The Fight against Extraterritorial Corruption and the Use of Money Laundering Control

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Table of Contents

I. Introduction
II. Corruption: Definition and Overview
   A. Definition of Corruption
      2. Isolated v. Systemic Corruption
      3. Domestic v. Transnational Corruption
   B. Understanding Current Concern
      1. The End of the Cold War
      2. Economic Liberalisation
      3. Shift in Development Thinking
   C. The Role of the International Community
      1. The Role of the World Bank
      2. The OECD Anti-Corruption Action
         a. Background
         b. Legal Antecedents to the 1997 Convention on Transnational Bribery
         c. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
      3. The Inter-American Convention against Corruption
   D. Conclusion

III. Money Laundering: Definition and Overview
   A. Definition of Money Laundering
      1. The Process of Laundering
      2. The Outcome of the Laundering Process
      3. Legally or Illegally Acquired Wealth
      4. Avoiding Law Enforcement
   B. The Current Paradigm of Money Laundering Control
      1. Criminalising Money Laundering

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2. Strengthening the Methods of Tracing, Freezing and Confiscating the Proceeds of Illegal Activity

3. Regulatory Measures to Prevent the Use of the Financial System for the Purpose of Money Laundering

4. International Co-operation

C. CONCLUSION

IV. Using Money Laundering Control to Curb Corruption

A. THE RATIONALE

1. Taking the Profit out of Corruption

2. Following the Money Trail

3. Reaching the Extraterritorial
   a. The Territoriality of Law and Regulation
   b. Corruption as a Challenge to Territoriality
   c. The Extraterritorial Reach of Money Laundering Control Measures

B. THE PRESENT LAW

1. Money Laundering Instruments

2. Anti-Corruption Instruments
   a. The OECD Convention on Transnational Bribery
   b. The Inter-American Convention against Corruption

C. THE ROLE OF FINANCIAL INSTITUTIONS

1. Bank Secrecy Reconsidered

2. Financial Regulations against Money Laundering
   a. Access to the Financial Market
   b. Know Your Customer
   c. Transaction Reporting
   d. Record Keeping

3. Extraterritoriality of Anti-Money Laundering Regulations

4. Extraterritoriality as a Problem

V. Conclusion

I. Introduction

Corruption is an economic crime that generates, at least in some of its forms enormous amounts of illicit proceeds. In recent years, corruption assumed very advanced positions on legal and political agendas both nationally and internationally, in both developed and developing countries. However, concern for corruption in developing countries and its impact on economic development remains paramount. This concern has been translated into various attempts at dealing with the problem. The international community became actively involved in tackling the problem and various instruments were designed for that purpose. The World Bank incorporated corruption in its agenda for assisting its target countries. The OECD countries passed and to a great extent implemented a convention on transnational bribery. These, however, were in addition to many other international agencies that contributed their own initiatives in dealing with this problem.
This paper is concerned with the use of money laundering control in the fight against corruption. The core argument is that money laundering control allows the states as members of the international community to extend the reach of their laws to corrupt practices in other countries where the corrupt ruling regime necessarily inhibits any local attempt at penalising its corruption.

II. Corruption: Definition and Overview

A. Definition of Corruption

Corruption belongs to the category of concepts that are widely discussed, and hardly defined. Various factors contribute to this elusiveness of the concept. Historically, corruption was used synonymously with sin thus encompassing "the entire moral life of mankind." This historical use gives the word a metaphorical quality that it maintains to our current time and that partly accounts for its lack of precision. The verbal imprecision of the metaphor is further accentuated by the lax use of the word in the media and political life.

The concept is a cross-disciplinary one. It is analyzed by writers in economics, political science, sociology, anthropology, public administration, business, and law. While cross-disciplinary analysis of such phenomena is essential, it does not readily help develop a precise commonly accepted definition of the concept discussed.

Corruption is also normative in character. To judge a certain conduct as corrupt necessarily implies reference to a set of values that are perceived to be breached by that conduct. This immediately imposes the question of the source of these norms and its legitimacy. It also renders the definition of what is corrupt culturally relative, which poses difficulties for both historical and comparative research.

Earlier writing on corruption was preoccupied with the question of definition. By contrast, current writing relies on working definitions and a common perception of

5. Id. at 8–9; see also Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* 91–110 (1999) (the author makes an interesting attempt to avoid the cultural dilemma through economic analysis of the cost of what is culturally acceptable); Robert E. Klitgaard, *Controlling Corruption* 134–55 (1988) (offering an interesting case study of cultural clash on the question of corruption).
6. See, e.g., Klitgaard, supra note 5, at xi ("I will not spend much time on definition. Corruption exists when an individual illicitly puts personal interests above those of the people and ideals he or she is pledged to serve.").
the problem that allows those involved to recognize a case of corruption when one is exposed.\textsuperscript{7}

