⁰⁴ The purpose behind bank secrecy laws is to protect the privacy interest of a customer.⁴⁰⁵ As articulated in several international instruments,⁴⁰⁶ the right to privacy is an international human right.⁴⁰⁷ The individual's right to privacy, as evi-

to facilitate another's retention of drug money, and who knows or suspects that the individual is someone who is benefiting from drug trafficking).

401. See Clark, *supra* note 16, at 470-72 (discussing reasons why anti-money laundering legislation targets financial intermediaries).

402. See Sen, *supra* note 362 (discussing RBI's concern that such stringent regulation of banking sector will conflict with current Indian banking laws).

403. See Hernandez, *supra* note 1, at 238 (noting that with emergence of international cooperation in fight against narcotics trafficking and money laundering, long established principle of bank secrecy, along with individual's right to privacy it protected, ceded to interest of global anti-rug enforcement).

404. See Charles Thelen Plombeck, *Confidentiality and Disclosure: The Money Laundering Control Act of 1986 and Banking Secrecy*, 22 INT'L LAW 69 (1988) (explaining idea of bank secrecy regulation).

405. See Hernandez, *supra* note 1, at 236-37 (discussing purpose behind bank secrecy protections). In the past, bank secrecy laws shielded individuals from financial loss in countries shaken by political instability. *Id.* at 235. For example, during World War II, the stringent bank secrecy laws of Switzerland protected the identity and assets of refugees from nazi persecution. See Michael Moser, Note, *Switzerland: New Exceptions to Bank Secrecy Laws Aimed at Money Laundering and Organized Crime*, 27 CASE W. RES. J. INT'L L. 321 (1995) (discussing some historical uses for Swiss banking secrecy).

406. See, e.g., Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217 A (III), U.N. Doc. A/A to 10, at art. 12 (1948) (stating that "no one shall be subject to arbitrary interference in his privacy, family, home, or correspondence . . .").

407. *Id.*

denced by the creation of bank secrecy laws in many countries, extends to financial matters.⁴⁰⁸ Government and financial officials in countries with long-standing traditions of bank secrecy⁴⁰⁹ often fear that reducing or eliminating bank secrecy protections would cause an erosion of customer confidence in their domestic banking industries.⁴¹⁰

An erosion in customer confidence in a country's banking system can lead to capital flight.⁴¹¹ While capital movements ensure the existence of global capital markets, for several countries, especially those in critical stages of development, a large capital outflow represents a significant economic problem.⁴¹² The maintenance of bank secrecy laws for many countries, is a

408. See Hernandez, *supra* note 1, at 240-41 (stating that right to privacy extends to privacy in financial matters).

409. See *id.* at 243 (discussing how bank secrecy laws developed in many countries as result of developments in Common Law of England). The right to financial privacy and the concept of bank secrecy for many countries find their origins in the English case of *Tournier v. Nat'l Provincial and Union Bank of England*. *Tournier v. Nat'l Provincial and Union Bank of Eng.*, (1924) 1 K.B. 461 (C.A.) [hereinafter *Tournier*]. In *Tournier* the employee sued his bank for defamation and for breach of an implied confidentiality because the bank had disclosed that he had failed to honor a check made to his bookmaker. *Id.* at 463. As a result of the bank's disclosure, the employee's contract was not renewed. *Id.* at 475. The court in *Tournier* held that a bank owes an implied contractual duty to a customer to abstain from disclosing any customer's financial information to third parties. *Id.* at 475. Beyond its own precedential value in England, the *Tournier* decision established the foundations for bank secrecy in several countries. See Hernandez, *supra* note 1, at 243-44 (discussing effect of *Tournier* decision on former British colonies). Former British colonies that adopted various aspects of the British common law, such as India, inherited and incorporated this idea of bank secrecy into their own systems of law. *Id.*

410. See Sen, *supra* note 362 (discussing RBI's opposition to idea of mandatory disclosure provision as facet of anti-money laundering laws). The RBI strongly opposed the provision of the MLPB which compels banks to disclose transactions in excess of a stipulated monetary limit. *Id.* The RBI felt that the inclusion of such a provision in proposed anti-money laundering legislation would run contrary to existing laws regarding bank secrecy. *Id.* The right to confidentiality in banking transactions is provided for in the Public Financial Institutions Act of 1993. Public Financial Institutions Act of 1993 (India). The RBI feared that such a provision would have an adverse effect on the banking industry and ultimately lead to a decline in customer confidence in the system. See Sen, *supra* note 362 (discussing RBI's fear that mandatory disclosure will lead to erosion in customer confidence in banking system).

