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Avoiding Criminal Liability in the Conduct of International Business

Bruce Zagaris

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AVOIDING CRIMINAL LIABILITY IN THE CONDUCT OF INTERNATIONAL BUSINESS

Bruce Zagaris

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As U.S. businesses increasingly take advantage of globalization trends and seek foreign markets, their profitability and overall success depend in part on their ability to identify, assess, minimize, and prevent the difficulties that result from criminal liability and its attending civil consequences.
Inside counsel can tailor their work to the nature of their international business by identifying and avoiding criminal liability. Outside counsel and practitioners are finding that criminal liability in international business is skyrocketing. As a result, specializing in international business is difficult. Indeed, international criminal liability for some clients can occur when an executive, or even a close relative, is merely taking a vacation or studying abroad. Further, the developments in communication, transportation, and money movement mean that a problem in a remote part of the world affects many corporate clients or potential clients in the United States. For example, urban problems of the United States when combined with foreign peasant poverty patterns of cultivating coca leaves, result in bringing cocaine and crack to the United States for cash and arms. Because interdiction and law enforcement solutions actually privatize the prevention efforts, U.S. transportation companies, financial institutions, and even travel agents can become targets of criminal investigations. These U.S. companies generally do not have state of the art prevention programs to detect such corrupt practices.

Export control and economic sanctions laws present another clear example of the globalization impact of criminal liability. These laws can subject multinational companies, and their related entities and employees to criminal investigation even when a small percentage of a commodity enters or leaves a restricted country. Minimal activity of the United States in such a transaction can trigger U.S. jurisdiction.

Despite increased exposure to criminal liability, most general corporate counsel or practitioners still view criminal defense issues as limited to criminal defense counsel. However,
the sentencing guidelines' preoccupation with the need for state of the art prevention programs preventing indictment or minimizing punishment has forced commercial lawyers to pay attention to criminal issues. Prevention programs also help persuade judges and/or juries that the facts of indictments should be construed in a positive light in reaching a verdict on their culpability.

The globalization impact has accelerated a trend that has been emerging for some years—the merger of international criminal law with other areas of the law. This merger causes criminal law and public international law to interact with and take on characteristics of other legal areas. For instance, tax authorities, have brought criminal lawyers from the U.S. Department of Justice into their negotiations. In an effort to improve the ability to assess and collect taxes of an international nature, tax authorities have concluded Tax Information Exchange Agreements ("TIEAs") that are a blend of tax treaties and Mutual Assistance in Criminal Matters Treaties ("MLATs").

The merging of disciplines has resulted in some lawyers, who are not criminal defense lawyers, advising clients on matters that have recently become criminal in nature. Several examples exist, and primarily occur with the movement of money.

Section II of this paper provides a selected survey of the U.S. criminal laws that affect international business abroad. Section III discusses foreign criminal laws that also affect how businesses conduct their international business. Procedural aspects of international criminal law and related enforcement mechanisms are discussed in Section IV. Finally, Section V highlights recent developments in international white collar crime and reinforces the need for practitioners in the United


4. See infra Part IV.

5. Some examples are money laundering prosecutions, new requirements to conduct comprehensive due diligence procedures, bank and savings and loan prosecutions, and penalization of transfer pricing and other international tax matters.
States to understand and apply both the substantive and procedural aspects of international commercial criminal law.

II. U.S. Criminal Laws That Affect Doing Business Abroad

This section provides a selective overview of some of the legal areas in which U.S. criminal laws may affect doing international business abroad: 6 Foreign Corrupt Practices Act; export control and technology transfer; international securities and commodities futures; money movement offenses; tax offenses; and environmental offenses. These topics are selected to contrast with the issues in these same substantive areas in foreign countries.

A. The Foreign Corrupt Practices Act 7

1. Background of the Foreign Corrupt Practices Act

The U.S. Congress enacted the Foreign Corrupt Practices Act ("FCPA" or "Act") in 1977 in response to the growing perception that U.S. multinationals doing business abroad were systematically engaging in the bribery of foreign officials. 8 This perception was supported by a Securities and Exchange Commission ("SEC") report which revealed that over 400 corporations based in the United States, including 117 of the Fortune 500, had paid substantial bribes in the past—totaling hundreds of million of dollars. 9


7. The author is grateful for the assistance of his colleague David W. Phillips in preparing this section.


Following the SEC report, Congress approved the FCPA with little debate. The Act controls bribery in two ways: first, it prohibits any U.S. person, real or corporate, from bribing a foreign official; second, it mandates record-keeping standards for publicly-held corporations registered under the Securities Exchange Act of 1934.

In 1988, Congress narrowed and clarified a number of standards contained in the Act. The single most important amendment modified the standard of knowledge required for liability under the Act. Previously, the FCPA imposed criminal and civil liability on those who made payments to third parties "knowingly or having a reason to know" that those payments would be used by the third party for purposes prohibited under the Act. Corporate officials claimed that the "reason to know" standard created uncertainty regarding their liability pertaining to the conduct of their foreign intermediaries, consultants and agents. Under the 1988 amendments, Congress replaced the "reason to know" standard with a clearer and narrower definition of "knowledge.”

2. The Foreign Corrupt Practices Act Today

a. Section 102: Accounting and Record Keeping Provisions

Section 102 of the Act mandates minimum accounting and international record keeping procedures applicable to publicly-held corporations. These standards apply only to "Issuers" of securities, which the Act defines as either (1) corporations with

10. See Bliss & Spak, supra note 6, at 445-46.
12. Id. § 78m(b)(2).
16. Id.
19. Id.; see infra notes 48-56 and accompanying text.
a class of securities registered under section 12 of the 1934 Act,\(^\text{21}\) or (2) companies required to file reports under section 15(d) of the 1934 Act.\(^\text{22}\) Thus, issuers with securities held of record by fewer than 300 persons are exempted from the FCPA’s record-keeping requirements.

Section 102 of the Act imposes a general duty on issuers to maintain accurate and detailed books and records. Moreover, this section requires issuers to adopt internal auditing procedures to reasonably ensure corporate supervision over the accounting and reporting procedures of the entire corporate organization (e.g., subsidiaries and affiliates).\(^\text{23}\) However, corporations complained that the 1977 Act’s record-keeping requirements were vague and produced unnecessary compliance costs.\(^\text{24}\) In 1988, Congress clarified several of these requirements to determine a standard governing liability.

The 1988 amendments more clearly defined the “reasonable detail” standard\(^\text{25}\) imposed on companies to keep their books, records and accounts.\(^\text{26}\) The amendments also added language establishing that a corporation must only obtain “reasonable assurance”\(^\text{27}\) of corporate supervision of its activities relating to its internal corporate accounting controls.\(^\text{28}\)

Criminal liability under the Act was modified under the 1988 amendments to cover only those persons who “knowingly circumvent” corporate accounting controls,\(^\text{29}\) or those who

\(^{21}\) Id. § 78l(a). Section 12 of the 1934 Act requires registration of all securities involved in transactions with the national securities exchange. Id.

\(^{22}\) See id. § 780(d). Section 15(d) of the 1934 Act imposes the duty to file periodic corporate reports upon issuers that have filed registration statements with the Securities Exchange Commission. Id.


\(^{25}\) 15 U.S.C. § 78m(b)(2)(B)(i)-(iv) (1988) (requiring that (i) all transactions be authorized; (ii) all transactions be recorded in such a way as to comply with generally accepted accounting principles and to maintain accountability for assets; (iii) any access to assets be authorized; and (iv) the books and records be periodically checked against existing assets to determine any possible discrepancies).

\(^{26}\) Id.


\(^{28}\) Id.

“knowingly falsify” corporate records.\textsuperscript{30} This ensures that penalties under the Act will not be imposed for “insignificant or technical infractions” or “inadvertent conduct.”\textsuperscript{31}

Congress also amended the FCPA to provide that an issuer that owns fifty percent or less of a foreign or domestic subsidiary discharges its duty under the Act,\textsuperscript{32} provided that the issuer uses its influence in good faith to cause the subsidiary to comply with the requirements of the Act.\textsuperscript{33} Issuers, therefore, are not held automatically liable for the acts of their minority-owned subsidiaries.\textsuperscript{34}

\textbf{b. Sections 103 and 104: The Antibribery Provisions}

Although sections 103 and 104 of the Act apply to different types of parties and are enforced by different governmental agencies,\textsuperscript{35} they commonly prohibit all United States persons from making monetary or other types of bribes to a “foreign official” to encourage a favorable decision.\textsuperscript{36}

In order to prove a violation of sections 103 and 104, the following elements must be established:\textsuperscript{37}

(a) the issuer or domestic concern has utilized a means of interstate commerce;\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{30} Id. § 78m(b)(2)(B), (b)(5).
\item \textsuperscript{33} Id.
\item \textsuperscript{34} Id.
\item \textsuperscript{35} For example, section 103 prohibits bribery of foreign officials by issuers, their officers, directors and agents. Id. § 78dd-1. Section 104 prohibits bribery of foreign officials by all domestic concerns other than issuers. Id. § 78dd-2(a). A “domestic concern” is defined broadly, including any individual who is a citizen, national, or resident of the United States; and any corporation, partnership, joint association, joint stock company, business trust, unincorporated organization, or sole proprietorship that has its primary place of business in the United States. Id. § 78dd-2(h)(1).
\item \textsuperscript{36} It should be emphasized that the bribery section of the Act applies only to conduct that seeks to influence a foreign official, political party, or candidate. Therefore, it is not illegal under the FCPA to bribe foreign private individuals to gain business from a foreign company.
\item \textsuperscript{37} See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (1988). The FCPA includes any decision by a foreign official to achieve new business or to continue business relations with a party. Actions by foreign officials that influence decision-making are also regulated by the FCPA. Id.
\item \textsuperscript{38} Id.
\end{itemize}
(b) corruptly;\(^39\)
(c) in furtherance of an offer, payment, promise to pay or authorization of a payment;\(^40\)
(d) of any money, offer, gift, promise to give or authorization of the giving of anything of value;\(^41\)
(e) to a foreign official, or foreign political party or its officials, any candidate for foreign political office, or any third party with the knowledge that part of the money will go to such an official, party or candidate;\(^42\)
(f) with the purpose of influencing any act, or decision or to induce the official, party or candidate to influence a foreign government or instrumentality to affect or influence any decision or act of the government or its instrumentality;\(^43\)
(g) in order to help the issuer or domestic concern to obtain or to retain business.\(^44\)

Several of the above elements are expressly defined in the Act.\(^45\) In addition, the legislative history of the 1977 Act explains how “corruptly” should be interpreted:

The word “corruptly” is used in order to make clear that the offer, payment, promise, or gift must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client, or to obtain preferential legislation or a favorable regulation. The word “corruptly” connotes an evil motive or purpose, an intent to wrongfully influence the recipient. It does not require that the act be fully consummated, or succeed in producing the desired outcome.\(^46\)

Thus, the payment must be intended to induce the wrongful exercise of official influence.

As indicated above, the most important revisions of the 1988 amendments to the FCPA modified the knowledge standard for liability under the Act.\(^47\) “Knowing” is now defined under the FCPA as follows:

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39. Id.
40. Id.
41. Id.
42. Id.
43. Id.
44. Id.
45. Id. §§ 78dd-1(f), 78dd-2(h).
(a) awareness that the third party is engaging in prohibited conduct, or that a prohibited circumstance exists or that a prohibited result is substantially certain to occur; 48
(b) belief that the prohibited circumstance exists or is substantially certain to occur; 49 or
(c) awareness of a high probability that a prohibited circumstance exists, unless the person actually believes that the circumstance does not exist. 50

The legislative history of the 1988 amendments shows that the knowledge standard under the Act will be met by "conscious disregard," "willful blindness," or even "a conscious purpose to avoid learning the truth." 51 However, mere recklessness is not sufficient to establish liability under the Act. 52

The 1988 amendments also clarified the type of behavior that would not violate the Act. 53 For example, a payment made to "expedite or to secure the performance of a routine governmental action" does not violate the FCPA. 54 This is a change from the original 1977 Act which excluded payments to certain foreign officials based on their status. 55 The Act now exempts the payment based on the character and purpose of the payment itself, not the status of the foreign official receiving the payment. 56

Payments for "routine governmental action" 57 are defined to include only those actions "ordinarily and commonly performed" to obtain permits or documents to qualify to do business in the country; 58 process official papers, such as visas and work orders; 59 provide police protection, mail service, contract performance, or transit inspections; 60 provide tele-

52. Id.
53. Id.
54. Id.
55. Id.
56. For example, clerical or ministerial government employees were exempted. See 15 U.S.C. §§ 78dd-1(b), 78dd-2(D)(2) (West 1981).
phone, power or water service, cargo handling or perishable goods protection; or similar actions. In addition to the specific exemptions outlined above, there are two affirmative defenses to charges of FCPA violations. First, there is an affirmative defense if the payment or gift was lawful under the laws of the country of the foreign official. However, the local law must be distinct and written; it is not a defense to simply assert that the country lacks express anti-bribery laws.

The second affirmative defense covers certain expenditures related to the execution or performance of a contract with a foreign government, or directly related to the promotion, demonstration, or explanation of the product or service. The establishment of an open expense account for visiting foreign officials would likely not qualify for this exemption. On the other hand, lobbying or other normal representations to government officials would qualify.

3. Enforcement

The bribery sections of the FCPA make it illegal for any company to bribe a foreign official to obtain or retain business. The Department of Justice has the jurisdiction to enforce the bribery provisions of the FCPA. However, the few cases that the Department of Justice has brought under the bribery provisions have involved egregious violations of the FCPA. In one set of cases, the Pemex cases, the bribery payments were so blatant that knowledge, under either the pre-or post-1988 standard, was not even at issue.

63. Id. §§ 78dd-1(c), 78dd-2(c).
64. Id. §§ 78dd-1(c)(1), 78dd-2(c)(1).
65. Id.
66. Id. §§ 78dd-1(c)(2)(B), 78dd-2(c)(2)(B).
67. Id. §§ 78dd-1(c)(2)(A), 78dd-2(c)(2)(A).
68. Id. §§ 78dd-1(a)(2), 78dd-2(a)(2).
69. Id.
71. See 1 Foreign Corrupt Practices Rep. 100.08, July 1991 (Business Laws, Inc.) (stating that criminal charges for accounting and record-keeping violations often accompany the bribery charges).
72. See supra text accompanying notes 15 and 69.
The *Pemex* cases arose out of a conspiracy among a number of companies to obtain or retain business with Petroleos Mexicanos ("Pemex"), an oil company owned by the Mexican government. The conspiracy involved kickback payments by the conspirators to two of Pemex's officers (subdirectors of purchasing and production; "the officers"). Crawford Enterprises, Inc. ("CEI") initiated the conspiracy and joined Ruston Gas Turbines, Inc. ("Ruston"); a division of International Harvester Corporation, and C.E. Miller Corporation ("Miller").

CEI arranged to pay the Pemex subsidiary officers five percent of all the fees the conspirators received from Pemex. In return, the officers gave the conspirators all of Pemex's turbine compression system business. In 1982, the Department of Justice brought criminal charges against the conspirators.

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for violation of the FCPA.\textsuperscript{75} Ruston, Miller, and International Harvester, pleaded guilty and paid fines.\textsuperscript{76}

The remaining defendants pleaded \textit{nolo contendere} on the eve of trial to all of the charges in the indictment.\textsuperscript{77} As a result, the court fined CEI $3,450,000, its president Donald Crawford $309,000, and other defendants $235,000.\textsuperscript{78} None of the defendants received prison terms.\textsuperscript{79}

\section*{B. Export Control and Technology Transfer}

An esoteric area of international trade and administrative law, whose violations have ensnared many unwary businesses in

\begin{itemize}
\item[78.] \textit{U.S. Dep’t of Just. Litig. Release, supra} note 77, at 696.6601.
\item[79.] \textit{Id.}
\end{itemize}
VOIDING CRIMINAL LIABILITY

criminal litigation, is export control and technology transfer. Although these laws initially were directed against communist countries during the Cold War, they continue to be aggressively enforced against additional countries deemed dangerous to the United States (e.g., Iran, Iraq, and Libya). The United States Customs Services has aggressively conducted undercover sting operations in the enforcement of these laws, including against foreign persons who are both residing overseas and not conducting business in the U.S. The differences in application of these laws by the U.S. Department of Commerce and the Customs Service make criminal enforcement of these laws a potential trap for the unwary.

1. The Export Administration Act

The chief mechanism by which the U.S. Government controls the extraterritorial supply of unclassified data and goods is the Export Administration Act ("EAA"). It applies to certain goods and various types of technical data. For goods, the EAA provides that the Secretary of Commerce publish a list of controlled goods, the Commodity Control List. The Bureau of Export Administration administers the Commodity Control List. Any good on the list cannot be exported without first obtaining a license specifically covering a shipment of such goods, unless a general license applies.

Several general licenses apply to goods. The most commonly available general licenses include the following: (1) G-DEST, which authorizes the export of particular commodities on the Commodity Control List to some countries without a specific license; (2) GLV, which deals with exports under specified dollar amounts; and (3) General License GCG, which permits exports to government agencies of specified countries. A good that is not covered by a general license cannot be export-

81. Id. § 2403(b); 15 C.F.R. § 799.1(a) (1994).
82. 50 U.S.C. app. §§ 2403(b), 2404(c) (1988) (also referred to as the Commerce Control List); see 15 C.F.R. § 799.1 (1994).
83. 15 C.F.R. § 799.1(a) (1994).
85. 15 C.F.R. § 771.3 (1994).
86. Id. § 771.5(a)(2). The amount does not exceed an amount specified for that country or $500. Id.
87. Id. § 771.14(a).
ed without a validated license from the Bureau of Export Administration. A validated license can authorize an export of a specific commodity to a specific entity (individual license), an export of unlimited quantities to foreign distributors for a year (distribution license), or a shipment of spare parts for service purposes (service supply license).88

The EAA also applies to technical information, which includes almost every form of technical data (e.g., a memorandum, map, or software) or technical assistance which may involve a transfer of technical data (e.g., a consulting service).89 The export of technical information may lead to difficult conceptual problems resulting in unanticipated violations of the EAA. These exports can even occur through disclosure to a foreign national within the United States, such as a foreign national's tour of a U.S. plant.90 Services, such as installation and repair performed abroad using technical expertise, may also constitute an "export" of data. A licensing scheme is related to the export of technical data.91 Failure to obtain a validated license exposes the exporter to criminal and civil penalties.