One of the most commonly accepted definitions is the World Bank's definition of corruption as "the abuse of public office for private gain."\textsuperscript{8} In choosing this definition the Bank's report emphasises the difficulty inherent in attempting to define a term that "covers a broad range of human actions."\textsuperscript{9} The report's approach to this problem is to adopt a "straightforward definition"\textsuperscript{10} that is "concise and broad enough to include most forms."\textsuperscript{11} And then to develop "a taxonomy of the different forms corruption could take consistent with that definition."\textsuperscript{12}

Despite the Bank's definition of corruption as a public sector phenomenon, it is important to note that it acknowledges the existence of corruption in the private sector. Its report on the problem of corruption states that "[f]raud and bribery can and do take place in the private sector, often with costly results. Unregulated financial systems permeated with fraud can undermine savings and deter foreign investment. They also make a country vulnerable to financial crises and macroeconomic instability."\textsuperscript{13} It goes on to indicate that despite this fact the Bank's concern is with public sector corruption.\textsuperscript{14} The basis of this policy is the perception of public sector corruption as a "more serious problem in developing countries."\textsuperscript{15}

It is the author's view that corruption should be perceived more generally as including both private and public corruption and that public corruption is not necessarily more serious. This paper, however, is concerned with corrupt governments whose corruption in itself prevents any accountability to their citizens. For this reason, it will be confined to public corruption and will accept the aforementioned definition of the World Bank as a good departure point for the analysis to follow.

Corruption has been categorized into different types according to various criteria. In this context I would like to draw attention to three of those categories.

1. \textit{Grand v. Petty Corruption}

This distinction is based on the size of the wealth corruptly acquired and the seniority of the corrupt official.\textsuperscript{16} Grand corruption describes situations where a senior official abuses his office to achieve substantial pecuniary gain. It usually takes place in the context

\begin{itemize}
  \item \textsuperscript{7} See Vito Tanzi, \textit{Corruption Around the World: Causes, Consequences, Scope, and Cures} 8, IMF Staff Papers, vol. 45, no. 4 (1998) ("However, like an elephant, while it may be difficult to describe, corruption is generally not difficult to recognize when observed.").
  \item \textsuperscript{8} World Bank, \textit{Helping Countries Combat Corruption: The Role of the World Bank} 8 (1997).
  \item \textsuperscript{9} \textit{id.}
  \item \textsuperscript{10} \textit{id.}
  \item \textsuperscript{11} \textit{id.} at 20.
  \item \textsuperscript{12} \textit{id.} at 8.
  \item \textsuperscript{13} \textit{id.} at 11.
  \item \textsuperscript{14} \textit{id.}
  \item \textsuperscript{15} \textit{id.}
  \item \textsuperscript{16} \textbf{Anti-Corruption Working Group, The Society for Advanced Legal Studies, Banking on Corruption: The Legal Responsibilities of Those Who Handle the Proceeds of Corruption} at 11 (2000).
\end{itemize}
of large government projects such as procurement contracts of high value and privatisation operations. On the other hand, petty corruption occurs at the lower levels of bureaucracy and involves corrupt payments of low value.

The harmful effects of petty corruption should not be underestimated; neither should the size of wealth that it can generate. Because of the particular concern of this paper, however, focus shall be placed on grand corruption involving senior officials whose political power defeats accountability.

2. Isolated v. Systemic Corruption

This dichotomy is based on a test of the frequency of corrupt behaviour within a given system. Where integrity is the norm and corrupt behaviour is rare or sporadic the rule of law remains intact and the system remains capable of enforcing accountability using its own institutions. Conversely, when corruption becomes endemic informal rules replace formal ones in governing the interaction between private interests and public bodies. It is in this latter case that the rule of law suffers and the capacity of the system's institutions to enforce it becomes limited. This specific effect of systemic corruption makes it particularly relevant to the discussion of the role of the international community in controlling it. It is where the national system fails to deal with the problem that the international community's assistance becomes invaluable.

Studying the case of Asian countries, where systemic corruption was accompanied by high growth, some commentators were inclined to argue that the harms of systemic corruption are limited by the predictability it offers. Following the Asian crisis, however, analysts have frequently suggested that systemic corruption was one of the causes of the crisis and the consequent setback to Asian economic development.

3. Domestic v. Transnational Corruption

This distinction refers to the territorial boundaries within which corruption takes place. In the case of the former, the corrupt transaction takes place within the boundaries of a single country. Taking bribery as the classic example of a corrupt transaction, for corruption to be domestic both the briber and the receiver of the bribe must be citizens of the country where the transaction took place.