411. See Cynthia Lichtenstein et al., *International Debt: How Can Developing Countries Regain Creditworthiness?*, 83 AM. SOC'Y INT'L L. PROC. 87, 100 (1989) (defining capital flight as movement of capital from one country to another).

412. *Id.*; see also Quirk, *supra* note 3, at 7 (noting that many countries feel that implementing stringent anti-money laundering legislation would impede economic liberalization).

method of preventing capital flight.⁴¹³ As such, the enactment of anti-money laundering legislation that heavily regulates the banking industry can lead to severe economic policy problems for developing countries.⁴¹⁴

In addition to arguments based on an infringement upon an individual's right to financial privacy, opponents to anti-money laundering legislation that removes bank secrecy laws argue that the enactment of such laws place an undue burden upon banks and financial institutions.⁴¹⁵ In order to comply with the know-your-customer and suspicious transaction reporting requirements that exist in most comprehensive anti-money laundering regimes, banks often disclose too much information.⁴¹⁶ Under know-your-customer laws, a bank will never be able to ascertain how much information it must require of its customers before it is deemed to know them well enough.⁴¹⁷ In addition, suspicious transaction reporting obligations lack standards for determining exactly what constitutes a suspicious transaction.⁴¹⁸ Consequently, in order to shield themselves from criminal liability, banks are likely to disclose more information than they need.⁴¹⁹ In some respects, under these laws, banks

413. See G. Philip Rutledge, *Bank Secrecy Laws: An American Perspective*, 14 DICK J. INT'L L. 601, 602 (1996) (noting that developing countries faced with capital flight and shortage of hard currency had adopted bank secrecy laws as economic development measure).

414. See C. Todd Jones, *Compulsion Over Comity: The United States' Assault on Foreign Bank Secrecy*, 12 NW. J. INT'L L. & BUS. 454, 456 (1992) (noting that increased economic and financial regulation led investors in certain countries to invest money in countries with relaxed government policies with respect to bank secrecy).

415. See, e.g., Hernandez, *supra* note 1, at 299 (stating that know your customer and laws that require banks to report any suspicious transactions place too much of a burden of banks); see also Alford, *supra* note 16, at 467 (stating that under current U.S. anti-money laundering legislation banks must "wrestle with the conflicting goals of law enforcement and customer privacy").

416. See Hernandez, *supra* note 1, at 299 (stating that know your customer rules and suspicious transaction reporting requirements encourage overdisclosure at expense of an individual's privacy).

417. *Id.*

418. *Id.*

419. *Id.* This tendency towards overdisclosure is particularly apparent when financial institutions seeking to protect themselves from criminal liability can act without fear of private action from the customer whose financial information is disclosed. *Id.* For instance, in the United States, the Annunzio-Wylie Act shields banks from civil liability for the disclosure of customer information to law enforcement authorities. 31 U.S.C. § 5318(g)(3). A provision exists under the DTA in the U.K. Drug Trafficking Act 1994, ch. 37, § 50(3)(a). Under the DTA, an individual is protected against civil liability for a breach any restrictions upon the disclosure of that information. *Id.* With

and other financial institutions are compelled to take on the role of law enforcement.⁴²⁰

In choosing what information to disclose to law enforcement authorities, banks have relatively little guidance from law enforcement authorities.⁴²¹ Laws that require banks to report any suspicious transactions to law enforcement agencies place banks in a precarious position, by compelling them to choose between the conflicting goals of law enforcement and customer confidentiality.⁴²² With every transaction, banks must weigh these goals against each other in order to decide whether a transaction is suspicious and should be reported despite the customer's right to confidentiality.⁴²³ Many anti-money laundering regimes do not provide guidelines which banks may adhere to in making these determinations.⁴²⁴ Without the proper guidance, banks are unable to make these decisions effectively.⁴²⁵

Laws that require banks to report suspicious transactions and require banks to learn as much as possible about their customers place an investigatory burden on banks that they are not equipped to handle.⁴²⁶ Such laws require banks to determine,

safe harbors such as these, it is in the best interest of a bank to disclose as much information as possible, in order to ensure that it is not deemed a vehicle for money laundering. See Hernandez, *supra* note 1, at 299 (discussing how anti-money laundering statutes which regulate the everyday conduct of banks encourage banks to disclose more customer information than necessary).