To convict a person for intentionally violating the EAA requires proof of knowledge that the intended destination of the controlled goods is a country where such goods are restricted.92 Penalties for willful violations for an individual include up to ten years' imprisonment and a fine of $250,000.93 The penalty for a business may be either five times the value of the exports or one million dollars, whichever is greater.94 Any criminal conviction can result in the forfeiture of the goods involved.95 For a lesser showing of intent an individual can receive a penalty of up to five years imprisonment and a fine.96

88. Id. § 772.2(b).
89. Id. § 779.1(a) (defined in § 799.1, supp. 3).
90. Id. § 779.1(b)(2)(i).
91. See, e.g., id. § 799.3.
94. Id. § 2410(b)(1)(A).
95. Id. § 2410(g)(1).
96. Id. § 2410(a).
An indictment for an EAA offense is often accompanied by charges of false statements to a government official, obstruction of a government investigation, mail or wire fraud, and racketeer influenced and corrupt organizations ("RICO") offenses, such as falsified export documentation used to trick customs officials as to the nature and value of the goods. These acts can constitute an independent criminal violation. Aider-abettor liability attaches to anyone involved in a transaction that eventually leads to an illegal export if that person made a false statement as a foreseeable means of furthering the illegal transaction.

Challenges to the propriety of having the contested good placed on the Commodity Control List and to the procedure for placing goods on the list have been brought. For instance, a defendant can assert as a defense that there was absence of proper factual basis for including a good on the list, and that the inclusion decision was arbitrary and capricious, and in violation of a statutory directive. The courts have split on

97. A person who falsifies export documentation and then learns of an investigation into his or her violation may try to cover up the offense. This may lead to an additional and independent crime. 18 U.S.C. § 1505 (1988).
98. A charge of use of the mails or the telephone to accomplish a fraudulent purpose may also be added. See 18 U.S.C. § 1341 & 1343 (Supp. IV 1992).
99. RICO charges normally are included when exporters have engaged in a pattern of conduct, especially because RICO claims bring forfeiture of the criminal enterprise assets and 20 years' imprisonment. See 18 U.S.C. § 1961 et seq.
100. 18 U.S.C. § 1001 (1988). The violation would be willfully concealing a material fact or making a misleading representation in connection with any matter within the jurisdiction of a government department or agency. Id.
101. United States v. Beck, 615 F.2d 441, 453 (7th Cir. 1980). In Beck, the Seventh Circuit held that the evidence established that the defendant had the requisite intent and level of participation required to be convicted as an aider and abettor of illegally exporting arms and of filing false customs export declarations even though the defendant did not participate in the actual preparation of the export declaration. Id.
102. These challenges have thus far failed. See, e.g., United States v. Spawr Optical Research Inc., 864 F.2d 1467, 1473 (9th Cir. 1988) (finding that due process was not violated when goods were deemed included on the central list and the decision was not subject to judicial review), cert. denied, 493 U.S. 809 (1989); United States v. Gregg, 829 F.2d 1430, 1437 (8th Cir. 1987) (finding the statutes and regulations that govern the placement of goods on the Commodity Control List are not unconstitutionally vague), cert. denied, 486 U.S. 1022 (1988); United States v. Moller-Butcher, 560 F. Supp. 550, 552 (D. Mass. 1983) (holding the goods need not make a significant contribution to the military potential of another country for inclusion on the control list).
whether the decision to place an article on the Commodity Control List is an unreviewable political decision.\(^\text{103}\)

Another defense may be whether a good fits within a prohibited category of goods, many of which are ambiguous. It is subject to controversy whether this issue should be decided by the court or the jury.\(^\text{104}\)

Another potential defense is that an export violation was not knowing and intentional and that the defendant did not realize that the good in question was within a listed category on the Commodity Control List.\(^\text{105}\) Much of the same evidence as to scienter would apply to a determination of whether the article in question was in fact on a proscribed list.\(^\text{106}\) A related defense is that, if the commodity was a controlled commodity, the list did not give reasonable notice of that fact, and thus would be void-for-vagueness. Of course, criminal statutes must provide reasonably clear guidelines as to precisely the proscribed conduct.\(^\text{107}\) Such pre-trial motions have not had much suc

\(^{103}\) Compare e.g., United States v. Mandel 914 F.2d 1215, 1222-23 (9th Cir. 1990) (holding the decision to impose export controls is not subject to judicial review) and United States v. Martinez, 904 F.2d 601, 602 (11th Cir. 1990) (holding no manageable standards exist for judicial determination of placing an item on the munitions list) and United States v. Helmy, 712 F. Supp. 1423, 1428 (E.D. Cal. 1989) (noting a determination to include an item on the control list is conclusive) with Dart v. United States, 848 F.2d 217, 221-25 (D.C. Cir. 1988) (holding judicial review is appropriate to test whether the Department of Commerce has acted in violation of the EAA and its own regulations).


\(^{105}\) See Gregg, 829 F.2d at 1436 (ruling that the admission into evidence of the Export Administration Act "and the voluminous regulations thereunder" supported the defendant's argument that he was confused by them, and therefore could not have requisite specific intent to violate the act); see also United States v. Murphy, 852 F.2d 1, 7 (1st Cir. 1988), cert. denied, 489 U.S. 1022.

\(^{106}\) See Murphy, 852 F.2d at 7 (holding "defendant must know that his conduct in exporing from the United States articles proscribed by the statute is violative of the law") (citing United States v. Lizarraga-Lizarraga, 541 F.2d 826, 828-29 (9th Cir. 1976)).

\(^{107}\) See, e.g., Smith v. Goguen, 415 U.S. 566, 573 (1974) (stating that where a statute's literal scope is capable of interpretation, it will receive a higher degree of judicial scrutiny).
cess. If the government cannot prove that the defendant actually knew of the obligations imposed by the EAA and the regulations promulgated thereunder and then chose to violate them, the defendant must be acquitted.

Foreign nationals who purchase proscribed goods or data may raise many of the above defenses as well as jurisdiction. The government may prosecute the foreign national as an accessory, i.e., one who aids, abets, counsels, or induces. These persons are sometimes prosecuted for sending packing instructions, making shipping arrangements, or arranging financing in a manner to avoid detection.

2. Arms Export Control Act

The Arms Export Control Act ("AECA") and the International Traffic in Arms Regulations ("ITAR") authorize the State Department to promulgate a Munitions List applicable to goods that are "inherently military in character." A license is required to export these articles.

The ITAR further applies to "defense services," including design, engineering, production, processing, repair, maintenance, and most significantly, the furnishing of "technical data." Regulations only apply to general technical data directly related to defense items and to information that advances the state of the art material on the Munitions List. The regulations exclude general scientific, engineering, and mathematical principles, as well as information in the public domain.

Penalties for willful violations of ITAR include ten years imprisonment and a fine of up to one million dollars. In

111. United States v. Beck, 615 F.2d 441, 444 (7th Cir. 1980).
114. 22 C.F.R. § 120.3 (1994).
115. Id. § 120.9 (1994).
116. Id. § 120.10 (1994).
117. Id. § 120.17(a) (2) (1994).
118. See Id. § 120.10(a) (5) (1994).
addition, defendants will likely be prosecuted for a series of related defenses discussed in the previous section on the EAA.\textsuperscript{120}

The best defense to the above is the lack of the requisite criminal intent, since it appears that a violation of the AECA is accepted as a specific intent crime.\textsuperscript{121} The same requirement applies to related conspiracy offenses.\textsuperscript{122} The government must prove the degree of criminal intent necessary for the substantive offense.\textsuperscript{123} This requirement actually helps acquit defendants, especially foreign nationals found to have made innocent or negligent errors.\textsuperscript{124} To prove specific intent in cases lacking credible evidence, the government must show actual notice that the defendant was made aware of the export license requirement or that he or she took evasive action indicating knowledge of the requirement.\textsuperscript{125} Defenses to the prosecution charges of specific intent may be proof that the defendant had no knowledge of the illegal destination of goods or no proof of intent through written agreement. These defenses indicate the deal was only in the discussion phase or within the sovereign immunity of a foreign entity.

\begin{itemize}
\item 120. See supra Part II.B.1.
\item 121. Murphy, 852 F.2d at 6-7; see also Lizarraga-Lizarraga, 541 F.2d at 828 (knowing and intentional violation of the munitions control act must be proven by the government to obtain a guilty verdict); Beck, 615 F.2d at 449-50 (holding that conviction requires proof of defendant's willful violation of the statute prohibiting the export of illegal goods); United States v. Durrani, 835 F.2d 410, 423 (2nd Cir. 1987) (requiring the prosecution to prove beyond a reasonable doubt that defendant had the specific intent to send weapons out of the country).
\item 122. United States v. Golitscheck, 808 F.2d 195, 201 (2d Cir. 1986); United States v. Wieschenberg, 604 F.2d 326, 331 (5th Cir. 1979) (holding that to maintain "a conviction of conspiracy, there must be proof of (1) an agreement between two or more persons, (2) an unlawful purpose, and (3) an overt act committed by one of the co-conspirators in furtherance of the conspiracy").
\item 123. Wieschenberg, 604 F.2d at 332.
\item 124. United States v. Davis, 583 F.2d 190, 193 (5th Cir. 1978) (imposing criminal penalties for innocent or negligent error defies Congressional intent).
\item 125. See United States v. Adames, 683 F. Supp. 255, 257-258 (S.D. Fla. 1988) (holding that written notice on sales receipt for firearms of fact that "certain products" may not be exported without prior approval, is not sufficient to put person on notice), aff'd 878 F.2d 1374 (11th Cir. 1989); United States v. Markovic, 911 F.2d 613, 615 (11th Cir. 1990) (holding that warnings of an illegal transaction were ineffective where defendant did not speak English).
\end{itemize}
3. Criminal Trade Secret Misappropriation

Trade secret misappropriation and other fiduciary breaches provide an additional area of growing criminal liability. Theft of the physical embodiments of proprietary information has become the misappropriation of pure data.

Misappropriation offenses have been prosecuted under the National Stolen Property Act, which prohibits the interstate transfer of stolen property. The early cases emphasize the theft of something tangible, even though the value was in the data, not its physical container.

C. International Securities and Commodities Futures

The SEC has recently given top enforcement priority to prosecuting insider trading, sham transactions, and market manipulation. Attorneys with securities backgrounds are increasing their numbers in key U.S. Attorneys' offices to pursue these cases. The SEC and the U.S. Attorneys' offices have increasingly applied their enforcement authorities extra-territorially to gather evidence and to prosecute individuals for conduct undertaken outside the U.S.

1. Extraterritorial Jurisdiction in U.S. Securities Cases

The "internationalization of the securities markets" has facilitated transactions in and between the markets of many countries instantaneously. U.S. courts construe federal securities laws to cover transactions originating in the United States and closing abroad as well as those initiated abroad and concluded

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127. United States v. Seagraves, 265 F.2d 876, 880 (3d Cir. 1959) (upholding conviction for conspiracy to transport in interstate commerce certain geophysical maps, knowing the maps had been stolen); United States v. Bottone, 365 F.2d 389, 393 (2d Cir. 1966) (holding that transporting stolen pharmaceutical manufacturing processes were illegal under the National Stolen Property Act), cert. denied, 385 U.S. 974 (1966); United States v. Greenwald, 479 F.2d 320, 322 (6th Cir. 1973) (transporting stolen chemical formulae within interstate commerce constituted "goods, wares or merchandise" within the meaning of the National Stolen Property Act), cert. denied, 414 U.S. 854 (1973).
128. For a useful discussion of this section, see Hannay, supra note 6, § 16.
129. Id. §§ 16.01, 16-4.
130. Id.
131. Id. §§ 16.06, 16-27.
in the United States.\textsuperscript{132} Courts base their authority to exercise jurisdiction on the language of the securities statutes themselves.\textsuperscript{133} The federal securities laws provide broad jurisdiction, based generally on securities transactions and related activities either originating in the United States or the mails, where interstate or foreign commerce is conducted.\textsuperscript{134}

By definition, "interstate commerce" is defined as including "trade or commerce in securities or any transportation or communication relating thereto... between any foreign country and any State, Territory, or the District of Columbia," according to section 2(7) of the Securities Act of 1933.\textsuperscript{135} Section 3(a)(17) of the 1934 Securities Act (1934 Act) has a similar definition.\textsuperscript{136} The preambles to both the 1933 and 1934 Acts provide that they are intended to apply to "interstate and foreign commerce."\textsuperscript{137}

U.S. courts will exercise subject matter jurisdiction when notable actions or the effect of those actions in the United States comes to light under U.S. securities laws. The courts tend to exercise their jurisdiction more frequently in securities fraud cases than in those involving regulatory matters.\textsuperscript{138} A limiting factor in this seemingly broad jurisdiction under the federal securities laws is the willingness of other states to abide by or with the courts' attempts to exercise jurisdiction in these cases.\textsuperscript{139}

2. Applicable U.S. Statutes

a. Insider Trading

Under section 10(b) of the 1934 Act\textsuperscript{140} it is unlawful to use or employ any manipulative or deceptive device or scheme against SEC regulations in connection with the purchase or sale of any security.\textsuperscript{141} Section 32(a) of the 1934 Act criminalizes

\begin{flushleft}
\textsuperscript{132} Id.
\textsuperscript{133} Hannay, supra note 6 § 16.06, at 16-27.
\textsuperscript{134} Id.
\textsuperscript{138} See Hannay, supra note 6 § 16.06, at 16-28.
\textsuperscript{139} Id.
\textsuperscript{141} Id.
\end{flushleft}
willful violations punishing them by fine or imprisonment of up to five years.\textsuperscript{142}

SEC Rule 10b-5 is often applied to insider trading cases. The SEC also uses Rule 14e-3, an insider trading rule applying specifically to tender offers.\textsuperscript{143}

The Insider Trading Sanctions Act authorizes the SEC to obtain civil penalties against any person trading in securities while possessing material, nonpublic information in addition to penalties against any person who aids and abets another by communicating that information. The civil penalty can be up to “three times the profit gained or loss avoided” as a result of the unlawful purchase or sale.\textsuperscript{144}

\textit{b. Disclosures and Market Manipulation}

Various laws require that exchanges and broker-dealers keep records to determine the “terms and conditions of [each] order.”\textsuperscript{145} Additional record-keeping requirements apply to publicly-owned U.S. corporations.\textsuperscript{146}

Under Section 9 of the 1934 Act, manipulation of securities markets by activities such as “churning”\textsuperscript{147} is forbidden.\textsuperscript{148} Manipulation of market prices for securities may also result in violation of section 17(a) of the securities Act of 1933, section 10(b) of the 1934 Act, SEC Rule 10b-5, and other securities laws.\textsuperscript{149}

\begin{footnotesize}
\begin{enumerate}
\item[142.] \textit{Id. \S 78ff(c) (2) (B).}
\item[143.] \textit{United States v. Chestman, 1992 WL 196792 No. 88 Cr. 455 (S.D. N.Y. Aug. 31, 1992) (prosecuting criminal insider trading and perjury charges resulting from the purchase of Waldbaum Inc. by A&P using Rule 13e-3, and the mail fraud and perjury statutes).}
\item[144.] \textit{15 U.S.C. \S 78u(d) (2) (A) (Supp. III 1985).}
\item[145.] \textit{17 C.F.R. \S 240.17a-3(6) (1994).}
\item[146.] \textit{15 U.S.C. \S 78m(b)(2) (1988).}
\item[147.] “Churning” occurs when a broker, exercising control over the volume and frequency of trades, abuses his customer’s confidence for personal gain by initiating transactions that are excessive in view of the character of account and the customer’s objectives as expressed to the broker. \textit{BLACK’S LAW DICTIONARY} 242 (6th ed. 1990).
\item[148.] \textit{15 U.S.C. \S 78i (1988).}
\item[149.] \textit{See SEC v. Resch-Cassin & Co., 862 F. Supp. 964, 968 (S.D. N.Y. 1973) (holding that manipulative activities expressly prohibited by \S 9(a)(2) of the Exchange Act with respect to a listed security are also violations of \S 17(a) of the Securities Act proscribing fraudulent interstate transaction and \S 10(b) of the Exchange Act proscribing manipulative and deceptive devices in interstate commerce when the same activities are conducted with respect to an over-the-counter security).}
\end{enumerate}
\end{footnotesize}
The federal and wire fraud statutes can also be applied to international securities transactions that are performed with a fraudulent intent.\footnote{150}

c. Other Federal Criminal Securities Laws

The federal fraud statute is used to punish false statements made in filings required by the SEC.\footnote{151} The statute has been used in a variety of well known cases, such as the prosecution of Paul Bilerian and Michael Milken.\footnote{152}

The federal criminal conspiracy statute is also used to prosecute insider trading or other securities frauds that have a direct impact on the federal government.\footnote{153}

The Criminal Victims Rights Statute allows a court to impose, in addition to any other penalty authorized by law, a requirement to make restitution under certain circumstances.\footnote{154}

d. Authority to Assist in Foreign Investigations

In recent years Congress has enacted laws granting enlarged enforcement powers to the SEC. The Insider Trading and Securities Enforcement Act of 1988 ("ITSEA")\footnote{155} enlarges section 21(a) of the Securities Exchange Act\footnote{156} by permitting the SEC to help foreign securities authorities determine whether foreign securities laws have been violated, even if violations of the U.S. securities have not occurred.

3. Investigating and Prosecuting Securities Violations

International securities enforcement requires that the SEC may have to investigate operations of the parent company that may be located entirely abroad. The money may also be located outside the United States. Hence, the SEC may have unique

\footnotesize{
151. Id. § 1001.

http://open.mitchellhamline.edu/wmlr/vol21/iss3/20
problems both in gathering evidence to prove the fraud as well as recovering the money from a foreign jurisdiction.

Initially, the SEC tries to obtain information through the voluntary cooperation of the parties. Foreign blocking and secrecy statutes may prevent such cooperation.\(^{157}\)

The SEC may issue subpoenas compelling the production of documents and testimony. The SEC's authority to subpoena witnesses from anywhere in the United States has been construed as a broad and flexible authorization to compel the production from anywhere in the world so long as service has been properly effected in the United States.\(^{158}\)

In addition to being able to utilize bilateral and multilateral criminal and related agreements, the SEC has concluded Memoranda of Understanding ("MOU") with its counterparts, such as Switzerland,\(^{159}\) Canada,\(^{160}\) the U.K.,\(^{161}\) Brazil,\(^{162}\) Japan,\(^{163}\) and Canadian provinces. These MOU enable the SEC and their counterparts to directly obtain assistance as well as to freeze assets quickly.

**D. Money Movement Offenses**

An attorney or professional who does not pay attention to legal considerations concerning the movement of money, especially internationally, may find a client or even himself or herself with legal and criminal difficulties. Several U.S. laws should be considered. Section IV of this article discusses prevention strategies for these offenses. When U.S. persons or

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157. See, e.g., Securities Exchange Comm'n v. Banca Delta Suizzera Italiana, 92 F.R.D. 111, 113 (S.D.N.Y. 1981) (stating that the SEC, as part of its initial investigation, sought voluntary disclosure of the identity of certain key bank employees; no such disclosure was forthcoming, and the SEC proceeded more formally).