17. Rose-Ackerman, supra note 5, at 27 (1999).
18. World Bank, supra note 8, at 10.
19. For an interesting discussion of the formal and informal rules, see Cheryl W. Gray, Legal Process and Economic Development: A Case Study of Indonesia, 19 WORLD DEV. 763 (1991) (suggesting two models for performing the functions of the legal system. One is the formal model and the other is the informal model, then arguing that in developing countries the informal model is predominant because of information and risk costs.).
20. This is part of a certain line of analysis that purports to prove the functionality of corruption under certain circumstances. See generally World Bank, supra note 8, at 14–17. This line of analysis is often traced back to J. S. Nye, Corruption and Political Development: A Cost-Benefit Analysis, 61 AM. POL. SCIENCE REV. 417 (1967). For an empirical and theoretical challenge of Nye's thesis, see Klitgaard, supra note 5, at 27–51 (1988).
Transnational corruption on the other hand occurs within more than one jurisdiction.\textsuperscript{22} An obvious example of this form is when a foreign company or a multinational company bribes a government official to secure its interest in a government contract. Similarly, transnational corruption occurs if the bribe is given to an officer of an international organisation for a similar purpose.

Liberalisation of markets in recent years and the consequent increase in contact between foreign capital and national governments in developing countries have multiplied exponentially the opportunities for transnational corruption. This and other factors have resulted in the recent concern of the international community in the problem of corruption in general and its transnational manifestations more specifically. This point leads to the second question in our discussion. Namely, what is the reason for this almost sudden international concern with the problem of corruption?

B. Understanding Current Concern

Three interrelated factors can be discussed in attempting to understand the international occupation with the problem of corruption. The first, which is also arguably responsible for the other two, is the end of the Cold War. The second is the sweep of economic liberalisation that followed the collapse of the Soviet Union. And the third factor, which is intellectual in nature, is a shift in the thinking and understanding of development.

1. The End of the Cold War

The end of the Cold War has been accompanied by a worldwide exposure of corruption scandals in both developed and developing countries. This exposure, while it accounts in part for the attention of the international community to the problem, remains to be explained. Analysts have addressed this question and found the answer to lie in the unipolar nature of the post-Cold War international system.

In a bipolar international political system, corrupt regimes were tolerated and supported as a price for their loyalty.\textsuperscript{23} Following the collapse of communism and the shift to a unipolar system this rationale for tolerance disappeared. Consequently, the international community, assisted and encouraged by local pro-democracy movements,\textsuperscript{24} began to expose the corrupt governments and to demand integrity.

\textsuperscript{22} For a discussion of transnational corruption, its causes, and the problems it imposes, see Michael Johnston, \textit{Cross-border Corruption: Points of Vulnerability and Challenges for Reform, in Corruption and Integrity Improvement Initiatives in Developing Countries} 13 (UNDP ed., 1998).

\textsuperscript{23} See Adrian Leftwich, \textit{On the Primacy of Politics in Development, in Democracy and Development: Theory and Practice} 3, at 11 (Adrian Leftwich ed., 1996) ("Moreover, as the Cold War intensified and the fear of communism grew, the US and the Western governments seemed oblivious to the abuses and incompetence of many non-democratic governments in the developing world. Aid and support continued to flow to them so long as they remained loyal to US interests.").

\textsuperscript{24} \textit{Id.} at 14–15.
2. Economic Liberalisation

The end of the communist political regimes had yet another effect of bearing on this new proliferation in corruption scandals and political concern over it. Namely, it confirmed neo-liberal economic theory resulting in a wave of economic liberalisation throughout the world.\textsuperscript{25} While economic liberalisation is held to be an effective policy against corruption,\textsuperscript{26} it is also admitted that it creates a host of new opportunities for the corrupt. National economic growth\textsuperscript{27} and contact with affluent international business\textsuperscript{28} raised the price offered for corrupt conduct. Furthermore, some liberalisation measures such as privatisation\textsuperscript{29} created new opportunities for corruption that did not exist under the previous state-controlled economic systems.

The new opportunities for corruption that were created by economic liberalisation explain the arguable increase in the incidence of corruption in some transitional economies and developing countries. This does not, however, on its own, explain satisfactorily the international concern.

Free and properly functioning markets are at the heart of economic liberalisation. Corruption undermines the proper functioning of the market. An obvious example is where a private company resorts to bribery in order to obtain a government contract thus undermining the rules of fair competition amongst the bidders.\textsuperscript{30} Global liberalisation of markets has introduced foreign actors into the markets of countries that were originally confined to nationals. This has created a multinational interest in the proper functioning of national markets and in eliminating any distorting factors such as corruption.