420. See Hernandez, *supra* note 1, at 302 (stating that if trend towards eliminating bank secrecy and right to financial privacy continues, banks will become another branch of government enforcement agencies).

421. See *id.* at 302 (discussing indicia used by banks to determine whether particular transaction is suspicious).

422. See Alford, *supra* note 16, at 467-68 (noting that government's objective is to prevent money laundering as method of enforcing drug trafficking laws, while banks goal is confidentiality of customer's transactions)

423. *Id.*

424. See Sultzer, *supra* note 25, at 215 (noting that it was not until the enactment of Annunzio-Wylie Act that U.S. government created regulatory body to help in development of BSA related reports). With the enactment of the Annunzio-Wylie Act, the U.S. government created the Bank Secrecy Act Advisory Group, consisting of people from the treasury and justice departments as well as members of the financial industry and others affected by the BSA. *Id.*

425. See Alford, *supra* note 16, at 467 (stating that protection from civil liability provision in Annunzio-Wylie Act will aid banks in making more effective decisions with respect to whether particular transaction should be reported to law enforcement authorities).

426. See *id.* at 466 (stating that U.S. government, both domestically through Annunzio-Wylie Act and internationally through Vienna Convention, has placed heavier regulatory burden on banks in effort to prevent money laundering); see also Rider, *supra*

with every transaction, whether they are serving as a vehicle for money laundering.⁴²⁷ Such laws place banks in yet another dilemma.⁴²⁸ When countries implement such stringent regulatory laws, banks are faced with the dilemma of balancing the goal of quick and efficient service with the goal of law enforcement.⁴²⁹ In order to extricate itself from any possible criminal liability, a prudent bank will complete a transaction and then report it to law enforcement authorities.⁴³⁰ If compelled to report most of its transactions, banks will incur increased costs, which will be passed on to customers.⁴³¹ Ultimately, such stringent regulations on the financial industry will place a burden upon customers.⁴³²

Another argument against the implementation of an anti-money laundering regime that includes strict regulation of the financial industry is that in order to avoid criminal liability, banks will render themselves susceptible to civil liability.⁴³³ Some anti-money laundering laws provide for immunity from breach of confidence actions if a bank reports confidential customer information to law enforcement authorities.⁴³⁴ These stat-

note 30, at 419 (stating that more information financial intermediaries are required obtain and test, more onerous will be their responsibilities).

427. See Alford, *supra* note 16, at 466-67 (discussing increased regulatory burden imposed upon banks by stringent anti-money laundering legislation).

428. *Id.*

429. *Id.*; see also Hernandez, *supra* note 1, at 299 (stating that know your customer and suspicious transaction requirements encourage banks to disclose more information than needed to law enforcement authorities in order to avoid criminal liability).

430. See Alford, *supra* note 16, at 467 (stating that prudent bank will report transactions to law enforcement authorities in order to ensure that it is not deemed vehicle for drug traffickers to launder profits in violation of law).

431. *Id.*

432. *Id.* The RBI has made similar arguments against imposing stringent regulations on the Indian banking industry in an effort to combat money laundering. See Hema Ramakrishnan, *India: RBI Stand on Bank Reporting Rejected*, BUSINESS LINE (THE HINDU), Sept. 19, 1997, available in Westlaw WL 13716083. The RBI argued that the type of compliance contemplated by the MLPB is incompatible with the present level of computerization in the banking industry. *Id.* The Indian government rejected the RBI's argument, stating that the burden placed on banks would not be too heavy as banks in less industrialized countries are able to comply with similar requirements. *Id.* If the current level of computerization in the Indian banking industry is truly subpar, then implementation of heightened know your customer laws and reporting requirements will result in increased costs for the banking industry and consequently, increased costs for customers of Indian banks. *Id.*

433. See Clark, *supra* note 16, at 468 (stating that there are very real dangers posed to banking industry by suspicion-based reporting system).