158. Id. at 117-19.


162. Memorandum of Understanding between the United States Securities and Exchange Commission and the Comissao de Valores Mobiliarios (Brazil), July 1, 1988, N.Y.L.J. June 21, 1990, at 5.

businesses make financial transactions that are for and/or connected to illegal transactions, a related number of criminal laws may be violated. These and other laws should be considered as a check list when counsel is requested to advise on payments to officials to obtain contracts, preparation of financial statements to obtain loans, tax planning, including structuring offshore asset protection trusts, and responding to potentially irregular or suspicious transactions.\(^{164}\)

1. Money Laundering

The federal money laundering statutes, sections 1956 and 1957 of chapter 18 of the United States Code, together define four separate criminal offenses, many of which incorporate several alternative scienter requirements.


A "financial transaction" offense is committed whenever a person (1) engages in a "financial transaction"\(^{165}\); (2) involving property that he or she knows represents the proceeds of some form, though not necessarily which form, of felonious criminal activity under state or federal (or after November 29, 1990, foreign) law\(^{166}\); (3) where the property in fact, represents the proceeds of at least one of the many "specified unlawful activities" defined in the statute\(^{167}\); and (4) the person engages in the transaction with either:

(i) the intent of promoting the carrying on of "specified unlawful activity:"

(ii) the intent to engage in conduct constituting tax evasion or tax fraud;

(iii) knowledge that the purpose of the transaction, in whole or in part, is either:

(a) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of "specified unlawful activity"; or

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166. Id.
167. Id.
(b) to avoid a transaction reporting requirement under State or Federal law.\textsuperscript{168}


An "international transportation" offense occurs whenever a person transports, transmits, or transfers—or attempts to transport, transmit, or transfer—funds or "monetary instruments" into or out of the U.S. with either

(i) the \textit{intent} of promoting the carrying on of "specified unlawful activity;"

(ii) \textit{knowledge} that the funds or monetary instruments involved in the transportation represent the proceeds of some form of unlawful activity \textit{and} that the purpose of the transportation, transmission or transfer, in whole or in part, is \textit{either}: (a) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or (b) to avoid a transaction reporting requirement under State or Federal law.\textsuperscript{169}

c. \textit{"Sting" Offenses: 18 U.S.C. Section 1956(a)(3)}

A "sting" offense occurs whenever a person (1) engages in a "financial transaction"; (2) involving property that is represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, by either (a) a law enforcement officer or (b) another person acting at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of Section 1956; (3) with the intent of either (a) promoting the carrying on of "specified unlawful activity"; (b) concealing or disguising the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or (c) avoiding a transaction reporting requirement under State or Federal law.\textsuperscript{170}

\textsuperscript{168} \textit{Id.} (emphasis added).
\textsuperscript{170} \textit{Id.} § 1956(a)(3).
d. Monetary Transaction Offenses: 18 U.S.C. Section 1957

A "monetary transaction" offense occurs when a person takes, or attempts to take, funds or a monetary instrument of a value in excess of $10,000, which he or she knows constitutes or is derived from a criminal offense and which, in fact, is derived from "specified unlawful activity," and either deposits, withdraws, transfers, or exchanges the funds or monetary instrument by, through, or to a financial institution so as to affect interstate or foreign commerce.\(^1\)

\(\text{e. Foreign Money Laundering Laws}\

As discussed below, many national governments have now criminalized money laundering and imposed the requirements of "know your customer," and "identifying and reporting to the government suspicious transactions." Most of the laws apply extraterritorially.

2. Asset Concealment from FDIC, RTC, Conservator, or Liquidating Agent

A person who knowingly conceals or endeavors to conceal an asset or property from the FDIC, acting as conservator or receiver with respect to any asset acquired or liability assumed by the FDIC, the RTC, any conservator or liquidating agent, or a person who corruptly places or endeavors to place an asset beyond the reach of such Corporation, Board, or Conservator commits a felony.\(^2\)

3. Bankruptcy Fraud

A person who knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy case under Title 11 of the United States Code, or after filing the case, knowingly and fraudulently withholds, conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information relating to the property or financial affairs of a debtor is guilty of bankruptcy fraud and related

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171. Id. § 1957.
A VOIDING CRIMINAL LIABILITY offenses. This crime may be a predicate for RICO, and can be the basis for authorizing the interception of wire or oral communications.

4. Fraud on Loan and Credit Applications

A person who knowingly makes a false statement or report, or willfully overvalues any land, property, or security, for the purpose of influencing the action of a federally insured financial institution on any loan or related application is guilty of a felony. This can occur when a person makes intentional misrepresentations, negligent misrepresentations, or makes a false statement without reasonable ground for believing its veracity; and concealment or suppression or a failure to disclose facts that the speaker has a duty to disclose. A false claim of ownership is a false statement, not an overvaluation. The impact of the statement is irrelevant. Hence, the institution need not actually rely on the statement for a violation to exist.

5. Mail Fraud and Wire Fraud: 18 U.S.C. Sections 1341 and 1343

The Crime and Control Act of 1990 increased the maximum penalty for mail and wire fraud to 30 years imprisonment and/or a $1,000,000 fine. A mail or wire fraud occurs when (1) the defendant forms a scheme or artifice with intent to defraud; (2) the defendant uses or causes use of the mails or wires; and (3) the use of mails or wires is in furtherance of a fraudulent scheme. Prosecutors frequently charge mail or

177. United States v. Davis, 730 F.2d 669, 673 (11th Cir. 1984) (holding that "only where a declarant assesses an inflated value to property that he actually owns can he be guilty of overvaluation").
178. United States v. Bowman, 783 F.2d 1192, 1199 (5th Cir. 1986) (stating that "it is settled law that a section 1014 offense is 'a crime of subjective intent that requires neither reliance by lending institution nor an actual defrauding for its commission'").
180. Id.
wire fraud as an alternative to offenses such as tax fraud, money laundering, bribery, and international trade crimes.

6. Reporting Crimes

Non-compliance with various reporting requirements will result in the commission of a variety of offenses. For instance, the failure of a professional or commercial business to report the receipt of $10,000 in cash violates chapter 26 United States Code Section 6050I. Rendering assistance in structuring transactions for the purpose of evading any reporting requirement under the Bank Secrecy Act is also an offense. The failure to report domestic coin and currency transactions exceeding $10,000 on Form 4789, Currency Transaction Report ("CTR") or international transportation of currency on Form 4890, Currency and Monetary Information Report ("CMIR"), required for currency in excess of $10,000 brought into or taken out of the country, may constitute money laundering or structuring.

As a preventative measure from the other perspective, professional employees working for banks, financial institutions, and other covered entities, must obtain sufficient information to "know their customer" and identify and report suspicious transactions or risk criminal penalties.

Various reporting requirements apply to foreign ownership of U.S. entities and properties. Examples are investments in U.S. agricultural land or U.S. investments in general, including acquisitions of U.S. companies. Reporting is also required for use by U.S. residents of foreign trusts and the interests of U.S. persons in foreign banks and securities accounts.

7. Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA")

If the defendant, acting with intent to defraud a bank, as statutorily defined, makes false entries, reports, or statements, he

184. Non-compliance with reporting requirements incurs criminal and administrative penalties.
can be found guilty of a crime under chapter 18 United States Code sections 1001, 1005, and 1006.185


To convict a defendant of aiding and abetting, the government must prove that the defendant "was associated with the criminal venture, participated in it as something he wished to bring about, and sought by his action to make it succeed."186 Examples of aiding and abetting are cases concerning misapplication of funds cases.187 Aiding and abetting has also appeared in cases concerning false statements188 and false entries.189

185. Under 18 U.S.C. § 1001, criminal penalties are imposed upon one who makes statements that are (1) false, (2) material, (3) made knowingly and willfully, and (4) made in a matter within the jurisdiction of any department or agency of United States. 18 U.S.C. § 1001 (1988). A violator of § 1001 "shall be fined not more than $10,000 or imprisoned not more than five years, or both." Id.

18 U.S.C. § 1005 states that an officer, director, agent, or employee of a bank cannot (1) issue or put any note of that bank into circulation without authority, (2) make false entry in any book, report, or statement of the bank with intent to injure or defraud the banking organization, or (3) deceive a person of the banking or regulatory organization. 18 U.S.C. § 1005 (Supp. IV 1992). Violators will be fined not more than $1,000,000 or imprisoned not more than 30 years, or both. Id.

As provided in 18 U.S.C. § 1006, an officer, agent, or employee of a financial institution cannot make any false entry in any book, report, or statement of that institution, with the intent to defraud or deceive either the institution or an individual of the institution. 18 U.S.C. § 1006 (Supp. IV 1992). The penalty for violation is a fine not more than $1,000,000 or imprisonment of up to 20 years, or both. Id.


187. See, e.g., 18 U.S.C. § 656 (Supp. IV 1992) (describing crimes of theft, embezzlement, or misapplication by bank officer or employee); Id. § 657 (Supp. IV 1992) (describing misapplication of funds in lending, credit, and insurance institutions); United States v. Mouton, 617 F.2d 1379, 1385-86 (9th Cir. 1980) (finding that "a violation will occur if the misapplied funds are for the use of any third person."); cert. denied, 449 U.S. 860 (1980).

188. See, e.g., 18 U.S.C. § 1001 (1988); United States v. Austin, 585 F.2d 1271, 1278 (5th Cir. 1978) (holding "there was sufficient evidence for a jury to find beyond a reasonable doubt that [defendant] aided and abetted the commission of [a] Section 1001 . . . offense . . . ").


A conspiracy occurs when there is an agreement by two or more persons, to commit an offense against or defraud the United States, with knowledge of the existence of the conspiracy, with intentional and actual participation in a conspiracy, and one of the conspirators makes an overt act in furtherance of the agreement.\(^\text{190}\)

9. Forfeiture

Draconian civil and criminal forfeiture provisions apply to most of the above-mentioned money movement offenses.\(^\text{191}\) Forfeiture of the instrumentalities and proceeds of crime has become a primary goal of prosecutors in the United States. Foreign law enforcement authorities are emulating the practice.\(^\text{192}\) As a result, international asset forfeiture is the main subject of treaties, major pieces of litigation, and an important sub-area of international criminal law.\(^\text{193}\)

E. Criminal and Quasi-Criminal Tax Offenses

The protection of assets abroad, when coupled with the non-payment and/or non-declaration, or misdeclaration of taxes, may constitute tax crimes.\(^\text{194}\) Criminal code provisions for the same conduct may also apply under Title 18 of the United States Code. The code provisions include those for conspiracy,\(^\text{195}\) false statements to government agencies,\(^\text{196}\) and mail fraud.\(^\text{197}\)

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191. See Id. § 981 (1988) (civil forfeiture); Id. § 982 (1988) (criminal forfeiture).
193. Id. at 860-61; see also infra Part IV.
194. See 26 U.S.C. § 7201 (1988) (discussing evading tax liability); Id. § 7203 (Supp. V 1993) (describing consequences of failing to file a tax return, supply information or pay tax); Id. § 7206(1) (1988) (filing false documents, including returns); 26 U.S.C. § 7206(2) (aiding or assisting in the preparation of a false return); Id. § 7207 (falsifying documents as to any material matter).
196. See Id. § 1001 (1988).
197. See Id. § 1341 (1988).
A number of federal programs exist to target certain types of transactions as well as transactions with certain countries and vehicles. Various inter-agency investigations and computer programs can assist in investigations and prosecutions. Moreover, the United States has raised revenue by targeting multinational enterprises that are perceived as not paying their fair share of taxes. This perception is based on the belief that these enterprises either shift profits to related enterprises in low tax countries or arbitrarily shift the costs of international operations to United States enterprises, thereby reducing net income and taxes owed the United States. As a result of the decrease in taxes owed to the United States, a series of laws and regulations in the transfer pricing area evolved.

These laws and regulations have dramatically increased the amount of recordkeeping and reporting required of multinational enterprises. These new requirements are accompanied by a major rise of severe economic penalties and loss of procedural rights for taxpayers who do not comply. Simultaneously, the Internal Revenue Service substantially improved its procedural rights. Consequently, tax authorities are able to demand information, extend the statute of limitations, prevent

198. An example of such a computer program is the Treasury Enforcement Compliance System ("TECS"). See generally Bruce Zagaris & David R. Stepp, Criminal and Quasi-Criminal Customs Enforcement Among the U.S., Canada and Mexico, 2 IND. INT'L & COMP. L. REV. 337 (1992) (discussing "TECS").

199. The United States has quickly and dramatically been imposing penalties on multinational enterprises in transfer pricing cases. The Internal Revenue Code describes transfer pricing as follows:

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

I.R.C. § 482. All citations to the I.R.C. are to the Internal Revenue Code of 1986, as amended.

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

201. The Internal Revenue Code imposes penalties of $10,000 for each year in which the reporting corporation fails to maintain information and records as required by § 6038A(a)(b). Id. § 6038A(d).
the introduction of foreign documents not immediately available
to them during an examination, 202 and completely disregard
records where the taxpayer has not timely furnished such
information. 203

In addition, U.S. tax authorities have concluded tax
information exchange and related mutual assistance agreements
with their counterparts to provide improved means for tax
agents to obtain and verify information and documents from
multinationals directly from their foreign counterparts. 204

F. Environmental Offenses

The proliferation of international environmental agree-
ments and United States domestic legislation has been spurred
by a growing awareness of the importance of enforcing environ-
mental standards to protect our quality of life. The media
attention to environmental matters, and overall political
importance, especially in the Clinton Administration, has
brought transnational environmental offenses to a high level of
attention. For example, significant attention has been given to
international hazardous waste disposal and trade which spawns
from the destruction of endangered species.

1. The Basel Convention on the Control of Transboundary
Movements of Hazardous Wastes and Their Disposal

The Basel Convention on the Control of Transboundary
Movements of Hazardous Wastes and Their Disposal regulates
the movement of hazardous wastes across international bor-
ders. 205 It was drafted under United Nations sponsorship and
signed on March 22, 1989, by more than 40 countries, including

202. See id. § 982(a). However, if the taxpayer establishes a reasonable cause for the
failure to provide the documentation requested, the documents may be introduced.
Id. § 982(b).
203. See id. §§ 6038A(e), 6038C(d) (stating that the treatment of such transaction
is within the discretion of the secretary).
204. See infra Part IV.A.
205. Global Convention on the Control of Transboundary Movements of Hazardous
Waste, U.N. Environment Programme (Agenda Item 3), UNEP Doc. UNEP/IG.80/3
of Plenipotentiaries on the Global Convention on the Control of Transboundary Movements
of Hazardous Wastes: Final Act and Text of Basel Convention, U.N. Environment Programme,
the U.S. On August 11, 1992, the U.S. Senate ratified the Basel Convention. The Convention covers wastes enumerated in annexes to the Convention, as well as wastes defined as hazardous in the domestic legislation of contracting countries. It applies to movements of hazardous wastes to, or through, participating nations.

Under the Convention, signatory countries can altogether forbid the import of, or transit through, of hazardous wastes, specific wastes, or shipments. Other countries may not export wastes to those countries that have neither specifically prohibited nor expressly consented to the import of that waste. No nation may export waste to a nation, particularly a developing nation, that the exporting nation believes will not manage the waste in an environmentally sound manner, nor to any nation that is not a party to the Convention. Before a country may export hazardous waste, it must take steps to minimize the amount of hazardous waste available for export. Although the Convention states that parties to the agreement should allow the transboundary shipment of hazardous wastes only when the exporting country does not have the technical capacity and necessary facilities to dispose of the hazardous waste, it will permit such movement of waste if it is in accordance with other criteria to be decided by the parties.

The Convention provides specific procedures to be followed before hazardous wastes may be transported across national borders. Any transboundary movement of hazardous wastes not in conformity with the provisions of the Convention is defined as illegal. The state of export is responsible for ensuring that illegally-transported hazardous wastes are returned to that

206. Id.
208. Id. arts. I, II (providing the scope & definitions of terms utilized for the purpose of the convention).
209. Id. art. IV, 1.
210. Id.
211. Id. art. IV 5, 9.
212. Id. art. IV, 2. For example, countries must ensure the availability of adequate waste disposal facilities. Id. art. IV, 2(b).
213. Id. art. IV, 9.
214. Id. art. IX, 1.
state or are disposed of in accordance with the provisions of the Convention. 215

While the Convention itself has no enforcement provisions, it requires all signatories to implement domestic legislation designed to prevent and punish illegal hazardous waste traffic through both civil and criminal enforcement. 216

The Basel Convention took effect in 1992 following ratification by 36 signatory countries. 217 On December 2, 1992, experts from signatory countries of the Basel Convention approved a draft law on the transport of hazardous waste from one country to another which will serve as a model for each signatory country to enact as law. 218

In addition to the Basel Convention, the United States has bilateral conventions with both Mexico and Canada concerning the transboundary shipment of wastes. 219

The United States regulates the import and export of hazardous substances under a variety of domestic environmental statutes. Chief among these is the Resource Conservation and Recovery Act ("RCRA"), which only regulates the export of hazardous wastes. 220 RCRA section 3017, 42 U.S.C. section 6938, added by Congress in 1984, prohibits the export of hazardous waste to foreign countries unless notice was given to and consent obtained from the receiving country. Violations of this provision may lead to civil or criminal penalties. 221

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215. Id. art. IX, 2.
216. Id. art. IV, 4.
218. Id.
221. Id. § 6928(d), (g). Other environmental statutes have enforcement provisions concerning the illegal export or import of toxic substances. Section 5 of the Toxic Substances Control Act, for instance, regulates the import of toxic substances. 15 U.S.C. § 2604 (1988). Section 17(a) of the Federal Insecticide, Fungicide and Rodenticide Act prohibits the improper labelling of pesticides for export. 7 U.S.C. § 1360(a) (1988). The Rule to Protect the Stratospheric Ozone, promulgated under the Clean Air Act, prohibits the import of certain ozone depleting chemicals. 40 C.F.R. § 82 (1994)
The first major criminal enforcement action against exporters of hazardous waste involved the Colbert brothers. In the early and mid 1980s, Jack and Charles Colbert amassed significant volumes of toxic chemicals which they stored in dozens of warehouses throughout the United States. They would then export these hazardous wastes to developing nations as virgin chemical products. In 1986, a federal court in New York sentenced the two brothers each to thirteen years in jail for fraudulent business practices. The Colberts were stopped not by enforcement of environmental statutes, but by laws against false labeling of exported chemicals.

The federal government has used RCRA's criminal provisions to prosecute persons illegally exporting and importing hazardous wastes. In United States v. Franco, one of two defendants pleaded guilty, on May 23, 1991, to charges of conspiracy, illegal export of hazardous waste to a foreign country, and illegal transportation of hazardous waste.