Corruption also undermines national trust in the economic liberalisation process because it diverts its benefits from the public to the private pockets of government officials. To justify its anti-corruption initiative, the World Bank expressed similar concern by stating in its policy report that "[t]here is increasing evidence that corruption undermines development. It also hampers the effectiveness with which domestic savings and external aid are used in many developing countries, and this in turn threatens to undermine grassroots support for foreign assistance."\textsuperscript{31}

\textsuperscript{25} See id. at 14.
\textsuperscript{26} This is the view held currently by international development institutions. See, e.g., World Bank, supra note 8, at 35–36 (arguing that deregulation and the expansion of markets is part of the Bank's policy in helping countries combat corruption).
\textsuperscript{27} On the relationship between corruption and economic growth, see Gordon White, Corruption and Transition from Socialism in China, 23 J. L. & Soc'y 149, 158 (1996) ("[e]conomic growth ... may fuel corruption because it rapidly expands the incentives for malfeasance").
\textsuperscript{28} Corrupt practices of international business have attracted the attention of both researchers and policy makers. See generally Michael Johnston, supra note 22; see also Philip M. Nichols, Regulating Transnational Bribery in Times of Globalization and Fragmentation, 24 Yale J. Int'l L. 257 (1999).
\textsuperscript{29} Privatisation as an opportunity for grand corruption has raised a lot of concern, especially in view of its impact on the credibility of the economic reform process. See Rose-Ackerman, supra note 5, at 35–38, 42–44 (applying economic analysis to show how privatisation can create opportunity for corruption, then offering some policy advice on how to reduce corruption possibilities in the privatisation process).
\textsuperscript{30} Id. at 12–13 (discussing the relationship between corruption and competition).
\textsuperscript{31} World Bank, supra note 8, at 1.
3. **Shift in Development Thinking**

One commentator writing in 1988\(^2\) lamented the silence of literature of international development on the problems of corruption; he said: "Corruption is devouring the economies and polities of many Third World nations. And yet the students of development policy tend to ignore it."\(^3\) By mid 1990s, the question of corruption had become widely acknowledged as a pressing developmental problem by all the international development institutions including the United Nations Development Program (UNDP), the World Bank (the Bank) and the Organisation of Economic Co-operation and Development (OECD).

This focus on corruption as a development issue is not an isolated trend. It is rather part of a general shift in development thinking. Until the 90s, development was perceived as a technical process with economic liberalisation, privatisation, macroeconomic stabilisation, and capitalisation as its means to the goal of higher GDP per capita and better allocation of resources.\(^4\) While these economic considerations remain relevant in the development thinking of the 90s, other means and goals have acquired attention. Development has come to be perceived holistically as a "transformation of society"\(^5\) with structural and social concerns treated equally and contemporaneously with macroeconomic and financial concerns.\(^6\) The core of this new thinking lies in the recognition that markets do not operate in a vacuum; they need an institutional infrastructure to be able to function.

In the academic and policy discussion of development this institutional aspect has been termed 'governance.' In the official pronouncements of the World Bank, governance was given a narrow technical definition. It was taken to be synonymous with "development management"\(^7\) and to include "building the capacity of public sector management[,] encouraging the formation of the rules and institutions which provide a predictable and transparent framework for the conduct of public and private business and to promoting accountability for economic and financial performance."\(^8\) In other development circles, especially in the Western governments' bilateral aid relations,\(^9\) governance was given a political meaning and stretched to include the democracy of the political system.\(^10\) It is in the context of governance as an important aspect of any development strategy that corruption became an important issue. After all corruption is but a form of poor governance.

As a result of these factors the international community decided to engage actively in the fight against corruption at all levels. This has been translated into various initiatives, some of which I will discuss in the following section.

\(^{32}\) Klitgaard, *supra* note 5, at 7.

\(^{33}\) Id.


\(^{35}\) Id.


\(^{37}\) Id.

\(^{38}\) Id. at 3.

\(^{39}\) Id. at 5; see also Leftwich, *supra* note 23, at 16.

\(^{40}\) See Leftwich, *supra* note 23, at 15–16 (discussing the two meanings of governance).
C. The Role of the International Community

Until the 1990s corruption was treated as an internal matter that does not justify international intervention. Due to international developments, which were discussed in the previous section, the 1990s have witnessed the adoption of corruption control as an international policy goal. While the legitimacy of this policy goal remains subject to debate, the practical developments in this field indicate a growing consensus to tackle corruption internationally. This can be justified on the basis of the increase in cross-border corruption that defeats the jurisdiction of a single country.

This section discusses a number of international initiatives to tackle corruption. While the World Bank initiative shall be discussed as an example of the incorporation of corruption control in development strategy, the focus shall be on treaty-based initiatives; namely, the anti-corruption conventions of the Organisation of Economic Co-operation and Development (OECD) and the Organisation of American States (OAS).

1. The Role of the World Bank

The World Bank has been dealing with corruption since its inception. While the 1980s did witness a shift in the Bank's approach to the problem, it did not introduce the problem of corruption as such. Until the 1990s the Bank's approach to corruption has been indirect and implicit. This was in concord with the overall understanding of the matter as a political and therefore internal problem. Instead of defining the problem that the Bank confronted in implementing its projects as corruption, it used a whole set of standard euphemisms. Examples of such euphemisms in a program review are: "governance problems," "unexplained cost overruns," or "excessive purchase of vehicles." All of the above are descriptions of what are in essence corrupt practices in the implementation of a Bank's project.