434. See, e.g., Drug Trafficking Act 1994, ch. 37, § 51(5)(a) (providing that disclo-

utory protections induce banks to disclose more information than necessary because of the aegis they provide against civil liability for the disclosure of the information in question.⁴³⁵ Such protections, however, are limited in application.⁴³⁶ While such protections may grant banks immunity from breach of confidence actions, they do not necessarily protect banks against other civil claims such as defamation,⁴³⁷ breach of contract,⁴³⁸ or claims for loss suffered as a result of disclosure.⁴³⁹

In addition, opponents of anti-money laundering legislation including reporting requirements and customer identity requirements state that such laws erode the client attorney privilege.⁴⁴⁰ A number of countries that are deemed to have comprehensive

sure of confidential financial information to law enforcement officers shall not constitute a breach of any restriction upon the disclosure of information imposed by statute or otherwise); *see also*, Annunzio-Wylie Act § 1517(b), 31 U.S.C. § 5318(g)(3) (providing that banks shall not be liable under federal or state law for disclosure of customer information to law enforcement authorities).

435. *See* Hernandez, *supra* note 1, at 299 (stating that suspicious transaction requirements and know your customer laws encourage banks to overdisclose).

436. *See, e.g.*, Clark, *supra* note 16, at 468 (stating that banks may still face claims from clients for refusing to carry out client's instructions if bank reported transaction to law enforcement officials).

437. *See id.* at 468 (stating that if financial intermediary reports suspicion which is found to be groundless, CJA protects it from claims for breach of confidence, yet leaves open possibility of claims for defamation or breach of contract). If a bank reported its suspicion that a particular client was involved in money laundering and news of the allegation reached the market place, thereby damaging the customer's reputation, the customer could bring an action against the bank for defamation. *Id.*

438. *Id.*

439. *See id.* at 499-500 (raising hypothetical case where bank could be faced with claims for losses suffered as result of its disclosure of customer information). It is possible that the disclosure of financial information could result in lost business opportunities for a customer whose financial information is reported. *Id.* For example, if a bank reports a suspicious transaction, and refuses to follow a client's instructions until the suspicions are deemed groundless, the contemplated transaction could fall apart as a result of the delay. *Id.* If the allegation is subsequently deemed groundless, the customer could feasibly bring suit for the loss it incurred or for defamation. *Id.* Legislation that protects banks, and other financial intermediaries from suits based on a breach of confidence. *Id.* These protections do not extend to actions based on breach of contract. *Id.* In order to avoid being deemed a vehicle through which money is laundered, a bank could find itself vulnerable to a number of civil actions. *Id.*

440. *See* Hernandez, *supra* note 1, at 302-03 (stating that know your customer and reporting requirements eliminate, among other things, traditional attorney-client like privilege, whereby bankers and professionals normally did not inquire into transactions and background of their clients); *see also*, Wendy Shuck, *The Impact of Anti-money Laundering Laws on Attorney-Client Privilege*, 19 SUFFOLK TRANSNAT'L L. REV. 507, 515 (1996) (stating that attorney-client privilege protects confidential communications between client and attorney made for purpose of securing legal advice). The privilege enables

anti-money laundering legislation, apply their laws to a host of financial intermediaries, including lawyers.⁴⁴¹ For example, some anti-money laundering laws impose criminal liability on those who assist a money launderer in retaining the proceeds of the money laundering operations where the individual knows or suspects that a person receiving aid is involved in drug trafficking.⁴⁴² As a result of such laws, a lawyer who may suspect that a client is involved in money laundering, but accepts the client's assurances to the contrary, could face criminal liability in the event that the client is actually involved in money laundering.⁴⁴³ Under such a scenario, it would be difficult for the lawyer to avoid liability, because he had suspicions, but failed to disclose them because the information was confidential.⁴⁴⁴