In 1991, American and Canadian authorities collaborated to investigate an alleged large-scale scheme centered in western New York, which may have involved mixing of toxic PCBs into waste oil sold on both sides of the border. The Buffalo United States Attorney, Dennis C. Vacco, stated that the investigation involved "a company with a local presence and a national presence." The investigation was characterized as having potential ramifications beyond the U.S.-Ontario border, and involving the cocktailing of hazardous waste into oil. While the Buffalo investigation indicates the desire American officials have to eliminate illegal transboundary waste transport, the investigation still faces substantial obstacles. In a recent GAO report, one high ranking United States environmental

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223. Id.
224. Id.
228. Id.
229. Id.
enforcement official described the hunt for illegal hazardous waste shipments as a "search for a needle in a haystack."230

In United States v. Fisher-Price, Inc., the federal government conducted its first criminal prosecution and obtained its first guilty plea for transportation of hazardous waste from another country into the United States. Until a load was stopped by a United States Customs inspector, Fisher-Price transported seven tons of lead contaminated solder waste without a manifest from its circuit board manufacturing facility in Tijuana to its facility in California.231 After a guilty plea on September 12, 1991, the company was sentenced to a $25,000 fine and agreed to make $1,000 restitution to U.S. Customs.232

The EPA, on September 26, 1991, took administrative and civil action against 23 facilities for violating environmental laws concerning the illegal import or export of hazardous waste or chemicals. Under this "cluster" enforcement action, the EPA sought $9.8 million in administrative penalties and the Department of Justice filed civil actions in two cases.233 Sixteen of the administrative cases were brought under RCRA, three were brought under the import provisions of the Toxic Substances Control Act ("TSCA"), and two of the cases were brought under the export provisions of FIFRA. The two civil actions concerned violations of the import regulations of the Clean Air Act concerning ozone-depleting chemicals. Eight cases concerned shipments of hazardous waste into Mexico and seven cases involved shipments of hazardous waste to or from Canada.234

III. Foreign Criminal laws That Affect Doing Business Abroad

U.S. businesses that conduct operations internationally must concern themselves with foreign laws that apply to their

234. Id.
operations in the context of the legal and business culture. To properly identify, understand, and inform businesses of the true implications of these foreign laws requires a knowledge of comparative law and the legal system within which the business operations are conducted. This section provides a selective look at the following foreign criminal laws: corruption and bribery laws; securities laws on insider trading; environmental crimes; tax offenses; and anti-money laundering laws.

A. Corruption and Bribery Laws

Additional requirements exist outside the Foreign Corrupt Practices Act discussed above. U.S. businesses that conduct international operations must concern themselves with foreign laws that apply to their operations. Businesses making payments abroad must also be aware of foreign laws criminalizing bribery of foreign officials. The corruption of foreign government officials is expressly prohibited in virtually all countries today. Foreign investors often complain that these laws are vague and unevenly enforced as some payments may stand on the border of legality and illegality. In response, the international community has undertaken multilateral action to prevent corrupt business practices. For example, the United Nations established an intergovernmental working group to draft an international agreement aimed at “preventing and eliminating illicit payments related to international business transactions.” Moreover, the OECD prohibits corrupt practices in its Guidelines to multinational corporations. However, these provisions are not binding. U.S. businesses should retain experienced and qualified counsel in the foreign jurisdiction because corruption provisions are often enforced at the discretion of the government in power.

235. See supra Part II A.


237. Id. at 236 n.27.


239. Id.
1. Middle East Countries

The following countries are often identified as Middle Eastern jurisdictions: Morocco, Algeria, Tunisia, Libya, Egypt, Sudan, Israel, Jordan, Lebanon, Syria, Saudi Arabia, the United Arab Emirates, Yemen Arab Republic, Kuwait, Iraq, and Turkey. Each country statutorily prohibits bribery of its officials. However, the scope of this prohibition varies from one country to another in three main respects: (1) the legal studies nature of the person prohibited from receiving a payment, (2) the type of consideration prohibited, and (3) the purpose of the payor.

a. Status of the Person Prohibited From Receiving a Payment

Each Middle Eastern country prohibits illegal payments to "public officials." Some domestic laws define the term and consider as public officials "all individuals entrusted with a public service." It is unclear whether such a broad interpretation would prevail in countries that leave the term "public official" undefined. A cautious attitude should be followed by U.S. businesses operating in these countries since enforcement of such highly political laws can vary widely from year to year.

Payments to foreign officials are often made through agents. Either the corporations deem it useful, or the Middle Eastern nations require that foreign businesses employ an agent when dealing with the government. United States corporations often pay a large "compensation" to these agents for their

240. Including Morocco, Algeria, Tunisia, Libya, Egypt, Sudan, Israel, Jordan, Lebanon, Syria, Saudi Arabia, the United Arab Emirates, Yemen Arab Republic, Kuwait, Iraq, and Turkey.
242. Id. at 104.
243. Id.
244. Id. at 105 n.22; see, e.g., Law No. 58 of July 31, 1937 (amended 1962), in Al-Mawsuah-al-Musriyah lil-Tashri Wa'al-Quada (compilation of Egyptian Legislation) (1962).
245. Suse, supra note 241 at 106.
246. Id. at 107.
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services. Such payments are not unlawful in and of themselves.\textsuperscript{247} However, many Middle Eastern countries consider it unlawful if the agent is merely a conduit for payments that are eventually received by an official.\textsuperscript{248} The payor may be able to avoid fines by showing he or she did not know the final destination of the payments.\textsuperscript{249} Most Middle Eastern statutes do not require the corporation to inquire about postpayment activities of an agent.\textsuperscript{250} Businesses should document, whenever possible, the legal purpose of a payment (e.g., the requirement that it only be used for proper purposes).

Finally, Middle Eastern countries are divided on whether payments for actions outside public functions of the official are punishable.\textsuperscript{251} Most domestic laws criminalize these payments. For instance, in Saudi Arabia, regulations prohibit payments to an official aimed at using “his genuine or alleged influence” to try to get from any public authority, works, ordinances, decisions, commitments, concessions, procurement contracts, or a job, service, or any kind of privilege.\textsuperscript{252}

\begin{quote}
\textsuperscript{247} Id.
\textsuperscript{248} Id. at 108 n.38 (citing Criminal Code of Sudan, Chap. 13(1), art. 129, Law No. 64 of 1974, in Gazetta Jumhuriyat al-Sudan al-Dinugraitiyah (Official Gazette) No. 1162 of June 30, 1974 (Library of Congress translation)). According to the translation:

Anyone who accepts, takes, or agrees to accept or tries to take any kind of gift, for himself or another, as an incentive or reward to induce a public official, by corruption and illegal means to:

\begin{enumerate}
  \item perform or refrain from performing any official act;
  \item show, in the performance of his duty, partiality for or against any individual; or
  \item render any service to any person, or cause him damage, or attempt to cause any of these to any government agency or public official, shall be punished by imprisonment for a period not exceeding 5 years, or a fine, or both penalties.
\end{enumerate}

\textsuperscript{249} Id. at 108.
\textsuperscript{250} Id.
\textsuperscript{251} Id. at n.49, (comparing, Jordan, Criminal Code of Jordan, arts. 170-73 in Gazetta Jumhuriyat al-Sudan al-Dinugritiyah (Official Gazette) No. 1162 of June 30, 1974 (Library of Congress translation) and Iran, Iranian Criminal Code of 1925-26 in Nasri, Magmj'ah-i Mudawan-i gavanin va mugarrat-i jaza'i (1971) (holding outside acts permitted) with Saudi Arabia, Regulations against Bribery, art. 5, Decree No. 15 of August 1962 (Library of Congress translation) (holding outside acts punishable)).
\textsuperscript{252} See Suse, supra note 241, at 110.
\end{quote}
b. Types of Considerations Prohibited

An illicit benefit is usually prohibited. The following transactions would be sanctioned in most Middle Eastern jurisdictions: payment of cash; gifts of property (i.e., jewelry or art items); gifts of services (i.e. automobiles or aircraft); and granting of unsecured loans. A few countries, like Kuwait and Sudan, specify which benefits are illegal.

c. Purpose of the Payor

In Middle Eastern countries, the payment must be made with corruptive intent to be illegal. The payment must be intended to induce the official to misuse his position. The so-called "aggressive payments," made directly in exchange for new business, address this element of intent. Invariably, "grease payments" are deemed lawful if they are made to expedite actions that low-level officials would perform anyway.

Other payments, such as "defensive payments," may be deemed lawful. In this situation, payment is made to avoid adverse governmental action. However, it seems that only a physical or personal threat is likely to exonerate the payor. Economic threats, such as the possibility of expropriation or nationalization of a business does not legitimize a payment.

As to sanctions on bribery, most Middle Eastern countries levy fines or compel imprisonment which generally does not
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exceed five years. Civil penalties may also be imposed, such as a prohibition from operating in the country.

The enforcement of bribery statutes has been extremely uneven and inconsistent because prosecution of bribery is discretionary by nature. Political and economic considerations often influence decisions to investigate and/or prosecute bribery. Obviously, some governments cannot afford the disclosure of bribery scandals. It follows that a large number of questionable payments are not challenged, despite well-publicized anti-bribery campaigns in several Middle Eastern countries. In brief, it is difficult for a foreign corporation to know precisely if its actions are likely to be criminal. Even though all Middle Eastern countries expressly prohibit bribery of their public officials, anti-bribery statutes are frequently vague and unpredictable.

2. Germany

The Strafgesetzbuch ("StGb") defines the crimes of government officials and employers, or what may be termed corruption. Sections 331-335a StGb govern circumstances which include payment and acceptance of bribes and nonfinancial advantages in return for past, present, and future favors. A subchapter addressing criminal offenses by public officials includes passive corruption. Bribing judges and arbitrators in Germany can result in three years imprisonment or a fine. Committing the same act with other officials, such as civil servants, can bring two years of prison or a fine. In situations where an official violates his or her duties to grant the desired favor, the offeror of the bribe is subject to imprisonment.

262. Id. at 116 & app. III (detailing penalties to which bribery is subject).
263. Id.
264. Id. at 117.
265. Id.
266. See supra Part III.A.1.
267. STRAFGESETZBUCH § 331-335a (F.R.G.).
268. Id. §§ 331-335a.
269. See id. § 331, Simple Passive Bribery (authorizing punishment of governmental officials who accept bribes); § 332, Aggravated Passive Bribery (punishing government officials for accepting a benefit for performing an official act).
270. See id. § 333(2).
271. See id. § 333(1).
from three months to five years.\textsuperscript{272} In less severe cases covered under section 332(1) StGb, the offeror is subject to imprisonment of not more than three years or a fine.\textsuperscript{273} If the offeree is a judge or arbitrator who violates certain official duties, the attempt and granting of the desired favor is punishable by imprisonment for three months to five years.\textsuperscript{274}

3. France

Article 179 of the French Penal Code defines the offense of corruption as the intentional use of violence or threat of violence, gifts or promise of gifts for the purpose of obtaining an action or abstention from action by a public official.\textsuperscript{275}

French courts have interpreted broadly acts which constitute bribery, i.e., violence or threat of violence, and gifts or a promise of gifts. The French Supreme Court even considers indirect words or writings of threats that lead a public official to think that libelous disclosures could be made against him as within the scope of Article 177.\textsuperscript{276}

The act in purpose must be accomplished by an official act or even abstention.\textsuperscript{277} The act can be one within official function or merely an act facilitated by official function.\textsuperscript{278} For example, Article 179 would apply to a bribe for the purpose of asking a public official to influence other officials or to gain information about other people with whom the official may

\begin{itemize}
 \item \textsuperscript{272} Id. at § 334(2).
 \item \textsuperscript{273} Id. § 332(1).
 \item \textsuperscript{274} Id.
 \item \textsuperscript{275} See, e.g., DELMAS-MARTY, supra note 238, at 91.
 \item \textsuperscript{276} Id. at 92-93. See Court of Cassation, Chambre Criminelle, Nov. 21, 1977; see also cases separated into two corruption categories in the French Penal Code: "Corruption-Passive," and "Corruption Active." These cases are fully cited as:

\begin{itemize}
 \item \textit{Corruption Passive}. That after intention is established in the corrupt act as non conclusive on the facts, complacent acts can qualify as a violation.


\item \textit{Corruption Active}. That the French Courts view the nature of the corrupt act in a case, particularly regarding solicitations (new business) pendant upon sexual relations.

\end{itemize}

\item \textsuperscript{277} Delmas-Marty, supra note 237 at 92.
\item \textsuperscript{278} Id.
\end{itemize}
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Acts of abstention may include the failure of an official to check submitted documents or excuse irregularities committed by a corporation.

The French impose penalties in the form of a fine. The amount levied is twice the amount of money represented by the gift act, whether given or promised. A minimum fine of 1,500 Francs and/or imprisonment from two to ten years is imposed for such acts.

4. Switzerland

Articles 288, 315 and 316 of the Swiss Penal Code prohibit a promise and/or giving bribes. The receipt of bribes or facilitating such payments are also prohibited. However, Swiss law does not punish a corporation making "grease payments"; only a public official is subject to punishment.

The definition of public official is rather vague and seems not as broad as the French equivalent. In Switzerland, the term encompasses judges, arbitrators, court room interpreters, and generally any official. Moreover, the act of bribing a mere citizen that is temporarily in charge of a public service is not within the scope of the Penal Code.

In 1973, Switzerland signed a Treaty of Mutual Assistance in Criminal Matters with the United States. The act of bribing a public official is an offense for which mutual assistance is available. These acts include ascertaining the where-

279. Article 179 applies to all individuals vested with a public function: elected officials at the national or local level; civil servants regardless of their position; and any citizen entrusted with any kind of public service whether permanently or temporarily. Id. at 87.
280. Id. at 89.
281. Id. at 86 (for passive corrupt acts, which fall under Article 177); id. at 91 (for active corrupt acts, which fall under Article 179).
283. Id. at 81.
284. Id.
285. Id.
286. Id. at 81 n.7 (citing SWISS PENAL CODE, arts. 110, 288 & 315).
287. Id. at 81.
288. Id. at 83 n.11 (giving citation for the Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, U.S.-Switz., at 27 U.S.T. 2019, T.I.A.S. No. 8302). For further discussion of MLATs, see infra Section IV.A.
289. Id.
abouts of persons, taking testimony from persons, and effecting the production of documents.290

In brief, Switzerland is one country where corruption of officials is most severely proscribed. According to Lachat-Heritier, incidence of bribery of public officials is also low.291 Bribery is not common because political power is decentralized in Switzerland, and thus, public officials are under close scrutiny by their constituents.292 Additionally, the majority of public officials in Switzerland are elected, not appointed.293

B. Foreign Securities Laws on Insider Trading

The United States has been a pioneer in developing sophisticated regulatory and enforcement laws regarding securities transactions, especially in the area of insider trading. Foreign countries with major capital markets have enacted similar laws in recent years. The European Union ("E.U.") is a prime example that demonstrates the design and implementation of insider trading laws.294 The European Union states have developed a mix of legal and non-legal regulatory and enforcement provisions against insider trading. In 1989, an E.U. Directive required the states to harmonize their regulatory regimes.295 For purposes of brevity, this account discusses only this Directive.

The E.U. Directive is an effort to respond to Union-wide threats posed by insider dealing. The Directive aims to build on United Kingdom and French experience in this area of regulation.296

Most importantly, member states are required for the first time to "prohibit" and penalize insider trading.297 The

290. Id.
291. Id.
292. Id. at 83.
293. Id.
294. See generally MARK STALLWORTHY, Legal Regulation of Insider Dealing in the United Kingdom and the European Community, in INTERNATIONAL TRADE AVOIDING CRIMINAL RISKS, Ch. 3 (William M. Hannay ed., 1991) [hereinafter STALLWORTHY].
296. Hopt, supra note 296, at 51-52.
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directive is a minimum standard measure. Thus, member states can make stricter provisions than those required by Community law.298

The Directive defines inside information as:
information which has not been made public, which is of a precise nature relating to one or several issuers of transferable securities or to one or several transferable securities, which, if it were made public, would be likely to have a significant effect on the price of the transferable security or securities in question.299

The nature of the inside trading prohibitions are best understood by first looking at the categories of persons brought under legal control.

The Directive applies insider dealing prohibitions to primary insiders for any person who possesses information by administrative membership, financial interests, or scope of duty. It also applies prohibitions by forbidding certain actions.300

Primary insiders are required neither to deal nor to influence others to deal in breach of the terms of the Directive.301

The Directive makes available exemptions and defenses. It excludes certain legitimate operations from its prohibitions in

298. Id. art. 13, sentence 1.
299. Id. art. 1(1).
300. Id. art. 2. The Directive explains:
Each member state shall prohibit any person who: by virtue of his membership of [sic] the administrative, management or supervisory bodies of the issuer, by virtue of his holding in the capital of the issuer, or because he has access to such information by virtue of the exercise of his employment, profession or duties, possesses inside information from taking advantage of that information with full knowledge of the fact, by acquiring or disposing of for his own account or for the account of a third party, either directly or indirectly, transferable securities of the issuer or issuers to which that information relates.

Id. art. 2(1).

Each member state shall prohibit other persons who, with full knowledge of the facts, possess inside information if the direct or indirect source of that inside information could not be other than a primary insider. Id. art. 4. The Directive also prohibits “secondary” insiders from acquiring or disposing of transferable securities.

Id. art. 5.

301. See id. art. 2 (stating that a primary insider is prohibited from taking advantage of inside information for their own benefit or the benefit of a third party); id. art. 3 (stating that a primary insider is prohibited from “disclosing . . . inside information to any third party” or, on that basis, “recommending or procuring a third party . . . to acquire or dispose of transferable securities,” but it does not extend liability to tipping by a secondary insider).
The Preamble. The Directive does not apply to "transactions carried out in pursuit of monetary, exchange-rate or public debt-management policies by a sovereign State, by its central bank or any other body designated to that effect by the State, or by any person acting on their behalf." Member states can assert that the directive's prohibitions do not apply to transactions "effected without the involvement of a professional intermediary outside [an official] market.

The nature of transferable securities is key to understanding the concept of inside information. The Directive defines transferable securities as instruments "admitted to trading on a market which is regulated and supervised by authorities recognized by public bodies, operates regularly and is accessible directly or indirectly to the public." Member states can assert that the directive's prohibitions do not apply to transactions "effected without the involvement of a professional intermediary outside [an official] market.

The Directive requires E.U. members to impose penalties for violations of insider dealing. The Directive leaves the administration of penalties to each member state, which is to be "sufficient to promote compliance with [E.U.] measures."

Under the Directive each member state is to ensure that the Directive's provisions are applied and that these provisions are given "all supervisory and investigatory powers that are necessary for the exercise of their functions." Domestic enforcement authorities must be established by each E.U. member when it is necessary to collaborate with other authorities.

302. Id. Directive Preamble. The following are not considered use of inside information:

[(1)] the mere fact that market-makers, bodies authorized to act as "contrepartie," or stockbrokers with inside information confine themselves, in the first two cases, to pursuing their normal business of buying or selling securities or, in the last, to carrying out an order...