In 1992, the Bank published a report on governance and development in which it established that "good governance is central to creating and sustaining an environment which fosters strong and equitable development, and it is an essential complement to sound economic policies." This report reflected into the Bank's work the shift in development thinking, which was discussed above. In this context corruption was identified as a governance problem and as such it was addressed in the country dialogue and taken into account in designing structural and sectoral reforms. While this represented a definite change in attitude towards corruption, the shift has not yet achieved its full

41. See Philip M. Nichols, Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal Under the Global Conditions of the Late Twentieth Century? Increasing Global Security by Controlling Transnational Bribery, 20 Mich. J. Int'l L. 451 (arguing for the legitimacy of corruption control as an international policy goal on basis of the threat that transnational bribery poses to international security and discussing the counter-argument that corruption is an internal matter).
42. See Johnston, supra note 22 and accompanying text.
43. ROSE-ACKERMAN, supra note 5, at xi.
44. Id.
45. World Bank, supra note 37, at 1.
46. Id. at 6–7.
swing. The Bank was finally addressing corruption deliberately and openly but was not yet involved directly in the fight against it.

This final twist in the Bank’s role was achieved with the assumption of James D. Wolfensohn of its presidency in 1995. The new president emphasised the problem of corruption as a general development problem in his first speech before the Annual Meeting of the Board of Governors in September 1995. The new approach materialised in developing a comprehensive strategy for tackling corruption in the Bank’s activities.

The Articles of Agreement imposed the first obstacle that the Bank had to deal with in assuming its new role.\textsuperscript{47} The Bank’s mandate is defined by its Articles and its legitimacy depends on staying within its purpose as stipulated therein. The Articles do not include corruption control within the Bank’s functions. They specifically exclude the Bank, in carrying out its functions, from having regard to “political or other non-economic influences or considerations.”\textsuperscript{48} Because of the political nature of corruption, the issue seemed to fall squarely within the ambit of this exclusionary provision.

While corruption is political in that it involves abuse of public power, its negative economic implications are of great concern.\textsuperscript{49} The advocates of the Bank’s involvement in curbing corruption,\textsuperscript{50} and the Bank’s itself in defending its new role,\textsuperscript{51} have placed the emphasis on those economic implications and used them to reconcile the new role with the Articles of Agreement.

The Bank’s Articles impose on it the duty to ensure that the proceeds of its loans are spent only for the designated purposes and that due attention is given to “considerations of economy and efficiency.”\textsuperscript{52} Corruption often diverts the proceeds of bank loans from its designated destination to private pockets. It often affects the choice of projects replacing rent-seeking potentials for efficiency and equity considerations. Therefore, corrupt public officials would choose a project because of the opportunity for corrupt gains that it creates instead of its economic viability and its social necessity. Such economic implications of corruption undermine the development efforts of the Bank, and reduce the public trust in the reform process in client countries, and the willingness of the donor countries to support the Bank’s efforts especially at grassroots level.\textsuperscript{53}

The economic implications of corruption seem to suggest that the Bank shall not be able to meet its obligations under its Articles unless it addresses corruption explicitly in implementing the Bank-funded projects. Since specific projects can hardly be insulated from the overall environment in which they are implemented, addressing corruption in a more general way in the context of the overall activities of the Bank seems justified on the same basis. That is in addition to the Bank’s fiduciary obligations towards its lenders.

\textsuperscript{47} See Shihata, supra note 3, at 474–77.
\textsuperscript{49} See Tanzi, supra note 7, at 22–29; see also Paolo Mauro, Corruption and Growth, Q. J. Econ. 681 (1995).
\textsuperscript{50} Susan Rose-Ackerman, The Role of the World Bank in Controlling Corruption, 29 Law & Pol’y Int’l Bus. 93, 94 (1997).
\textsuperscript{51} World Bank, supra note 8, at 1, 17–19.
\textsuperscript{52} Id.
\textsuperscript{53} Id. at 1.
and donors, which impose on it the duty to secure the efficient use of the resources it allocates for the purposes for which they were allocated.\textsuperscript{54}

The Bank's strategy is to address corruption at four levels\textsuperscript{55}:

- Preventing fraud and corruption within Bank-financed projects.
- Helping countries that request Bank support in their efforts to reduce corruption.
- Taking corruption more explicitly into account in country assistance strategies, country lending considerations, the policy dialogue, analytical work, and the choice and design of projects.
- Adding voice and support to international efforts to reduce corruption.

In tackling the problem at all these levels the Bank remains constrained by its mandate. Its concern with corruption is an economic rather than a political one. Therefore, the Bank while addressing corruption in the bureaucratic management of public sector cannot stretch its mandate to include the political regime and its democratic management. Another limitation has been expressed by the Bank itself where it said: "though the engagement of civil society is crucial for the long-run control of corruption, there are obvious limits on the extent to which the Bank, as a lender to governments, can directly support civil society's efforts to control corruption."\textsuperscript{56}

It is beyond the scope of this paper to address the details of the Bank's efforts to curb corruption. Therefore, I now turn to the OECD convention as one of the most prominent international legal instruments for controlling corruption in its cross-border form.