B. Arguments in Favor of Enacting Anti-Money Laundering Legislation That Imposes Stringent Regulations on the Financial Industry

Proponents of anti-money laundering regimes that include the strict regulation of the financial industry recognize that such laws place a large burden upon banks.⁴⁴⁵ The question for these proponents becomes whether the costs of the resulting changes to banking operations are worth the improved prevention of

clients to disclose information which otherwise would not have been disclosed and permits attorneys to provide informed advice. *Id.*

441. See Drug Trafficking Act 1994, ch. 37, § 51(4) (Eng.) (stating that provision for any person of goods or services which are of assistance to him in drug trafficking shall constitute offense under Act); see also I.R.C. § 60501 (1998) (stating that any person who is engaged in a trade or profession, who in course of such trade or business receives more than US\$10,000 in cash, in aggregate, shall report such transaction to Internal Revenue Service); see also Hernandez, *supra* note 1, at 303 (stating that even Switzerland no longer permits registered financial intermediaries, such as lawyers and accountants, to accept money on behalf of clients without disclosing identity or needs of clients).

442. See Drug Trafficking Act 1994, ch. 37, § 49(3) (Eng.) (criminalizing act of aiding money launderer to retain proceeds of money laundering). It is a defense to this provision that the potential offender notifies law enforcement authorities on his initiative and as soon as reasonably practicable. Drug Trafficking Act 1994, ch. 37, § 49(4) (Eng.).

443. *Id.*

444. See Clark, *supra* note 16, at 494-95 (discussing dilemma faced by law firms as result of U.K. anti-money laundering legislation).

445. See Alford, *supra* note 16, at 438 (noting that U.S. anti-money laundering laws place increasing regulatory burden upon banks).

money laundering and drug trafficking.⁴⁴⁶ These proponents argue that the benefits of controlling money laundering and drug trafficking outweigh the burdens placed on financial institutions.⁴⁴⁷

A money laundering operation requires some sort of financial intermediary in order to successfully launder the funds back into the legitimate economy.⁴⁴⁸ As the use of a bank or other financial institution is vital to the success of a money launderer, it seems that the most logical area to direct anti-money laundering efforts is at the financial industry.⁴⁴⁹ The rationale behind heavily regulating the financial industry is that if banks and other financial intermediaries are required to report their suspicions, the money launderer will find it more difficult to accomplish his goals.⁴⁵⁰

Another reason why many anti-money laundering regimes compel financial institutions to comply with increased regulations is because there are certain stages in the money laundering process that are more vulnerable to detection than others.⁴⁵¹ These stages include the entry of cash into the financial system,⁴⁵² the cross-border flows of cash, and transfers within and from the financial system.⁴⁵³ These stages, where the money laundering process is most easily detected, require the participa-

446. *See id.* at 466 (noting how anti-money laundering statutes require banks to become more aware of money laundering problem and to take steps to combat it).

447. *See id.* (concluding that benefits to hindering global money laundering and drug trafficking outweigh any burden born by banks and bank customers); *see also* Hernandez, *supra* note 1, at 238 (noting that with emergence of international cooperation in fight against drug trafficking and money laundering, long embraced principles of bank secrecy and individual's right to financial privacy ceded to interests of global anti-drug enforcement).

448. *See* Clark, *supra* note 16, at 471 (noting that launderers erect veil of legitimacy through incorporation of vehicle for laundering such as bank).

449. *See id.* at 470 (stating that it is perhaps inevitable that law enforcement authorities should lean so heavily upon financial institutions given their crucial role in money laundering process).

450. *Id.*

451. *See* Alford, *supra* note 16, at 439 (stating that money laundering process is most susceptible to detection by law enforcement authorities during placement stage, when funds are first deposited into financial institution).

452. *See* Alford, *supra* note 16, at 439 (discussing how money laundering process is particularly susceptible to detection at placement stage); Clark, *supra* note 16, at 470 (describing layering stage of money laundering process).