[(2)] the fact of carrying out transactions with the aim of stabilizing the price of new issues or secondary offers of transferable securities; [or]...

[(3)] any transaction carried out on the basis of... estimates [developed from publicly available data].

Id.

303. Id. art. 2(4).

304. Id. art. 1(2). The covered instruments include shares and debt securities, puts and calls, futures, options, and index contracts. Id.

305. Id. art. 2(3).

306. Stallworthy, supra note 294, at ch. 3, § 3.03.


308. Id. art. 8.

309. Id.
The Directive requires a duty of cooperation, which includes the exchange of information between authorities across frontiers "whenever necessary for the purpose of carrying out their duties." The exchange by the member states should include information on prohibited actions under the options in Articles 2 and 3 of the Directive which compel more stringent provisions than those of the Directive that request cooperation. Many E.U. member states have concluded bilateral agreements or memoranda of understanding with foreign countries to gather and exchange regulatory information or intelligence in corporate securities law. E.U. member states have already enacted insider trading laws and have prosecuted under these regulations. In March 1994, the media reported the first conviction under the insider trading law in Italy.

C. Foreign Environmental Offenses

Some of the world's most tragic and significant ecological disasters have resulted in part from transnational investment, such as in Bhopal, India, in 1984 and the gradual process of deforestation in Brazil's Amazon region. Environmental problems in many foreign countries are broad and include air, water, noise pollution and soil erosion. These countries also face future world-wide environmental issues, such as the enhanced greenhouse effect, global warming, and the use or release of genetically manipulated organisms. Environmental issues are regularly displayed by the media in most countries and have become mainstream political issues.

310. Id. art. 10(1).
311. See Stallworthy, supra note 294, § 3.06C; Council Directive, supra note 295, art. 10(1) (cross-referencing articles 5, 6).
312. See Stallworthy, supra note 294, § 3.06C.
314. For an excellent overview, see Anna Alvazzi del Frate and Jennifer Norberry, Rounding Up: Themes and Issues, in ENVIRONMENTAL CRIME, SANCTIONING STRATEGIES AND SUSTAINABLE DEVELOPMENT 1-21 (United Nationals Interregional Crime and Justice Research Institute, Publication No. 50 Nov. 1993) [hereinafter NORBERRY].
315. Id. at 4 n.13.
A comparative discussion of approaches to environmental crimes is difficult because environmental protection operates in many countries at quite different levels—national, state, and local—or combinations of levels. It is also not possible to compare enforcement data between countries, because in some countries, access to data is a problem. In other countries, environmental protection systems are either minuscule or so recent in origin that little or no information is available. For these reasons, this section will identify and briefly discuss issues and trends including criminal enforcement of foreign environmental law.316

Several developed countries are enforcing statutory environmental protection through a more aggressive use of criminal law.317 Other bodies of the law are used, such as public health or resource statutes, and in some cases, civil codes. For instance, polluting the environment is often sanctioned in the context of endangering public health or under a nuisance theory.318

 Constitutional issues are also an important tool in environmental enforcement in that a constitution may provide guarantees of environmental protection.319 The protection afforded by delegating responsibility for environmental matters through a constitutional division of power may be decreased with each level of delegation.320 Delegation to the various government levels may also impair the cooperation necessary to coordinate an efficient enforcement strategy.321

 Some governments have provided constitutional guarantees protecting the environment by placing obligations on the state and its citizens to further strengthen and protect the environment (e.g., the Constitutions of Brazil and China).322 These countries give citizens the constitutional right to remedy environmental degradation through independent legal action.323

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316. Id. at 1.
317. Id.
318. Id. at 6.
319. Id. at 6-7.
320. Id.
321. Id.
322. Id. at 7.
323. Id.
Enforcement of environmental protection loses its strength in actual implementation. For example, even though Article 225 of the Brazilian Constitution imposes penal liability upon legal persons for environmental degradation, Brazilian constitutional provisions are not self-executing.\textsuperscript{324} The Brazilian judiciary only recognizes environmental liability of legal persons under ordinary law.\textsuperscript{325} Therefore, since Article 225, paragraph 4, has not been given the effect of ordinary law, the constitutional provision has no teeth.\textsuperscript{326}

National constitutions were typically adopted prior to the development of modern environmental laws. In many countries, the local government units may enjoy residual power in areas not specifically reserved in the federal constitution. Often, the environment is not given specific mention in the national constitution.\textsuperscript{327} Environmental laws in some nations are incidentally linked to other constitutional powers such as commerce, territorial maritime jurisdiction and foreign affairs.\textsuperscript{328}

When the division of power is not clear, such as in Argentina,\textsuperscript{329} confusion and uncertainty over direct responsibility may exist. The confusion can develop into conflict when the national government attempts to legislate or enforce environmental protection matters traditionally reserved to the state governments, as in Nigeria.\textsuperscript{330}

Many countries have "a multi-tiered environmental protection structure" at state or provincial and local government levels.\textsuperscript{331} The result is several different models of environmental protection.\textsuperscript{332} Some agencies are focused and specialize in environmental protection, whereas in other government agencies, environmental protection is merely an incidental

\begin{itemize}
  \item \textsuperscript{324} Id.
  \item \textsuperscript{325} Id. at 7.
  \item \textsuperscript{326} Id.
  \item \textsuperscript{327} Id.
  \item \textsuperscript{328} Id.
  \item \textsuperscript{329} Id. For example, in Argentina, Australia and Nigeria, the political subdivisions have power over matters not specifically set forth in the constitution. Id.
  \item \textsuperscript{330} Id. at 7.
  \item \textsuperscript{331} Id. at 8. An example is Australia, which has the Victorian and New South Wales Environmental Protection Authorities. Id. n.24.
  \item \textsuperscript{332} Id. at 8.
\end{itemize}
Several environmental protection agencies are entrusted with one or more functions of formulating policy, setting standards, and administering and enforcing rules or laws.

Persons foreign to a particular country can experience problems due to a lack of coordination between the agencies, and their individual and sometimes undefined responsibilities. The potential for conflict between agencies operating at national, state and provincial, and local levels is ever present. As a result, it is extremely important to understand the legal frameworks of foreign environmental criminal law.

There are two identified legal models of environmental protection. The first model utilizes a central environmental code (e.g., the Australian States of Victoria, Western Australia and Tasmania). The second model employs separate laws for various environmental concerns (e.g., China, India, and the Australian States of New South Wales, Queensland and South Australia). However, these models are not mutually exclusive. An additional model exists in countries where environmental protection is found indirectly, through laws covering natural resources such as fisheries, forests, minerals and water (e.g., Argentina, Brazil and Tunisia). It is difficult to work through these legislative frameworks. Fragmentation, inconsistency, duplication and gaps are compounded by amendments to environmentally-related legislation, many of which date back to the early part of the century.

333. Id.
334. Id. at 8 n.25. As an example in Brazil:
[The] National System for the Protection of the Environment (SISNAMA) includes a Federal Council of Environment Protection (CSMA), which assists in the drafting of national environmental policy, a National Board on Environment (CONNAMA), which makes decisions about norms and standards, and the Brazilian Institute of Environment and Renewable Natural Resources (IBAMA), which coordinates and implements national environmental policy.

Id.
335. Id. at 8.
336. Id.
337. Id. at 8-9.
338. Id. at 9.
339. Id.
340. Id.
Substantive criminal law is an increasingly important element of the environmental protection legal framework in many countries.\textsuperscript{341} Three basic legal sanctions are used for environmental enforcement.\textsuperscript{342} The first sanction utilizes criminal law and quasi-criminal or regulatory offenses.\textsuperscript{343} The second employs administrative sanctions and the third, civil sanctions.\textsuperscript{344} Although many countries protect the environment primarily through civil or administrative sanctions, the use of criminal penalties is on the rise.\textsuperscript{345}

Criminal codes, statutes and administrative environmental protection statutes usually include criminal sanctions.\textsuperscript{346} The penalty for an environmental offense is typically a fine or imprisonment, or both.\textsuperscript{347} Some countries are attempting to strengthen their penal sanctions by increasing maximum initial fines, levying higher fines for repeat offenders, imposing larger fines for corporations than for individuals and, issuing daily fines for on-going offenses.\textsuperscript{348} The threats of significant economic penalties are designed to deter potential offenders belying the view that fines are merely a cost of doing business.\textsuperscript{349}

Imprisonment is another means to punish environmental offenders. Some nations include imprisonment in public health offense and nuisance provisions of criminal codes or in administrative environmental statutes.\textsuperscript{350} In Nigeria and Argentina, violators of hazardous waste laws may be imprisoned,\textsuperscript{351} in Nigeria imprisonment could be for life.\textsuperscript{352} Environmental protection agency officials in some jurisdictions incur both criminal and civil liability for environmental destruction resulting from a violation of their statutory duty.\textsuperscript{353} One

\textsuperscript{341} Id.
\textsuperscript{342} Id. at 10.
\textsuperscript{343} Id.
\textsuperscript{344} Id.
\textsuperscript{345} Id.
\textsuperscript{346} Id.
\textsuperscript{347} Id.
\textsuperscript{348} Id.
\textsuperscript{349} Id.
\textsuperscript{350} Id. Furthermore, in some jurisdictions in Australia, parties guilty of aggravated pollution may be imprisoned for up to seven years. Id.
\textsuperscript{351} Id.
\textsuperscript{352} Id.
\textsuperscript{353} Id. at 11.
country indirectly imposes criminal liability on corporations by sanctioning corporate employees.\textsuperscript{354}

Variations among national environmental criminal laws exist in standards of culpability and evidentiary requirements. These variations include the establishment of intent, proving pollution or damaging effects, and "linking the pollution, the substance and the polluter."\textsuperscript{355} The result is a trend toward new mechanisms that allow better application and enforcement of criminal responsibility.\textsuperscript{356}

Strict liability is the solution used by some nations to avoid the problems that occur when criminal law is imposed.\textsuperscript{357} In these countries, a defense of honest and reasonable mistake is useless.\textsuperscript{358}

In some jurisdictions, a corporate official automatically becomes a defendant and must overcome a presumption of guilt if his or her corporation is found in violation of environmental laws.\textsuperscript{359} Unless corporate directors and managers can establish a specified defense, such as due diligence and lack of knowledge of the contravention, some agency laws assume they are guilty.\textsuperscript{360}

It is important to understand the effect of international conventions and agreements on environmental issues within the national laws and regulations of each country. In many countries these international conventions may not be self-executing and require implementing legislation, despite the fact that the conventions and agreements have been ratified.\textsuperscript{361}

\textbf{D. Foreign Tax Offenses}

Due to increasing international business transactions, a trend exists for legislators, intergovernmental agencies and organizations to focus on the phenomenon of tax crimes. The governments' need to obtain more tax revenue and ensure
equity motivates the fight against evasion. There has been a tendency towards a closer examination of noncompliance, including the forms it can take and the techniques for countering it. In international and regional bodies, there have been several studies on the growing efforts against tax noncompliance. Indeed, some countries, such as Malta, have alleged that deprivations of the Convention are reasons for its decision not to sign the Council of Europe Organization of Economic Cooperation and Development Convention on Mutual Administrative Assistance in Tax Matters.

This section only considers preliminary examples of tax crime and distinguishes between tax evasion and tax fraud. Further, this section reviews general tax legal theories (e.g., the concept of abuse of law), special measures taken by some countries, and international cooperation against international tax evasion. The treatment of tax evasion in selected countries is then considered.

1. Substantive Aspects

Substantive aspects of tax crimes can be important in determining whether one country will cooperate in the prosecution or enforcement of a criminal tax prosecution.

a. Tax Evasion

Tax evasion occurs when “the taxpayer intentionally avoids payment without avoiding the tax liability.” The taxpayer who is guilty of tax evasion has unquestionably broken the law. However, many countries do not agree on the definition of evasion. This is due to differing attitudes toward the constituent elements of evasion, such as the behavior or action of the taxpayer in order to avoid payment of taxes. For instance, the taxpayer may evade taxes by inaction such as failing to file returns for income, paying the tax authority amounts deducted from employees’ wages, or providing the authorities with the information necessary to proceed to an assessment. Addi-

tionally, tax evasion may result from fraudulent acts, such as falsifying accounts, submitting false declarations, faking invoices, claiming fictitious deductions, improperly characterizing expenses and income, etc. 366

In most countries, a taxpayer’s act of omission or inaction and active behavior can result in tax evasion. 367 "The differences between acts of omission and active behavior has no special significance in most jurisdictions." 368 However, for the purpose of the application of criminal sanctions, the analysis of the different ways in which evasion can occur may be significant in identifying the place where the unlawful behavior occurs. 369 Some countries apply the criterion of the place where the action or omission occurs. Other countries focus on the place where the effect occurs, while others use the criterion of where the illegitimacy is ascertained. 370 The most serious problem in many countries, and indeed in international law, is not so much distinguishing between “tax evasion” and “fraud” or between “evasion” and “avoidance,” 371 but rather of delimiting the scope of “tax avoidance.” 372 It can be difficult for businesses with international operations to make long-term business plans when governments have different concepts of avoidance and evasion as well as when governments change these concepts and begin to criminalize behavior over time. 373

Tax evasion may result from a taxpayer’s intentional deception. 374 The taxpayer’s mens rea may be an evil state of mind, such as bad faith, intent to evade taxes, or willfulness. 375 However, sometimes a transaction that appears to be a willful evasion, upon examination, will reveal that the violation resulted from good-faith reliance on others’ misinformation. In such

366. Id.
367. Id.
368. Id.
369. Id.
370. Id. See also J. Van Hoorn Jr., The Use and Abuse of Tax Havens, in TAX HAVENS AND MEASURES AGAINST TAX EVASION AND AVOIDANCE IN THE EEC 1-10 (J.F. Avery Jones ed., 1974) [hereinafter TAX HAVENS] (discussing the difficulty between tax evasion and tax avoidance in the international context).
371. Uckmar, supra note 362 at 2-23.
372. Id.
373. See Jud Harwood et al., The U.S. and U.K. Lock Horns Over a U.S. Transfer-Pricing Criminal Investigation, 44 TAXES INTERNATIONAL 3 (June 1983).
374. Id.
instances, the incompetence of bookkeepers or an honest, but mistaken interpretation of the applicable law may erroneously suggest willful evasion. In addition to willful behavior, the taxpayer’s evasion can occur due to “ignorance (unawareness of the law), error (miscalculation), or negligence (for example, failure to safeguard records).”

In some jurisdictions, such as Austria, Greece, Luxembourg, Norway, France, Denmark, Switzerland, Israel and Italy, tax evasion does not usually require the taxpayer to intend the evasion. However, willful avoidance of tax payment is the most common form of evasion. Nevertheless, intent to evade is required to establish a criminal offense.

When the law regarding tax evasion requires an intentional act “motive is inferred from the demonstration as a matter of fact that ‘concealment’ or ‘disguise’ (for example, France) has occurred.” The courts in some jurisdictions determine intent on a case-by-case basis in accordance with applicable criminal law. Willful evasion can thus “be inferred from false data, clear contradiction between books, documents and other correlative records, and data contained in sworn statements which might imply an incomplete declaration of the taxable matter.”

In most countries, unintentional evasion results only in the obligation to pay interest on the additional tax assessment and in the imposition of penalties. In other jurisdictions, such as Denmark, the same approach is used, however the application is limited to unintentional evasion resulting from negligence, and not to gross negligence. Nevertheless, these circum-

376. Id.
377. Id. at 22.
378. Id.
379. Id.
380. Id.
381. Id.
382. Id. (citing Israel, Argentina, and Germany as examples).
383. Id.
384. Id. (citing Israel as an example).
385. Id. For example, in Denmark, the same approach is used, however, the application is limited to unintentional evasion resulting from negligence, and not to gross negligence. Id. On the other hand, Italy “does not distinguish between intentional and unintentional evasion or ordinary negligence/gross negligence.” Id. In Germany and Austria, evasion always requires the taxpayer to intend the evasion. Id. However, if the taxpayer confesses before the tax authorities discover the evasion,
stances may normally be considered by tax courts, "which are legally entitled not to apply penalties if the interpretation of the law is controversial." A survey concluded that it is not possible to identify with reasonable certainty the common criteria or underlying concepts of evasion analysis.

b. Tax Fraud

Tax fraud is characterized by the payer's specific intent to evade taxes. Most countries criminalize fraud and thus have elaborate legislative provisions regarding the psychological element.

In international tax cooperation, some countries, such as Switzerland, provide for mutual assistance only if the matter of the proceedings is a case of tax fraud and not of simple "evasion." The European Convention on Extradition Protocol, provides for extradition "whenever, under the law of the requested State, the fiscal offense corresponds to a violation of the same nature."

c. General Measures to Combat International Tax Evasion

Each country has measures to combat international tax evasion. Civil law countries developed a theory of abuse of law "under which no one can exercise his rights in conflict with the function to which the right was attributed." In tax

punishment can be avoided. Id.

386. Id.
387. Id.
388. Id. at 22-23.
389. Id. at 23.
390. Id.
391. Id. For additional discussion of Swiss cooperation policies in international tax, see, e.g., 3 Tax Treaties (CCH) 9158.28 (1990); Mario Kronauer, Information Given for Tax Purposes from Switzerland to Foreign Countries Especially to the United States for the Prevention of Fraud or the Like in Relation to Certain American Taxes, 30 TAX L. REV. 47 (1974); Dr. Walter Meier, Banking Secrecy in Swiss and International Taxation, 7 INT'L LAW. 16 (1973).
392. Uckmar, supra note 362, at 24. These measures can take several forms, including "statutory provisions, administrative procedures, or the development of case law." Id.
393. Id. at 26. This concept is a constituent element in the judicial systems of these jurisdictions. Id. In Portugal, Germany, Argentina, the Netherlands, and France, the "abuse of law" theory is applied in tax matters. Id. at 26-27. Slightly different approaches are taken in each country. In Germany and France, for instance, "the motive (intent to avoid tax) must be accompanied by the artificiality (abnormality) of
jurisprudence, the abuse of law principle protects the state's interest vis-a-vis the taxpayer's liberty to choose which lawful means to produce income. 394

In addition to the above-mentioned measures against tax evasion, many countries "have enacted ad hoc provisions to counteract illegitimate reductions of tax burdens when the taxable objects or subjects cross national boundaries." 395

For example, in order to reduce the loss of revenue when persons transfer their residence, "some countries have extended the unlimited tax liability of the individual for a period of years subsequent to the transfer of residence." 396 In some jurisdictions it is merely a presumption. 397 Canada, for instance, imposes a "departure tax" on a taxpayer who ceases to be a resident of Canada and has "disposed of the whole of his assets (other than property remaining subject to Canadian taxation) at their fair market value at the time of his emigration." 398

Efforts to prevent loss of revenue may lead countries to characterize different events as evasion. 399 For instance, some countries, such as Greece, Brazil, Argentina and Italy, consider non-arm's-length transactions as tax evasion. 400 Nonresident taxpayers can encounter tax evasion charges in the case of taxation of investment income at source and capital gains tax on the disposal of real estate (and shareholdings). 401

Many countries also have employed exchange control and tax clearance laws that are important mechanisms in detecting the legal form which is chosen to achieve a given economic result." Id. at 27. Germany determines this latter factor "on the basis of the taxpayer's deviation from the course of conduct normally taken by a businessman." Id. In the Netherlands, the concept of "fraus legis," which, in contrast with Germany and France, is not given statutory expression, is used by the courts to replace the "nontaxable" transaction with a "taxable" transaction, when the exclusive purpose of avoiding is combined with a factual situation economically equivalent to the one that the legislation intended to give rise to a tax liability. Id.