2. The OECD Anti-Corruption Action

The concern of the OECD with the control of corruption dates back to 1989. In November 1997, eight years after OECD has placed this issue on its agenda, this concern materialised in a multilateral convention on Combating Bribery of Foreign Public Officials in International Business Transactions. In this section I shall review the history of OECD efforts with the aim of understanding the background to the convention that constitutes the most important legal instrument against cross-border bribery.

a. Background

Corruption is a very diverse activity with wide-ranging and pervasive harmful impact on almost all aspects of society. Economists have developed extensive analysis of the impact of corruption on the economic performance of society especially in the context of economic development. Its impact on democracy and human rights has also been widely discussed. Understanding anti-corruption activities of a certain agency must proceed from an understanding of the reasons for its engagement and the harms of corruption with which it is primarily concerned.\textsuperscript{57}

\textsuperscript{54} Id. at 25.
\textsuperscript{55} Id. at 3.
\textsuperscript{56} Id. at 25.
\textsuperscript{57} On the mandate of the World Bank and how it shaped its anti-corruption policy see Shihata, supra note 3.
The OECD concern for corruption is predominantly a concern for the impact of corruption on competition. Through its effort in this area the Organisation aims at securing a level playing field in the competition for world markets. Corruption has adverse impact on competition as it replaces the highest bribe for considerations of economy, quality and generally efficiency in the allocation of market opportunities.

In 1977, the U.S. Congress enacted the Foreign Corrupt Practices Act (FCPA), which criminalised the making of corrupt payments to foreign government officials by United States firms and individuals. Since the United States was the only trading country to uphold the illegality of such payments, its firms were under a competitive disadvantage vis-à-vis other participants in the world market who were not under a similar legal constraint. Though empirical evidence on the real impact of this situation on U.S. trade opportunities is scant, it is largely believed to have caused U.S. firms significant loss. It is due to this unbalanced situation and as a result of U.S. pressures that the issue of corruption and competition found place on the OECD agenda.

The OECD anti-corruption activity tackles corruption at four different levels:

- In international business transactions, where its Working Group on Bribery in International Business Transactions has been engaged in multilateralising the legal action against transnational business corruption since 1989;
- In the public administration of OECD member countries through its Public Management Service;
- In aid funded procurement projects through the Development Assistance Committee; and
- In the administration of non-member countries through the primarily research and training activities of the OECD Development Centre.

Discussion of the initiatives of the Public Management Service, the Development Assistance Committee or the OECD Development Centre lies beyond the scope of this paper. Instead it will focus on the legal initiatives of the Working Group and more specifically on the 1997 Convention on Transnational Bribery.

b. Legal Antecedents to the 1997 Convention on Transnational Bribery

The first four years of the OECD anti-corruption activity were dedicated to research and discussion in an attempt to reconcile the diverging views of the OECD countries on foreign bribery. It was not until 1994 that the member countries reached their first agreement and issued a Council Recommendation on Bribery in International Business Transactions, which defined the framework for future initiatives. This recommendation was followed by another in 1996 on the Tax Deductibility of Bribes of Foreign Officials in International Business Transactions. And finally in 1997, the Council issued the Revised Recommendation on Combating Bribery in International Business Transactions that resolved several points of difference and set the ground for a multilateral convention on transnational bribery.

58. Pauline Tamesis, Different Perspectives of International Organisations in the Fight Against Corruption, in 129 UNDP, supra note 22, at 134.
Considering the centrality of U.S. effort in multilateralising legal action against corruption, it seems justified to view the U.S. Foreign Corrupt Practices Act (FCPA) as a predecessor to the OECD convention. Therefore, in this section I shall discuss the U.S. FCPA as the earliest predecessor to the convention. I will then follow that by a discussion of the three Council Recommendations of 1994, 1996, and 1997.

U.S. Foreign Corrupt Practices Act (FCPA)

The FCPA was enacted in 1977 as a response to media exposure of corrupt payments to senior foreign officials by major U.S. corporations such as Mobil and Lockheed. As one author explains it: “The expanding and somewhat uncontrollable activities of multinational corporations, the post-Watergate mood in the United States, and the moral tone of the Carter Administration all put pressure on the U.S. Congress to enact the FCPA.”

The Act attempts to deal with corruption of U.S. business in foreign markets. It therefore establishes that it is a criminal offence for a “domestic concern” to bribe a foreign official through the use of any means of interstate commerce including telephone, facsimile or telex. The definition of a “domestic concern” delineates the scope of the act and confines it to individuals who are citizens, nationals or residents of the United States, and to any corporation or business association that is organised under the laws of a state or with its principal place of business in the United States. “Domestic concern” also includes an issuer of the securities of such an entity.