453. *See* Clark, *supra* note 16, at 470-71 (discussing why financial intermediaries are compelled by legislation to comply with law enforcement authorities).

tion of banks.⁴⁵⁴ Consequently, law enforcement officials believe that strict regulation of banks and other deposit taking institutions will result in a decrease in money laundering activity.⁴⁵⁵ The proponents of regulating the financial industry as a method of combating money laundering and drug trafficking argue that such strict regulation may be the only way to detect money laundering operations.⁴⁵⁶

Money laundering has severe negative effects on a country's macroeconomy.⁴⁵⁷ For instance, money laundering has a significant income distribution effect.⁴⁵⁸ In countries where money laundering remains relatively unchecked, it redirects income from high savers to low savers.⁴⁵⁹ Where money is shifted from sound investments to riskier low quality investments, the economic growth of a country suffers.⁴⁶⁰ With proper financial industry regulation, these adverse macroeconomic effects can be alleviated if not eliminated.⁴⁶¹

In addition, money laundering can deter legitimate investment from entering a country.⁴⁶² Illegal transactions have the ability to deter legitimate transactions by contamination.⁴⁶³ For example, certain transactions involving foreign parties, which

454. *Id.*

455. *Id.*

456. *Id.* The metaphor of dropping a stone into a body of water is appropriate. *Id.* When the proceeds of crime are first deposited into the financial system, it creates a noticeable ripple, but if unnoticed, it may remain undiscovered. *Id.*

457. *See* Quirk, *supra* note 3, at 8 (stating that because amount of money laundered through financial system is difficult to measure, money laundering distorts economic data and complicates government efforts to manage economic policy).

458. *See id.* (stating that money demand appears to shift from country to country as result of global money laundering, which results in misleading monetary data, and can have adverse effects on exchange and interest rates).

459. *Id.*

460. *Id.* For example, studies suggest that funds from tax evasion in the U.S. are often channeled into riskier but higher yielding investments. *Id.*

461. *Id.* Cognizant of the ability to prevent these adverse economic consequences of money laundering through increased regulation of the financial industry, several international organizations including the Basle Committee and the FATF financial institutions to cooperate with law enforcement authorities in an effort to control money laundering. *Id.*

462. *See id.* at 8-9 (discussing indirect macroeconomic effects of money laundering).

463. *Id.* This leads to the conclusion that the enactment of bank secrecy laws as economic development measure is misguided. *See* Rutledge, *supra* note 411, at 602 (stating that developing countries faced with capital flight and lack of hard currency have adopted bank secrecy laws as economic development measures).

are completely legal, can become less desirable as a result of an association with money laundering.⁴⁶⁴ Anti-money laundering regulation aimed at regulating the financial industry will further ensure that countries do not reject legitimate foreign investments.⁴⁶⁵

III. INDIA SHOULD IMPLEMENT AND ENFORCE A COMPREHENSIVE ANTI-MONEY LAUNDERING REGIME

India should implement and enforce an anti-money laundering regime if it intends to curb its escalating drug problem. The proposed Money Laundering Prevention Bill,⁴⁶⁶ as well as the other initiatives that India has taken in recent years, demonstrate its desire to join in the international effort at combating money laundering and narcotics trafficking. In order to establish an effective anti-money laundering regime the Indian government must implement comprehensive compliance regulations for the entire financial industry,⁴⁶⁷ create an efficient regulatory body, and establish additional mutual legal assistance treaties.

A. *It is to India's Economic Advantage to Enact Anti-money Laundering Legislation*

It will be to India's domestic as well as international economic benefit to enact anti-money laundering legislation. Further delay will likely alienate those nations currently involved in the international effort to combat money laundering and illicit drug trafficking. India is one of the largest economies in the world, with a growing economic power and a highly sophisticated financial sector. While the financial industry may have reservations about a strict compliance program, the adoption of an anti-money laundering regime will set an example for other countries in the area plagued by drug trafficking and money

464. See Quirk, *supra* note 3, at 9 (stating that confidence in markets and in efficiency-signaling role of profits is eroded by money laundering).

465. *Id.*

466. See *supra* note 367 and accompanying text (discussing development of MLPB).

467. See *supra* note 374 and accompanying text (noting that proposed Money Laundering Prevention Bill only contemplates creating compliance programs for banks rather than all deposit taking financial institutions).

laundering.⁴⁶⁸

Furthermore, an attempt to criminalize money laundering activities will eventually aid the Indian economy in attracting legitimate investment.⁴⁶⁹ Money laundering transactions have the ability to deter legitimate foreign investment.⁴⁷⁰ With the enactment of anti-money laundering legislation, those placing funds in the Indian economy will be individuals interested in legitimate investment opportunities in India, as opposed to those who merely shift their money from country to country in an effort to launder the proceeds of their illicit activity.