394. Id. at 27.
395. Id. at 32-34.
396. Id. at 34.
397. Id.
398. Id. at 35.
399. Id. Some triggering events concern the residence of companies. Evasion may include, inter alia: avoidance of residence; migration and transfer of assets; and transfer pricing. Id. at 35-36.
400. Id. at 36.
401. Id. at 38-39.
and prosecuting tax evasion. Tax-motivated exchange control measures may range from a reporting obligation, which constitutes a further source of information for tax authorities, to the prohibition on exporting business (or portfolio) income or capital without prior tax clearance. The control measures may deny authorization for the establishment, purchase or expansion of affiliated companies located in tax haven jurisdictions or deny authorizations conditioned on the repatriation of a certain proportion of income. Some countries have also made tax clearance certificates mandatory requirements for resident and nonresident persons transferring capital or income or, more generally, leaving the country. In some cases, compliance with tax rules is administered by the tax authorities in conjunction with the emigration authorities, and in other cases, with the assistance of the exchange control officials.

E. Foreign Anti-Money Laundering Offenses

Anti-money laundering law is new and developing quickly. Governments are taking unprecedented steps to encourage countries to enact laws, to assist them in the preliminary stages of investigations, and to help them modernize their procedural laws to fulfill the new bilateral and multilateral treaties. A compilation of a restatement of international money laundering or a type of international customary anti-money laundering law would be very useful in providing basic guidelines for the development of such legislation in countries throughout the world. The Financial Action Task Force ("FATF") has set forth forty principles for which participating countries are audited. The following is a simplified and abbreviated version of the FATF principles which must be addressed if a country wishes to enact effective anti-money laundering legislation.

402. See id. at 40.
403. Id.
404. Id.
The first principle adopted by the FATF is to criminalize the offense of money laundering. This principle was derived from the 1988 U.N. Drug Convention which required nation states to criminalize money laundering.\textsuperscript{406} Differing among countries is the norm of conduct and scienter requirement needed to criminalize participation in money laundering. Some countries require the transgressor to understand or at least to have knowledge of the crime, but some treaties or laws criminalize conduct that is only negligent or careless.\textsuperscript{407} Hence, it is important to study each convention and law, because if a country requests assistance and this country does not have the same mens rea standard as the requested state, the obligation to cooperate and assist may be undermined.

Another principle adopted by the FATF erodes the right to financial secrecy. A regime whose objective is to combat money laundering must, by necessity, weaken the right to financial privacy. Clearly the right to financial privacy is best protected when a lawyer explicitly protects this right and the legislature imposes criminal penalties on violators. Several countries, however, have imposed exceptions to this right to financial privacy. Attorneys must intrude on financial privacy to understand the business of their clients or a transaction under the penalty of being responsible to society for the failure to “know their client” or to recognize “suspicious transactions.”\textsuperscript{408} That is, if a lawyer or bank does not ask enough questions, they risk the possibility of committing a crime. This is a very important change in international law.

A third principle is the requirement to “know your client.”\textsuperscript{409} International movement of money is greatly affected by this requirement to obtain detailed information about clients and transactions. In the United States and Australia, this information must be transmitted to the government, which in turn compares it against information stored in a computer database which records tax information and potentially suspicious crimes.\textsuperscript{410}

\textsuperscript{407} Id.
\textsuperscript{408} Id. at 12.
\textsuperscript{409} Id. at 18.
\textsuperscript{410} See generally id. at 13.
Other countries such as Canada and France have more limited requirements. In these countries, only banks and other professionals must obtain, and maintain for some years, information about their clients and certain transactions. If there is a criminal investigation the banks and professionals must immediately transmit this information to the government. Presently, only banks and professionals must do this, but pressure is being exerted, especially by the United States and Australia, to require that this information be transmitted automatically and not just by request of governmental authorities. In the United States these reports are known as "Currency Transaction Reports." The governments of Switzerland and Italy have terminated the right of registered intermediaries, such as attorneys and accountants, to accept money in the form of deposits from their clients, without revealing the identification of such clients. The governments of Switzerland and Italy have very important financial sectors, and thus they are trying to force other governments and international organizations to take the same action so that money does not flow from their country to other countries with more lenient regulations.

A fourth principle of identifying and reporting suspicious transactions requires a bank or an attorney to inform the government if they observe suspicious financial activity. If a bank or bank official does not inform the government of the suspicious transaction, the bank or bank official is criminally liable. The requirement to inform on a client is dangerous because some governments (such as the United States), in adopting this requirement, interpret transactions with a suspicious country, with bank secrecy, or with an offshore trust

411. See generally id.
412. Id. at 16. Divergence of opinion existed within the Task Force on whether suspicious activity reporting should be mandatory or permissive. Id.; see also Office of the Comptroller of the Currency, Money Laundering: A Bankers Guide to Avoiding Problems, at 4, 7 (Dec. 1989).
414. See generally 54, BNA’s Banking Report (BNA) No. 3, at 115 (Jan. 22, 1990) (discussing the European Economic Community’s goals and program for liberalization and unification of its financial markets); When the Walls Come Tumbling Down; A United Europe Will Allow Criminals to Move Cash Profits Though Europe More Easily, 34 AM. SOC’Y FOR INDUSTRY sec., Vol. 1, No. 15, at 13 (Nov. 3, 1989) (discussing the problems facing the European Economic Community and its goal of establishing a single market in banking).
regime, as suspicious simply because these countries themselves are suspected of being money laundering havens.

It will be important for countries to study and combat the implementation of the suspicious transaction requirement because there is danger that the implementation of this law will harm the jurisdictions that have important financial sectors.

Another principle advocated by the FATF is to improve the regulation of professionals operating in the financial sector.\(^{415}\) By strictly regulating professionals and entities operating in the financial sector, governments may effectively deter money laundering. In many jurisdictions, the owners and operators of companies, trusts, financial institutions, travel agencies and other persons who manage money are not strictly regulated. However, countries with international banking sectors are beginning to establish regulations for these professionals and entities in an effort to combat money laundering.\(^{416}\)

The final principle of anti-money laundering law discussed here is the forfeiture of goods.\(^{417}\) So important has the principle become that it is itself now considered a sub-regime—the subregime of international asset forfeiture. These new anti-money laundering laws contain substantive and procedural provisions for forfeiting goods. Some laws which provide for asset forfeiture include only criminal activity, but other forfeiture laws include civil and administrative actions.\(^{418}\) Many countries cooperate with asset forfeiture provisions only when laws are derived from the penal code. Also, some countries apply these laws only to the proceeds and instrumentalities of drug-related crimes. Other countries have more comprehensive laws encompassing all crimes.\(^{419}\)


\(^{416}\) Id.


\(^{418}\) For an overview of international asset forfeiture law, see Bruce Zagaris & Elizabeth Kingma, Asset Forfeiture International and Foreign Law On Emerging Regions, 5 EMORY INT'L L. REV. 446, 513 (1991).

\(^{419}\) Id.
IV. Procedural Aspects of International Criminal Law and Related Enforcement Mechanisms

To counsel clients and participate effectively in international criminal law cases requires a detailed knowledge of the procedural aspects of international criminal law. Procedural international criminal law involves such matters as jurisdiction; obtaining evidence; investigating transnational crimes; obtaining custody of the alleged criminal(s); transferring proceedings and obtaining recognition of judgments; and transferring prisoners.

A. Mutual Assistance Treaties/Letters Rogatory

1. Mutual Legal Assistance Treaties ("MLAT")

The conclusion in 1959 of the Council of Europe’s Multilateral European Convention on Mutual Assistance in Criminal Matters carved out judicial assistance in criminal matters conventions as a separate legal instrument. In the 1970s the United States decided to try to conclude Mutual Assistance in Criminal Matters Treaties, which is one specific form of a MLAT.420

The first MLAT the United States concluded was in 1977 with Switzerland.421 Thereafter, the United States concluded treaties with eleven other countries with the negotiation process of additional countries underway.422

The purpose of mutual assistance in criminal matters treaties is to supplement international law enforcement assistance to police and other enforcement officials. In particular, their purpose is to serve as a more effective and efficient substitute for letters rogatory423 when compulsory process is

420. For a useful discussion of the history and operation of U.S. MLATs, see MICHAEL ABBELL & BRUNO A. RISTAU, 3 INTERNATIONAL JUDICIAL ASSISTANCE, CRIMINAL-OBTAINING EVIDENCE, ch. 8 (1990) [hereinafter ABBELL & RISTAU I], on which this discussion relies in part.

421. Id. at ch. 4 § 12-4-1 at 99; see also Treaty Between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters, May 25, 1973, U.S.-Switz., T.I.A.S. No. 8302, [hereinafter U.S.-Switz. MLAT]. The Switzerland-United States MLAT was signed May 25, 1973, but did not enter into force until January 23, 1977.

422. ABBELL & RISTAU I, supra note 420, at ch. 4, § 12-4-1 at 99-100.

423. Letters rogatory are the medium whereby one country, speaking through one of its courts, requests another country acting through its own courts, to assist the
required to obtain evidence, or when specific procedures must be complied with for the evidence to be admissible at a criminal trial in the requesting country. Whenever possible, it is most efficient for countries to deal directly at the police level. In most instances, MLATs specifically provide that the treaty countries can provide law enforcement assistance to each other through other channels. MLATs can, and will, be effectively used once a country decides to make a criminal tax investigation.

a. Offenses Covered

Most U.S. MLATs provide that a requested country give assistance despite the fact that the acts for which the requesting state seeks assistance would not constitute an offense under the laws of the requested state. However, the proposed Panama-U.S. MLAT requires a combination of dual criminality, and elaborates specific offenses covered without a requirement of dual criminality. The Panama-U.S. MLAT excludes specific offenses from coverage by the treaty.

For instance, some MLATs, in addition to refusing assistance for “political offenses” and “military offenses,” provide for specific exceptions for offenses such as tax offenses, exchange control offenses, antitrust offenses, and customs duty offenses. Some of the treaties, such as the proposed Panama-U.S. MLAT, nevertheless cover some of these offenses if they relate to illegal narcotics trafficking.

administration of justice in the former country. Such a request is usually granted by reason of the comity existing between nations in ordinary peaceful times. Tiedemann v. The Signe, 37 F. Supp. 819, 820 (E.D. La. 1941); ABBELL & RISTAU I, supra note 420, at ch. 3, § 12-3-3 at 75 (purporting that letters rogatory fail to meet the needs of U.S. investigators and prosecutors because they cannot be used before the grand jury stage of a criminal investigation and a court may not invoke its judicial power unless a judicial proceeding is pending).

424. ABBELL & RISTAU I, supra note 420, at ch. 4, § 12-4-2 at 100-01.
425. Id.
426. Id.
427. Id. at ch. 4, § 12-4-3 at 102.
428. Treaty on Mutual Assistance in Criminal Matters, n.d., Panama-U.S., [hereinafter Pan.-U.S. MLAT]. One of the definitions of "offense" is "any conduct punishable as a crime under the laws of both the Requesting and Requested States." Id.
429. Id. art. 2(1)(a).
430. Id. art. 2(1)(b).
431. See id.
The scope of offenses covered in an MLAT is one of the areas in which litigation arises. For example, it is a source of litigation in most international judicial assistance cases.


New MLATs require providing assistance for: (1) the immobilization and forfeiture of the proceeds of offenses for which forfeiture may be ordered; (2) the collection of criminal fines; and (3) the acquisition of restitution to victims of crimes.\(^{432}\)

In the case of issues arising in Panama, the treaty agreement to immobilize and forfeit the proceeds may be important, since under the treaty agreement the United States shares with Panama the proceeds of forfeited assets.\(^{433}\) If Panama or developing governments are vigilant and careful, these provisions may be a source of substantial revenue that can also help compensate for any loss of investment in the international financial sector of host countries. In addition to governments and defendants, many third parties, including financial institutions and businesses, will be involved.

c. Coverage of Other Civil and Administrative Matters

The Council of Europe MLAT excludes civil and administrative investigations and proceedings unrelated to criminal investigations and proceedings.\(^{434}\) The U.S.-Colombia proposed MLAT covers civil and administrative investigations and proceedings.\(^{435}\) One of the reasons that Colombia was not able to ratify the treaty was the broad coverage of proceedings. The United States has not proposed such broad coverage since.\(^{436}\) However, the trend internationally, such as in the European Laundering Convention,\(^{437}\) is to cover civil and administrative proceedings. The United States advocated such

\(^{432}\) E.g., id. art. 14(2).
\(^{433}\) See id.
\(^{434}\) See ABBELL & RISTAU I, supra note 420, at A-137.
\(^{435}\) Id. at ch. 4 § 12-4-3 at 104. The Mutual Legal Assistance Treaty Between the United States and the Republic of Colombia has been approved for ratification by the U.S. Senate, but is not presently in force. Id.
\(^{436}\) Id.
\(^{437}\) Council of Europe: Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime, Nov. 8, 1990, 30 I.L.M. 150.
coverage since requested states have refused to enforce civil in rem forfeitures from the United States. The requested states were not held covered by treaties and they conflicted with due process requirements for defendants in criminal cases. The proposed U.S.-Panama MLAT allows a requested state, in its discretion, to provide assistance to any administrative agency performing an adjudicatory function in the requesting state concerning the imposition of civil or administrative sanctions which is ancillary to other covered matters.438

d. Taking Testimony

U.S. MLATs require a requested country to compel the appearance of a witness located within its territory before its judicial authorities for purposes of testifying in connection with a criminal investigation or proceeding in the requesting country.439

Generally, the provisions allow the presence of such persons as specified in the request during the execution of the request.440 The purpose of such provision is to allow a defendant in a criminal proceeding in the requesting country to effectively cross-examine a witness, whose testimony in a requested country is compelled under the applicable treaty. This means that the defendant and/or defense counsel can be present and can directly or indirectly interrogate the witness. In contrast, many civil law countries require that a defense counsel propose questions to the judicial authority conducting the examination. The foreign judicial authority will then ask the questions to the witnesses.

438. Pan.-U.S. MLAT, supra note 428, at art. 2(3)(e). The term "proceeding" is broadly defined to include criminal trials, including pre-trial motions, any U.S. grand jury or any preliminary investigation by Panamanian authorities; and any court or administrative agency in a hearing that could result in an order imposing forfeiture of fruits or instrumentalities of narcotics trafficking. Id. art. 2(3)(c).


440. See, e.g., Pan.-U.S. MLAT, supra note 428, at art. 9(4); Can.-U.S. MLAT, supra note 439, at art. 7(2). But see, Mex.-U.S. MLAT, supra note 439, at art. 15 (person "invited" to appear in requesting state).
e. Providing Documents, Records, and Articles of Evidence

MLATs provide for the production of records and information in the possession of the government of the requested state. Such requested state must provide copies of publicly available government documents, including documents of its judicial department.\footnote{441}{Pan.-U.S. MLAT, supra note 428, at art. 13(1); Can.-U.S. MLAT, supra note 439, at art. 13; Mex.-U.S. MLAT, supra note 439, at art. 10(1).} The requested state also has discretion to provide the requesting state with copies of records or information in the possession of a government office or agency, but not publicly available, to the same extent and under the same conditions as it would to its own law enforcement authorities. "The [r]equested [s]tate may in its discretion deny the request entirely or in part."\footnote{442}{See Pan.-U.S. MLAT, supra note 428, at art. 13(2); cf., Can.-U.S. MLAT, supra note 439, at A-71 (allowing no requesting state to deny request).} In practice, this provision can be critical to efficient cooperation between states.\footnote{443}{The provision may work as follows: An assistant united states attorney (AUSA) in Miami prosecuting a narcotics or money laundering case sees evidence that either the defendant or perhaps a witness regularly used a Panamanian bank to launder funds. The AUSA also may notice in testimony or other evidence (i.e., letters and affidavits) that such person had a beach house, an apartment building, and several expensive automobiles in Panama. The AUSA can take several approaches. Most likely, because the AUSA is extremely busy with the case and does not know anyone in Panama, he or she does nothing. However, a more enterprising AUSA, may decide to contact an attorney in the Office of International Affairs. That attorney may tell the AUSA that the information should be conveyed to the Ministry of Justice in Panama for its handling. The Ministry of Justice in Panama may utilize the information to either criminally prosecute and/or to forfeit the assets, thereby converting assets of criminals and possibly organized groups into assets of the Panamanian people. However, in practice, some reciprocity often must be present for states to freely swap information under the discretionary provision.}

In addition to the above-mentioned government documents, most U.S. MLATs provide for production and authentication of business records and other non-government documents and the
obtaining of witnesses testimony in a requested country. The requested state must compel the appearance of a witness and his or her production of the requested records, documents, and other material.

Persons ordered to produce matter in a requested country can raise whatever privileges they may have under the laws of that country with respect to the production of such matter. They can also raise such privileges if they are directed to provide requested authentication and foundation testimony.

f. Executing Requests for Searches and Seizures

MLATs obligate a requested state to conduct searches and seizures on behalf of a requested state if the request has information to justify such action under the laws of the requested state.

These provisions are intended to require a requested state to conduct a search and seizure only if the information provided by the requesting state would permit the requested state to conduct a search and seizure in connection with a violation of its domestic laws committed within its jurisdiction.