The offence takes place when the “domestic concern” pays or offers to pay money or anything of value directly or indirectly to a foreign government official, political party, party official, political candidate or intermediary for such a person provided that such payment is paid or offered corruptly. This condition is satisfied if the act is carried out with the intention of influencing an official act or official decision in a way that assists the briber in obtaining or retaining business. In 1998, the FCPA was amended to include any officer or employee of an international organisation in the definition of “foreign official” for the purposes of this offence.

The Act extends the jurisdiction of the United States to foreign bribery provided it involves a “domestic concern” and use of the instrumentalities of interstate commerce such as mail or fax. This approach is revolutionary in that anti-corruption laws and regulations have always been concerned with controlling corruption in the country’s own administration. No attempt has thus been made at controlling corruption in another country’s administrative or political machinery.

Recommendation of the Council on Bribery in International Business Transactions 1994

In 1994, OECD countries were finally ready to reach a preliminary agreement on tackling the problem of corruption in transnational business. This point was reached not only as a result of U.S. pressure and continuous discussion and analysis of the issue, but also in response to a more favourable international climate. Corruption has

become an international policy issue, tabled by all the international and financial development organisations. Inasmuch as this Recommendation represents consensus on tackling corruption in other country's administration, it was obviously a reflection of this international climate.

The recommendation prompted OECD countries to take concrete and meaningful steps to combat bribery of foreign officials. It invited further discussion and analysis of ways to tackle international corruption. It also listed the various areas of the law that could be used for this purpose.

Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials 1996:

Tax laws were one of the areas of the law that the 1994 Recommendation prompted OECD countries to review for the purpose of controlling corruption. Following up on this Recommendation, the OECD Committee on Fiscal Affairs examined the tax laws of member countries to find that some of them allow the deductibility of bribes to foreign officials as business costs. This tax treatment seemed to favor bribery in transnational business and, as viewed by one author, almost amounted to government subsidy of foreign bribery.

In 1996, the Council acting upon the proposals of the Committee on Fiscal Affairs and the Committee in International Investment and Multinational Enterprises issued a recommendation that countries that allow the deductibility of bribes to foreign officials should revise their laws with a view to disallowing such deductibility. The Council also instructed both the Committee on Fiscal Affairs and the Committee on International Investment and Multinational Enterprises to monitor the implementation of the recommendation and to promote a similar approach in non-member countries.

Revised Recommendation of the Council on Combating Bribery in International Business Transactions 1997:

On May 23, 1997, the Council issued a recommendation that consolidated all previous OECD legal anti-corruption initiatives and developed the consensus on the question of criminalising the bribery of foreign officials.

The Recommendation established generally that all Member countries must "take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions." Then it went on to indicate

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61. Gantz, supra note 59, at 492. ("By providing firms that bribe with a tax subsidy, the affected OECD governments have effectively been encouraging, aiding and abetting foreign bribery, and their taxpayers are paying the cost. For example, in a situation where the corporate tax rate is thirty-five percent and foreign bribes are deductible from taxable income as a business expense, thirty-five out of every one hundred marks of francs used for foreign bribes is effectively supplied by the respective governments."
the areas of the law that a Member country must examine to achieve this result, it included: criminal law, tax laws, accounting and auditing principles, civil, commercial and administrative laws, and principles of legal co-operation.

The Recommendation has addressed the various issues of tax deductibility, accounting requirements, company external audits and internal controls, public procurement, and international co-operation. Its most important achievement, however, lies in the area of criminal law. The Council recommended that Member countries should criminalise the bribery of foreign public officials in an 'effective' and 'co-ordinated' manner by submitting proposals to their legislative bodies by April 1, 1998, in conformity with the agreed common elements.

According to the OECD ministerial commitment in May 1996, 'effective criminalisation' meant that the criminal statutes should be up to the set standards and that in operating together should not allow significant loopholes. The criminal statutes should also establish effective mutual legal assistance. 'Coordinated criminalisation' on the other hand meant securing broad and comparable participation by country Members.

To achieve both effectiveness and efficiency, the Member countries worked together for three years to develop common elements of criminal legislation and related action, which were annexed to the recommendation. Those "common elements" constitute minimum standards that the Member countries must meet in developing their criminal legislation. They included definition of the bribe, the briber, the foreign public official, excuses and defences, basis for jurisdiction, and other related issues.

This Recommendation, as well as all the others that were discussed above, was issued by all the members of the OECD as opposed to the secretariat of the Organisation. While this indicated the consensus of the Member countries, it did not change the non-mandatory nature of the Recommendation. This was criticised by both France and Germany who advocated a hard law approach to the question as a better tool for securing the commitment of the members and a level playing field. The United States resented the French and German approach as aiming at gaining time and delaying action in view of the fact that conventions take a long time to conclude, and in the end national legislation remains needed for their implementation.

The 1997 Recommendation constitutes a conciliatory instrument in that it sets all the elements for a future convention, invited all Member countries to amend their criminal legislation in accordance with those elements within a specific timeframe, and opened the negotiation for an international convention to criminalise bribery in conformity with the common elements. To avoid the use of this procedure to delay the action, the Council set the end of 1997 as the date for the conclusion of the negotiation.