B. India Must Enact Broad Anti-Money Laundering Legislation

It is imperative that India enacts legislation that prohibits money laundering in all forms.⁴⁷¹ Legislation that freezes the assets of those involved in narcotics trafficking and other crimes is an integral component of an anti-money laundering regime.⁴⁷² But such legislation, without additional laws designed to enforce the government's prohibition of the crime, is insufficient to curtail money laundering.⁴⁷³

1. India Must Strictly Regulate Its Financial Industry

In addition to creating laws that criminalize the laundering of the proceeds of crime, India must also enact strict compliance programs for the financial industry that make it more difficult to launder money. Financial institutions must be compelled to report suspicious transactions, as such reporting requirements increase the probability that law enforcement officers will detect

468. See *supra* notes 373-74 and accompanying text (discussing RBI opposition to certain provisions in MLPB requiring banks to report transactions exceeding a stipulated limit).

469. See *supra* notes 410 and accompanying text (detailing fear amongst banking experts that strict compliance program would reduce customer confidence and ultimately reduce investment).

470. See *supra* notes 462-64 and accompanying text (discussing how money laundering transactions have ability to contaminate legitimate transactions).

471. See *supra* note 333 (opining that despite government initiatives aimed at combating money laundering, India is notorious for money laundering). As a party to the Vienna Convention, India currently criminalizes money laundering as it relates to narcotics trafficking. *Id.*

472. See *supra* note 333 and accompanying text (discussing current Indian assets forfeiture laws).

473. See *supra* note 335 and accompanying text (discussing how money launderers are able to circumvent India's prohibition on money laundering).

money laundering operations.⁴⁷⁴ Furthermore, financial institutions should train employees to spot potentially suspicious activity. The placement stage of the money laundering process is the most vulnerable to detection.⁴⁷⁵ As such, if bank employees are able to identify the characteristics of money laundering transactions, they will detect more transactions. Such training could enable law enforcement authorities to apprehend and convict an even larger percentage of money launderers.

In addition, financial institutions within India should institute identification requirements similar to the know-your-customers rules.⁴⁷⁶ Financial institutions should be required to obtain substantial information about their clients in order to ensure that they are engaged in legitimate business activity. Such a system would allow banks to discover suspicious transactions with greater ease.

The creation of a strict regulatory regime for financial institutions will require financial institutions to abandon their policies of customer confidentiality.⁴⁷⁷ In order to establish comprehensive anti-money laundering legislation, India must limit the scope of the right to financial privacy. If banks are to comply with strict governmental regulation, they must be able to do so without the fear of future actions against them for breach of contract or defamation.

2. India Must Negotiate Additional Mutual Legal Assistance Treaties

Finally India must negotiate additional MLATs with other countries. MLATs are invaluable to international judicial assistance. They supplement existing international agreements and will enable law enforcement officials to obtain information in a form admissible in Indian courts. In addition, the enactment of MLATs will enable India to tailor its anti-money laundering re-

474. See *supra* notes 449-54 (discussing importance of requiring financial institutions to report suspicious transactions).

475. *Id.*

476. See *supra* note 273 and accompanying text (discussing use of know your customer rules in U.S. anti-money laundering legislation).

477. See *supra* notes 405-09 and accompanying text (discussing ideas of bank secrecy and right to financial privacy).

gime to specific problems that the government faces.⁴⁷⁸

IV. CONCLUSION

Money laundering poses a major challenge to India as a result of the volume of funds derived from drug trafficking that pass through its financial institutions. The lack of an anti-money laundering regime in India, combined with its status as a major transit point in the international drug trade, makes it an attractive area for money launderers. If India intends to curb its escalating drug problem, it must take an aggressive stance with respect to money laundering.

478. See *supra* note 382 and accompanying text (discussing benefits to establishing bilateral agreements).