To help ensure the admissibility of the evidence seized, MLATs require the requested state to provide certificates relating to the chain of custody of records, documents, and articles seized, the identity of the objects seized, and the integrity of their condition. Under the language of the MLATs,
the certificates will be admissible in evidence in the requesting state as proof of the truth of the matters contained in them.\textsuperscript{447}  

The requested state does not have to provide any item seized to the requesting state unless the requesting state has agreed to such terms and conditions as may be required by that state to protect third party interests in the item to be transferred.\textsuperscript{448}

\textit{g. Transferring Persons in Custody for Testimonial Purposes}

MLATs normally allow a defendant in custody to be transferred to a requested state for purposes of confrontation in relation to the taking of testimony in that country in accordance with the provisions of the treaty.\textsuperscript{449}  The Panama-U.S. MLAT provides that when the appearance of a person who is in the territory of the requested state is needed in the requesting state, the requesting state may require that the requested state invite the person to appear before the appropriate authority in the requesting state.\textsuperscript{450}  The person will be informed of the kind and amount of expenses that the requesting state has indicated will be paid to him and the response of the person will be

\textsuperscript{447} See, e.g., Pan.-U.S. MLAT, supra note 428, art. 15(2); Can.-U.S. MLAT, supra note 439, art. 16(2); Mex.-U.S. MLAT, supra note 439, art. 12(2) at A-132. However, if the objects seized are records or documents, the certification may not meet the admissibility requirements of 18 U.S.C. § 3505 because the certificates do not state the manner in which the records or documents were created and maintained. That is, the certificates do not vouch for the trustworthiness of the contents of the seized documents, but only to the fact of their seizure, custody, and physical integrity. See 18 U.S.C. § 3505 (1988) and discussion in ABBELL AND RISTAU I, supra note 420, at § 12-4-4.

\textsuperscript{448} See, e.g., Pan.-U.S. MLAT, supra note 428, art. 15(3); Can.-U.S. MLAT, supra note 439, art. 16(4) at A-73. For instance, if the United States requests confiscation of assets of a trust account because one of the beneficiaries of the account was convicted of drug trafficking and some of the proceeds thereof were shown to have gone through the account, Panama, as the requested state, might want to insist on full opportunity for third parties who have a right to contest the confiscation of the proceeds of the account. Similarly, if the United States as a requesting state requests substitute or value forfeiture of an account of a bank because its customer, a deposed high-level army officer, is alleged to have used the account and there are no longer funds available, either the bank, the customer, or even creditors may want to contest such a request.

\textsuperscript{449} See, e.g., Can.-U.S. MLAT, supra note 439, art. 15 at A-72; Mex.-U.S. MLAT, supra note 439, art. 8 at A-131.

\textsuperscript{450} Pan.-U.S. MLAT, supra note 428, art. 11.
communicated promptly to the requesting state.\textsuperscript{451} The person is under no compulsion to accept an invitation by the requesting state.\textsuperscript{452}

\begin{enumerate}
\item \textbf{Documents That Do Not Require Appearance in Requesting Country of the Person Served}

All U.S. MLATs, including the one with Panama, authorize the service of a document that does not require the person served to travel to the requesting country for the purposes of appearing in a criminal investigation or proceeding.\textsuperscript{453} The Panama MLAT states that "[u]nless otherwise agreed, any request for the service of a document inviting the appearance of a person before an authority in the [r]equesting [s]tate must be transmitted at least thirty days prior to the date of the scheduled appearance."\textsuperscript{454} The requested state must return as proof of service a receipt signed by the person served or a declaration signed by the officer making service, detailing the form and date of service.\textsuperscript{455}

\item \textbf{Documents Requiring Personal Appearance in the Requesting State}

Some treaties, including the Panama, Cayman Islands, and Bahamas MLATs, expressly do not "obligate" the requested state to serve a subpoena.\textsuperscript{456} Another MLAT prohibits the imposition of sanctions by the requesting state on a person who does not comply with a subpoena.\textsuperscript{457} There are various other

\begin{itemize}
\item \textsuperscript{451} Id.
\item \textsuperscript{452} Id.
\item \textsuperscript{453} See, Pan.-U.S. MLAT, supra note 428, art. 17(1); see also, Can.-U.S. MLAT, supra note 439, art. 11(1) at A-71; Mex.-U.S. MLAT, supra note 439, art. 14(1) at A-133.
\item \textsuperscript{454} Pan.-U.S. MLAT, supra note 428, art. 17(2); cf. Can.-U.S. MLAT, supra note 439, art. 11(2) at A-71 (requiring reasonable time for service).
\item \textsuperscript{455} See, Pan.-U.S. MLAT, supra note 428, art. 17(3); see also Can.-U.S. MLAT, supra note 439, art. 11(4) at A-71 cf., Mex.-U.S. MLAT, supra note 439, art. 14(3) at A-133 (proof of service returned as specified in request).
\item \textsuperscript{456} Pan.-U.S. MLAT, supra note 428, art. 17(1); Cayman Island-US MLAT, supra note 471, art. 13(1) at A-84; Treaty Between the United States and the Commonwealth of the Bahamas on Mutual Assistance in Criminal Matters, art 17 (1) at A-46, reprinted in ABBELL & RISTAU I, supra note 420.
\item \textsuperscript{457} Treaty on Extradition and Mutual Assistance in Criminal Matters, June 7, 1979, U.S.-Turk. T.I.A.S. No. 9891, at art. 31(2) [hereinafter Turk.-U.S. MLAT].
\end{itemize}
provisions restricting the power of a requesting state to take action to compel the personal appearance in its territory.458

\textit{j. Locating and Identifying Persons}

MLATs require a requested state to use its best efforts, under a treaty request, to ascertain the whereabouts of particular persons thought to be in its territory, and who are required in connection with the investigation, prosecution or suppression of an offense in the requesting state.459 The requested state must communicate as soon as possible the results of its inquiries to the requesting state.460

\textit{k. Assisting in Forfeiture Proceedings}

Currently, the most dynamic aspect of MLATs is their use for immobilizing and forfeiting assets. The Panama MLAT provides that, if a treaty state becomes aware of the fruits or instrumentalities of offenses located in the other state that may be forfeitable or otherwise subject to seizure under the laws of that state related to serious offenses such as narcotics trafficking, it may inform the other state.461 If that other state has jurisdiction, it must present this information to its authorities for a determination as to whether any action is appropriate.462 "These authorities will issue their decision pursuant to the laws of their country, and shall, through their Central Authority, report to the other State on the action taken."463

By concluding an MLAT, Panama becomes eligible to receive assets forfeited on request from the United States under U.S. law.

\begin{itemize}
\item 458. See generally ABBELL & RISTAU I, supra note 420, at § 12-4-4, at 105.
\item 459. See, Pan.-U.S. MLAT, supra note 428, art. 16(1); Mex.-U.S. MLAT, supra note 439, art. 13(1) at A-133; cf. Can.-U.S. MLAT, supra note 439, art. 10 at A-71 (stating competent authorities are to use best efforts to locate and identify persons in request).
\item 460. See, Pan.-U.S. MLAT, supra note 428, art. 16(2); Mex.-U.S. MLAT, supra note 439, at A-133.
\item 461. Pan.-U.S. MLAT, supra note 428, art. 14(1). The Panama MLAT requires the treaty states to assist each other to the extent allowed by their respective laws and the MLAT in proceedings relating to the forfeiture of the fruits or instrumentalities of offenses, restitution to the victims of crime, and the collection of fines imposed as sentences in criminal prosecutions. Id. art. 14(2).
\item 462. Id.
\item 463. Id.
\end{itemize}
Avoiding Criminal Liability

1. Safe Conduct of Witnesses Testifying in the U.S.

Except for the Canadian and Mexican treaties, all U.S. MLATs provide that a person, whose appearance and testimony in the requesting country is requested under an MLAT, be granted safe conduct while he is in the requesting state for such purposes. These provisions are designed to encourage witnesses who cannot be compelled to travel to the requesting country, to appear and testify in that country voluntarily. The Panama MLAT provides that, while the person is in the requesting state pursuant to the execution of a request, such person will not be subject to service of process or prosecution or suit or be "detained or subjected to any restriction of personal liberty by reason of any acts which preceded his departure from the requested state." The safe conduct ceases if, ten days after the person appearing has been notified that his presence is no longer required, that person being free to leave, has not left the requesting state; or, having left the requesting state, has returned.

m. Other Types of Assistance

The MLATs authorize other types of assistance that are not expressly provided for in each respective MLAT. For example, the Panama MLAT states that assistance and procedures in the MLAT do not prevent either of the treaty states from granting assistance to the other treaty state pursuant to the


465. Pan.-U.S. MLAT, supra note 428, art. 12(1).

466. See, e.g., Italy-U.S. MLAT, supra note 464, art. 17(2) at A-121; Neth.-U.S. MLAT, supra note 464, art. 9(3) at A-150; Pan.-U.S. MLAT, supra note 428, art. 12(2); Switz.-U.S. MLAT, supra note 421, art. 27(3) at A-164.15; Turk.-U.S. MLAT, supra note 457, art. 34(9) at A-197.

467. See, e.g., Can.-U.S. MLAT, supra note 439, art. 18 at A-73 (providing that "the Parties may agree on such practical measures as may be necessary to facilitate the implementation of this Treaty").
provisions of other international agreements to which it may be a party or in accordance with the provisions of its internal laws.\footnote{468}

\textit{n. Letters Rogatory}

As discussed above, MLATs are useful tools with detailed provisions to assist in international investigations. Letters rogatory, on the other hand, are clearly inferior to the procedures of an MLAT. They may not be used prior to the grand jury stage of a criminal investigation, since a U.S. court can issue a letter rogatory only if a judicial proceeding is pending before it.\footnote{469} Further, not all countries will permit the use of letters rogatory in a grand jury stage.\footnote{470} In addition, because letters rogatory are normally not transmitted directly, substantial delays are often encountered when one uses letters rogatory. For example, the lack of proper supervision and monitoring of the transmission and implementation of letters rogatory results in delays and other problems in the execution of letters rogatory. Finally, the execution of letters rogatory is discretionary whereas execution of an MLAT is mandatory as is the method to implement the request.\footnote{471}

\footnotetext[468]{Pan.-U.S. MLAT, \textit{supra} note 428, art. 18(1); see also Mex.-U.S. MLAT, \textit{supra} note 439, art. 15 at A-133 (with identical provision language).

\footnotetext[469]{U.S. v. Reagan, 453 F.2d 165, 172-73 (6th Cir. 1971), \textit{cert. denied} 406 U.S. 946 (1972). In the Reagan case, the court interpreted the law permitting letters rogatory, 28 U.S.C. \textsection 1781. \textit{Id.} at 172. The question was when the court could issue the letters—during a grand jury investigation, or after a grand jury indictment? \textit{Id.} The court found no pointed precedent, but held that as long as an action is pending before a tribunal, it is not necessary to wait for a decision of the grand jury. \textit{Id.} at 173.


\ldots \mbox{[F]oreign jurisdictions often do not recognize United States grand jury and administrative procedures as valid bases for letters rogatory because they do not meet their "judicial proceeding" requirement for answering a letter rogatory. \textit{Id.}}

\footnotetext[471]{For a discussion of a case in which a U.S. court denied a request by the Brazilian Government for letters rogatory assistance in a criminal tax investigation, see Bruce Zagaris, \textit{U.S. Court of Appeals Overturns Brazilian Letters Rogatory Because Criminal Proceeding Is Not Imminent Enough}, 7 \textit{INT'L ENFORCEMENT L. REP.} 265 (1991).}
2. Procedure

a. Competent Authority Responsibility

The MLATs provide that a Central Authority in each treaty state has the responsibility for the administration and implementation of the MLAT.472 For Panama, the Central Authority is the Minister of Government and Justice or a person designated by him.473 For the U.S. the Central Authority is the Attorney General or a person designated by her.474

The Attorney General delegates her authority to act as the Central Authority under the MLATs to the Assistant Attorney General, Criminal Division.475 In turn, the Assistant Attorney General has redelegated the authority to the Criminal Division’s Office of International Affairs (“OIA”).476 The Director of OIA has the primary responsibility for the administration and implementation of the MLATs.

The Central Authority has the responsibility to receive and screen all treaty requests that originate in its territory.477 Requests for assistance can be made only by the Central Authority of the requesting state.478 The Central Authority of the requesting state must directly transmit all requests to the Central Authority of the requested state.479 The Central Authorities must communicate directly with one another with

472. See e.g., Cayman Islands-U.S. MLAT, supra note 441, art. 2 at A-78; Republic of Colombia-United States Mutual Assistance Treaty, signed, Aug. 20, 1980, art. 2(1), reprinted in ABBELL AND RISTAU I, supra note 420, at A-100 [hereinafter Col-U.S. MLAT]; Mex.-U.S. MLAT, supra note 439, art. 2 at A-128; Switz.-U.S. MLAT, supra note 421, art. 28(1) at A-164-15; Thail.-U.S. MLAT, supra note 441, art. 3 at A-168.

473. Pan.-U.S. MLAT, supra note 428, art. 4(3).

474. Id. art. 4(2).

475. See 28 C.F.R. §0.64-1 (1994) (stating that a central or competent authority is delegated power under treaties and executive agreements on mutual assistance in criminal matters).

476. Department of Justice, Criminal Division Directive No. 81 [reprinted in 28 C.F.R. following C.R. § 0.64-3].

477. ABBELL AND RISTAU I, supra note 420, at 136 (citing Turk.-U.S. MLAT, supra note 457, art. 28(2) at 197). See also, Can.-U.S. MLAT, supra note 439, art. 1 at A-67; Italy-U.S. MLAT, supra note 464, art. 2 at A-115; Switz.-U.S. MLAT, supra note 421, art. 28(2) at A-164.15; cf. Mex.-U.S. MLAT, supra note 439, at 128 (cooperation to take place between “coordinating authorities”).

478. ABBELL & RISTAU I, supra note 420, at § 12-4-8, at 136 (citing Thail.-U.S. MLAT, supra note 471, art. 3(4) at A-168).

479. ABBELL & RISTAU I, supra note 420, at 136-37.
respect to the treaty implementation. The Central Authorities must consult with each other for purposes of improving the effectiveness of the treaty and dealing with and trying to resolve any problems that may arise in the implementation of the treaty.

b. Responsibility to Execute the Requests

MLATs provide expressly for responsibilities of the authorities of the requested country in executing treaty requests. The Central Authority of the requested country must comply promptly with the request. If the Central Authority cannot execute the request itself, it must transmit it promptly to an appropriate authority in that country for execution. The appropriate authority or official of the requested state must represent a request before its court when judicial action is required to execute the request. The Central Authority of the requested state must return the executed request, together with all information and evidence obtained, to the Central Authority of the requesting state.

A Central Authority of the requested state necessarily acts as an intermediary and must delegate many of the tasks in the execution of a request. Normally, it will receive requests and screen them to verify their compliance with the MLAT. The Central Authority then determines whether they contain sufficient information to allow them to be executed. If so, they send them to the appropriate authority in the requested state for execution. The Central Authority acts as a liaison between the executing authority and the Central Authority of the requesting state in obtaining any additional information required to execute the request and to clarify any issues the executing authority may have with respect to the substantive and procedural requirements of the requesting state vis-a-vis the execution of the request. Finally, the Central Authority receives the executed requests and information and evidence obtained from the executing authority. It will then send it to the Central

480. Id. at 137.
481. Id.
482. Id.
483. Id.
484. Id. at 136-37.
485. Id. at 137-38.

http://open.mitchellhamline.edu/wmlr/vol21/iss3/20
Authority of the requesting state for sending to the authority which initially made the request.\textsuperscript{486}

c. Form and Contents of a Request

MLATs provide that requests for assistance must be written.\textsuperscript{487} The Panama-U.S. MLAT provides only that requests must be in writing where compulsory process is required in the requested state or where otherwise required by the requested state.\textsuperscript{488} The new MLATs also provide that in urgent circumstances an oral request can be made, but they must be followed by a written request.\textsuperscript{489}

MLATs provide the elements that must be included in a treaty request, as well as those which should be included to enable its execution and allow the evidence obtained to be introduced in evidence in a criminal trial in the requesting state.\textsuperscript{490} MLATs also have requirements regarding the lan-
guage of requests, the return of documents and articles, and costs.

(c) the identity and location of persons from whom evidence is sought.

Pan.-U.S. MLAT, supra note 428, art. 5(2)(3).

Other MLATs provide that the requesting state must provide a list of questions to be answered, the form in which documents and evidence should be produced and authenticated, a description of documents and articles to be produced, and information concerning persons likely to be affected by the request (but who are not the subject of the investigation or prosecution). See, e.g., Switz.-U.S. MLAT, supra note 421, art. 29(2) at A-164.16; Italy-U.S. MLAT, supra note 464, art. 3(2) at A-116.

491. MLATs provide that if the two treaty states do not speak the same language, a request must be translated into, or submitted in, the language of the requested state. Most MLATs also require documents accompanying requests to be translated into the language of the requested state. See, e.g., Mex.-U.S. MLAT, supra note 439, art. 4(1) at A-129; Thail.-U.S. MLAT, supra note 471, art. 4(1) at A-168-69.

492. See MLATs noted supra note 519. MLATs provide that the requesting state must return the documents, records, and articles transmitted to the requesting state in executing a treaty request. Most MLATs specify that such material must be returned to the requested state as soon as possible unless the requested state waives their return.

493. See, e.g., MLATs noted supra note 519. MLATs state that the costs of executing treaty requests be allocated. Much difference exists among the treaties concerning which country should bear the costs of execution. All MLATs provide that the requesting state is responsible for the costs of: (1) transferring and returning persons in custody; (2) the travel and subsistence expenses of witnesses who appear in a proceeding in the requesting state pursuant to a treaty request; and (3) the fees of expert witnesses who testify in either the requesting or requested state. See, e.g., Pan.-U.S. MLAT, supra note 428, art. 7(1).

The Panama-U.S. MLAT provides that the requested state must bear all ordinary expenses of executing a request within its boundaries, except certain costs that the requesting state must meet. See, e.g., Pan.-U.S. MLAT, supra note 428, art. 7(2). Article 7(2) of the Panama-U.S. MLAT requires the requesting state to pay for costs associated with the following: (1) expert fees; (2) translations and transcriptions; (3) travel and incidental expenses of persons traveling to the requested states to attend the execution of a request; (4) reasonable costs associated with the location reproduction and transportation of requested documents or records to the Central Authority of the requesting state; and (5) the costs of stenographic reports requested by the requesting state. Id.

The Panama-U.S. MLAT and other MLATs provide that if during the execution of the request, it becomes apparent that expenses of an extraordinary nature are required to fulfill the request, the parties must consult to determine the terms and conditions under which the execution of the request may continue. See generally Id. art. 7(3).
B. Extradition

Extradition is the international rendition of fugitives wanted for trial on an extraditable offense, or sought for punishment after they have been convicted.494

Most states have a "mixed" extradition system in which both the executive and judiciary play a role, although there exist various models and systems.495

In the United States, while the executive branch negotiates extradition treaties, the judiciary decides issues of treaty existence or coverage. Judicial interpretations of treaty provisions and their applicability to specific situations give great deference to executive branch authority and expertise.496

U.S. law authorizes the Secretary of State to extradite persons.497 When the United States is the requested state, the Secretary of State has authority to surrender the fugitive to the requesting state only after the fugitive has been found extraditable by a judicial officer of the United States following a proper extradition hearing.498 However, the Secretary of State has discretion not to surrender the fugitive even when the judiciary has ordered the extradition.499

While common law countries traditionally have based extradition on bilateral treaties, civil law countries have based extradition on comity and reciprocity, combined with national legislation and a multilateral approach. Civil law countries permit extradition in the absence of any treaty on the basis of national extradition laws that require reciprocity.500


495. Id. at 17-4 (containing a discussion and references to the different types of models).

496. See id. at 17-5; see also United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936); Missouri v. Holland, 252 U.S. 416 (1920).

497. 18 U.S.C. § 3186 (1988); see also Escoedo v. United States, 623 F.2d 1098, 1105 n.20 (5th Cir. 1980) (holding that the Secretary of State always has discretion to refuse to extradite, even if magistrate concludes that fugitive is extraditable), cert. denied, 449 U.S. 1036 (1980).


499. Id. § 3184 (1988); Escoedo, 623 F.2d at 1105 n.20.

In the United States, extradition is a federal power that, by law, requires a treaty. Under U.S. law, extradition treaties are generally self-executing and require no implementing legislation. Nevertheless, applicable extradition law does not permit extradition from the United States in the absence of a treaty.

Even if a fugitive goes to a country which is not one of the more than 100 countries with which the United States has an extradition treaty, the United States will often seek extradition as a matter of comity even if it is not possible for the United States to extradite a person in the absence of a treaty. Notwithstanding the lack of reciprocity, positive responses by foreign governments to extradition requests made in this manner are not uncommon as a matter of comity or on the basis of that country's municipal extradition law.

Although most countries do not extradite their own nationals, the United States traditionally has extradited its nationals. Provided that the extradition treaty allows a nation the discretion to extradite nationals, the United States will do so, even though the country seeking extradition might not be able or willing to reciprocate. The United States will also extradite nationals even though the requesting country may not have the same system of constitutional protections afforded to the criminal defendant bound over for trial before the United States courts.

An accused fugitive in the United States is entitled to an evidentiary hearing which includes a specific numeration of each charge and how it satisfies the treaty requirements.

501. Factor v. Laubenheimer, 290 U.S. 276, 287 (1933) (citing United States v. Rauscher, 119 U.S. 407 (1886)); see also Ivancevic v. Artukovic, 211 F.2d 565, 566 (9th Cir. 1954). The principles of international law recognize no right to extradition apart from a treaty. However, a government may voluntarily exercise the power to surrender a fugitive from justice to a the country from which he has fled and it is generally under a moral duty to do so. Factor, 290 U.S. at 287.


503. Id.

504. See Pan.-U.S. MLAT, supra note 428, art. 17(2).

505. See generally In re Extradition of Burt, 737 F.2d 1477 (7th Cir. 1984) (holding that extradition of a nation's own nationals is often done, and the United States has such authority).

A fugitive in the United States has various procedural rights, such as the right to counsel.\textsuperscript{507} Extradition is allowed only on evidence showing probable cause to believe that the fugitive committed the alleged extraditable offense. The fugitive must be permitted "discovery" to enable him to "explain" his position relating to the charges against him.\textsuperscript{508}

The United States grants extradition only after a showing of probable cause to believe that the fugitive committed the crime charged. The European and civil law countries generally permit extradition upon a showing of only two elements of evidence: (1) a properly authenticated arrest warrant or other similar document, in the case of a person charged with having committed an extraditable offense, or the official document or judgment and sentence of the convicted fugitive; and (2) evidence that the accused person standing before the court is the person identified in the extradition documents.\textsuperscript{509} The European judge essentially verifies the formal regularity of the extradition request and normally does not consider the sufficiency of the evidence or the foundation of the complaints against the accused.\textsuperscript{510}

1. Defenses to Extradition

A number of defenses and exceptions exist to avoid extradition.

Extradition treaties generally provide the extradition of persons who have been charged with or convicted of any of the crimes or offenses specified in the treaty as being extraditable, if committed within the jurisdiction of one of the contracting parties. Although five different bases for jurisdiction exist in United States criminal cases, United States courts and commentators traditionally interpret jurisdiction in extradition treaties as only territorial.

\textsuperscript{507} Wirth v. Surles, 562 F.2d 319, 322 (4th Cir. 1977) (holding that a fugitive is entitled to a hearing before a magistrate who must inform him of the demand made for his extradition, that he has a right to counsel, and that he has a right to test the legality of his arrest).

\textsuperscript{508} Quinn v. Robinson, 783 F.2d 776, 815 (9th Cir.) (abuse of discretion not to allow discovery), cert. denied, 479 U.S. 882 (1986).


\textsuperscript{510} Id.
When the requested and requesting states’ jurisdictional law differ, a defendant may have a defense based on the “special use of double criminality.” Under this doctrine, extradition must be denied if the offense for which extradition is sought would not be considered by the law of the requested state to be within its jurisdiction under similar, but obverse, circumstances. 511

It is not uncommon for United States courts to sanction the assertion of jurisdiction over an offense consummated outside United States territory, either when a constituent element of that offense has occurred within United States territory or when the offense causes harmful effects or results within that territory.

A basic defense to extradition is that the offense charged is not extraditable by the relevant treaty. For instance, pre-World War II extradition treaties generally did not cover crimes such as mail fraud and wire fraud or securities law violations. However, recent treaties have broader coverage. 512

Extradition treaties usually incorporate one of two methods for delimiting extraditable offenses: the enumerative and the “no-list” methods. Traditionally, the United States and most common law countries have enumerated an exclusive list of offenses that are extraditable. Generally, the treaties of European countries and many recent United States treaties have used a “no-list” approach and incorporated a clause providing that a certain minimum standard of punishability under the laws of both states will render an offense extraditable. 513

Until 1979, all the United States bilateral extradition treaties used the enumerative method. 514 The United States’ refusal to utilize the no-list approach resulted from a belief that such an approach would be to unwieldy in light of the various criminal justice systems in the United States. 515

511. Blakesley, supra note 494, § 17.05. The double criminality principle is that the offense charged must be an offense in both the requesting state as well as in the requested state. Id.


513. Blakesley, supra note 494, at § 17.05.


515. Id. at 600. A variety of approaches exist in the various U.S. extradition treaties, and specific treaties should be reviewed carefully in a given case. For instance, many treaties do not allow extradition for RICO violations and for many newer financial crimes, such as money laundering and insider trading.
The principle of double criminality is based on the legal maxim *nulla poena sine lege* and precludes extradition unless the conduct is considered a crime under the domestic law of both countries.\(^{516}\)

The double criminality rule is satisfied if the requesting state submits: (1) evidentiary documentation of the crime; and (2) an affidavit of relevant law (including the statute that makes the action in question criminal). To refute the claim, defense counsel should: (1) review the law of the requested state or find an expert who knows it; and (2) develop a strategy so that the reviewing court will listen to and understand the differences in foreign, criminal law.\(^{517}\)

A dispute sometimes develops over whether the determination of double criminality is controlled by the "denomination" of the offense in each state’s law or by the underlying conduct.\(^{518}\)

Under the principle of specialty, a fugitive returned by way of extradition may be tried only for the offenses for which he was extradited.\(^{519}\) This principle requires a correspondence between the charges contained in the indictment and the facts presented to the extraditing magistrate. The fugitive must be

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516. Williams, *supra* note 514, at 582 states:
The basic precept of extradition law, contained in many countries’ extradition statutes and bilateral treaties, is that there must be a threshold requirement of double criminality, otherwise known as duality of offenses. Under this doctrine, the offense for which extradition is sought must be one for which the requested state would in turn be able to demand extradition. In other words, the offense must be considered criminal in both states. Double criminality is based upon a reciprocal characterization of the offenses and a type of mutuality of obligations between states. It is also premised upon the maxim *nulla poena sine lege*, or "no punishment without law." As one author succinctly stated: "No person may be extradited whose deed is not a crime according to the criminal law of the State which is asked to extradite as well as the state which demands extradition."

*Id.* (footnotes omitted).

517. Blakesley, *supra* note 494, at § 17.05.

518. *Id.*

519. See United States v. Herbage, 850 F.2d 1463, 1465 (11th Cir. 1988) ("[t]his principle stands for the proposition that the requesting state, which secures the surrender of a person, can prosecute that person only for the offense for which he or she was surrendered by the requested state or else must allow that person an opportunity to leave the prosecuting state to which he or she had been surrendered.").
released from custody and permitted to leave the country, before he may be tried for other offenses.\(^{520}\)

Continental countries have applied the rule of specialty to voluntary return as well as to the more common extradition. However, United States courts have not applied the rule of specialty when the fugitive has either waived extradition or been deported.\(^{521}\) Where the fugitive is handed over as a matter of comity, the rule of specialty has been applied by United States courts.\(^{522}\)

A split of authority exists over the issue of whether a returned fugitive has standing to raise the principle of specialty or whether only the requested state can raise it. Whereas the classical view holds that persons are only objects of treaties and cannot assert the right, the modern view posits that persons are the subjects of treaties and as such have the right to assert the principle of specialty.\(^{523}\)


\(^{521}\) United States v. Ditommaso, 817 F.2d 201, 212 (2d Cir. 1987) (holding that when the accused is within the court’s jurisdiction, such court should not consider the scope of the charges unless the Department of State or the deporting country suggests the defendant can or should be tried in the United States only for specified offenses); United States v. Molina-Chacon, 627 F. Supp. 1253, 1264 (E.D.N.Y. 1986) (establishing that a superseding indictment did not violate the doctrine of specialty even though it contained additional counts and a broader conspiracy than that for which the defendant consented to be returned to the United States; for the doctrine of specialty is a privilege of the asylum state and not the individual right of one accused of a crime, and there was no evidence that asylum state had any objection to the indictment), aff’d, 817 F.2d 201 (2d Cir. 1987).


\(^{523}\) See, e.g., U.S. v. Puentes, 50 F.3d 1567, 1574 (11th Cir. 1995) (holding that an individual extradited pursuant to an extradition treaty has standing under doctrine of specialty to raise any objections which the requested nation might have asserted). However, the extradited individual enjoys this right at the sufferance of the requested nation. \textit{Id.} If the requested nation waives its right to object to a treaty violation, the defendant loses standing to object to such an action. See United States v. Riviere, 924 F.2d 1289, 1300-01 (3d Cir. 1991); United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir.), cert. denied, 479 U.S. 1009 (1986). Note that the requested state’s waiver of a treaty provision may occur either contemporaneously with the extradition or after the defendant has been surrendered to the requesting state. \textit{Puentes}, 50 F.3d at 1575 n. 5.
Extradition treaties have "exceptions" from extradition. The law of the requested state determines whether or not any of the exceptions will apply.524

2. Procedural Issues

The accused in an extradition hearing both in civil law countries and the United States has no absolute right to bail or provisional liberty. However, bail may be permitted if the court finds "special circumstances" to justify it.525

Extradition agreements are applied retroactively, without violating the principle of nulla poena sine lege526 or traditional protections against ex post facto laws. However, extradition treaties differ on their treatment of the effective date and should be consulted.

United States case law permits a court to exercise jurisdiction even if the fugitive has been brought to the court by means of irregular rendition (e.g., expulsion, deportation, and exclusion—all means that normally provide procedural shortcuts to extradition procedure) or even kidnapping. Only if the abduction involves egregious conduct violating the person's bodily and psychological integrity will the courts not find jurisdiction.

524. Examples of "exceptions" are as follows:
1. When the person whose surrender is sought is currently being proceeded against or has been tried and acquitted or punished in the territory of the requested party or in a third state for the acts for which his extradition is requested (e.g., double jeopardy), see M. CHERIF BASSIOUNI, The United States Model, in 2 INTERNATIONAL CRIMINAL LAW 413-17 (M. Cherif Bassiouni ed., 1986);
2. When the person sought, according to the law of either the requesting or the requested party, has become immune from the prosecution or punishment by reason of lapse of time (i.e., a statute of limitations), id.;
3. The offense is a tax-related or other "fiscal" violation; id.; or
4. The offense for which the individual's extradition is requested is of a political character or the requisition for his surrender has, in fact, been made with a view to try or punish him for an offense of a political character. See NADELMAN, supra note 501, at 419.

525. Salerno v. United States, 878 F.2d 317, 317 (9th Cir. 1989) (citations omitted). Special circumstances include "the raising of substantial claims upon which the appellant has a high probability of success, a serious deterioration of health while incarcerated, and unusual delay in the appeal process." Id.

C. Prisoner Transfer Treaties

In 1976, the United States concluded a prisoner transfer treaty with Mexico. Since then, the United States has negotiated and signed similar bilateral prisoner transfer treaties with seven other countries, and a multilateral treaty with the Council of Europe. The treaties in some cases allow convicted persons who are imprisoned in a foreign country and want to serve their sentence in their home country to apply for a transfer, so that they can serve the remainder of their sentence in their home country.

The purposes of such treaties are to alleviate problems associated with the rapidly growing number of foreign nationals being convicted in their courts. Such a large number of foreign persons presents substantial administrative problems to the corrections authorities of sentencing countries and is comparatively costly. Humane and rehabilitation reasons also motivate transfers.

V. Conclusion

As demonstrated by the discussions of the selected areas of international white collar crime, U. S. practitioners increasingly need to understand and apply on a regular basis both the substantive and procedural aspects of international commercial criminal law. Globalization and the growth of information technology will accelerate the growth of law and regulations in international white collar crime law.

Examples of areas not mentioned in this article are those coming from public international law, such as the Chemical

527. MICHAEL ABBELL & BRUNO A. RISTAU, 6 INTERNATIONAL JUDICIAL ASSISTANCE, CRIMINAL PRISONER EVIDENCE § 14-1-1 n. 3, (1990) (referencing treaties with Bolivia, Canada, Panama, Turkey, Peru, France, and Thailand).
528. ABBELL & RISTAU I, supra note 420, at 4 n.4 (citing treaty and ratification by 22 countries).
529. Id.
530. For background on such treaties under U.S. law, see ABBELL AND RISTAU I, supra note 420.
Weapons Convention and the efforts to prevent the spread of nuclear weapons and their components.

An enormous growth area already in process is the development of international commercial criminal law due to economic integration. Examples mentioned in this discussion are the result of the E.U.'s influence in the development of insider trading legislation. With the achievement of the single Economic Market and institution of the Maastricht Agreement, the E.U. has begun assuming direct responsibility for criminal justice. The E.U. is developing laws in the areas of anti-money laundering, securities trading, and customs. Just as important it has established the Europol whose tasks include: facilitating exchange of information among E.U. members; collecting, collating and analyzing information and intelligence; supporting national investigations by forwarding all relevant information to the national units; and maintaining computerized collections of information containing data. The Schengen Information System has been created among nine countries for the purpose of exchanging information on certain crimes such as illegal migration, terrorism, organized crime, and drug trafficking.

Similarly in the Western Hemisphere, in the context of NAFTA, criminal provisions and procedure for dealing with intellectual property protection and customs are con-
tained within the text of NAFTA. During the negotiation of NAFTA, measures were taken to strengthen environmental enforcement cooperation and promises were made and implemented which allows Mexico to strengthen its ability to prosecute Americans alleged to have committed violent crimes in the United States. 539 As a result of the criticisms during the hearings on the ratification of NAFTA in the United States, anti-money laundering measures have been implemented in both Mexico and the United States. 540

A growing area that counsel dealing with international commercial crime developments must understand and manage is the roles of both international governmental organizations ("IGOs") and non-governmental organizations ("NGOs"). IGOs, such as the Economic Summit, Financial Action Task Force, 541 and more traditional IGOs such as the E.U., Council of Europe, and Interpol all play important roles. Counsel must understand the IGO's operations and be able to cooperate with them to successfully manage international criminal investigations.

NGOs, such as the International Maritime Bureau and its fraud bureau, 542 the Inter-American Federation of Bank Associations, the International Bar Association ("IBA"), 543 and their national counterparts all provide information, education and training, and sometimes take positions and try to influence the international criminal policy of IGOs and governments.

disclose to Customs officers return information with respect to its authority to conduct audits under 19 U.S.C. § 1509, or "other actions to recover any loss of revenue, or collect duties, taxes, and fees, determined to be due and owning pursuant to such audits."

539. See, e.g., NAFTA Debate Raises International Criminal Cooperation Issues, 9 INT'L ENFORCEMENT L. REP. 404 (Oct. 1993) Rep. E. Clay Shaw threatened to hold up NAFTA ratification if the United States did not persuade Mexico to extradite a Mexican accused of kidnapping and raping the 4-year old niece of the congressman's secretary. Id. at 404-05.
540. See id. at 405.
541. See supra section III.D.
542. See, e.g., ICC International Maritime Bureau Exposes Nigerian Fraud, 11 INT'L ENFORCEMENT L. REP. 58 (Feb. 1994). The Bureau has published a special report entitled NIGERIA: TRADERS AT RISK written by B.A.M. Ajibade, a Nigerian lawyer, that traces the various schemes employed and proposes remedies to obtain recompense and prevent future incidences of fraud. Id.
543. The IBA has had two three-day programs called "Defending the Alleged Transnational Criminal." One program took place in Munich in 1991 and the other in Madrid in 1993.
Counsel can establish links with NGOs in order to participate in their work.

Bar associations, such as the American Bar Association and the American Society of International Law, increasingly have groups that regularly follow international white collar crime developments. Attorneys can benefit significantly from participating in such groups. These groups also regularly have programs and videos that provide the latest information on international white collar crime law.

Law schools increasingly offer courses and seminars on international criminal law and even international white collar crime. International law society and student bar groups frequently hold programs on international criminal law, including white collar subjects.

Non-legal groups, such as persons concerned with diplomacy, international affairs, international business policy, national security, and the interaction of military and other alternatives to the resolution of disputes, are participating in the studies and policy-making on international white collar crime. For instance, studies have illustrated increasing links among organized crime groups who operate crime rackets as a business. Similarly, studies have shown that police operating overseas also increasingly operate like a multinational enterprise and are emulating techniques brought by United States law enforcement officials. Hence the interaction of law and non-legal disciplines are important in the study and practice of international white collar crime.

544. The ABA's Criminal Justice and Section of International Law both have Committees on International Criminal Law.

545. The ASIL has an international criminal interest group and many other interest groups that deal at least tangentially with international criminal law.

546. For a survey of the current U.S. courses on international criminal law and the materials used in these courses, see Michael Scharf, Report of the ABA Task Force on Teaching International Criminal Law, 5 CRIM. L.F. 91, 91-104 (1994).


548. See, e.g., Center for Strategic & Int’l Studies, THE TRANSNATIONAL DRUG CHALLENGE AND THE NEW WORLD ORDER (Jan. 1993) (concluding that the international drug trade has evolved into a complex, sophisticated transnational commercial industry).

549. NADELMANN, supra note 501, at 1-4.
As the discussions in this article show, both the substantive and procedural areas of international white collar criminal law are still emerging and dynamic. They provide fruitful areas for study and practice.