The Council Recommendation was acted upon and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was opened for signature on November 21, 1997, thus setting a record time for the conclusion of such a multilateral instrument.

63. Carolyn Ervin, OECD Actions to Fight Bribery in International Business Transactions, in 151 UNDP, supra note 22, at 152.
64. Id.
65. Id.
c. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

The OECD Convention on Transnational Bribery was signed on December 17, 1998. It entered into force on February 15, 1999, to become the most important legal instrument against cross-border corruption. Since cross-border corruption is exercised mainly by multinational companies operating in foreign markets, a convention that is signed by countries that are home to the majority of such companies is more likely than any other to have an impact on the level of cross-border corruption provided it is implemented effectively. In the following pages I shall discuss the various aspects of the Convention.

Elements and Scope of the Offence of Bribery of Foreign Public Officials:

The Convention requires each party to render it a criminal offence “for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to foreign public official for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.”

According to this article the Convention covers bribery very broadly to include direct and indirect offering of pecuniary and non-pecuniary advantage. The act must be intentional, and the intention must be directed towards influencing the performance of the official duties in a way that is intended to secure a business advantage for the briber. The concern of the OECD with the unfair competition element of corruption is very obvious from this definition of the scope of the offence and its definite link with business interests.

The Convention defines “foreign public official” to mean “any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public enterprise; and any official or agent of a public international organisation.”

Efforts to include bribery of party officials along the lines of the U.S. FCPA were not successful and this category was left outside the ambit of the offence at the risk of rendering the criminalisation ineffective in certain situations where the bribe is funnelled through a political party.

The briber can either be an individual or a legal person. Confronted by the problem that some legal systems do not allow for the criminal liability of legal persons, the Convention does not require the Party to alter its legal system. Instead, the Party is required to establish whatever legal liability for such action as consistent with the principles of its legal system. This liability is considered functionally equivalent to the liability established by other Parties for the purposes of co-operation and mutual legal assistance. According to the Commentaries on the Convention, it is not the purpose of the Convention to


67. Id. art. 1(1).

68. Id. art. 1(4)(a).
assimilate the laws of Member States on this issue; it rather seeks to "assure a functional equivalence among the measures taken by the parties."  

Sanctions:

The Convention requires member parties to impose "effective, proportionate and dissuasive" sanctions. The sanctions are essentially criminal in nature unless the legal system of the member state does not apply criminal liability to legal persons. In this case non-criminal sanctions may be applied as long as they are "effective, proportionate and dissuasive."  

The Convention also imposes on each Party the obligation to take necessary measures to deprive the briber of the bribe and the proceeds of the bribery either through seizure and confiscation measures or through monetary sanctions of comparable effect. Additional civil and administrative sanctions are optional.

Jurisdiction:

The Convention incorporates jurisdiction on both territorial and nationality basis. It obligates each party to establish its jurisdiction over the bribery of a foreign official once the offence has been committed in whole or in part in the party's territory. According to the Commentaries, territorial jurisdiction must be interpreted broadly as not to require an "extensive physical connection."

In line with the Convention's overall approach, nationality jurisdiction is applicable inasmuch as the country's legal system allows it and in accordance with the principles according to which it is applied. The Convention does not require the parties to alter the general principles in their legal systems. It does, however, require them to review the effectiveness of their existing basis for jurisdiction and to take remedial steps where necessary.

Safeguards:

The Convention establishes two safeguards against potential procedural abuse that may render the Convention ineffective:

- Article 5 stipulates that prosecutorial discretion in the investigation and enforcement of the bribery of foreign official shall be based on legal criteria and shall exclude any economic or political considerations such as national economic interest or relationships with another country.
- Article 6 provides that the application of any statute of limitation must allow time for the investigation and prosecution of this offence. This obviously implies taking into consideration the transnational character of the offence and the implications that it has for the length of the procedures.

70. OECD Convention on Transnational Bribery, supra note 66, art. 3(1).
71. Id. art. 3(2).
72. Id. art. 3(3).
73. Commentaries on OECD Convention on Transnational Bribery, supra note 69, ¶25.
International Co-operation:

Because the Convention deals with corruption of cross-border nature, international co-operation in the investigation and pursuit of bribers of foreign officials is a necessity if the Convention is to work effectively. Articles 9 and 10 provide for two essential forms of co-operation; namely mutual legal assistance and extradition.

According to Article 9, countries are obliged to “provide prompt and effective legal assistance” to other parties for the purpose of investigating acts that fall within the ambit of the convention. Legal assistance often concerns the gathering of evidence for the purpose of establishing liability for the acts covered by the Convention. This can take the form of sharing information or facilitating the availability of witnesses or other persons who can and consent to help in the investigation through measures that make the temporary transfer of such persons from one country (the requested country) to another (the requesting country) possible.

Article 9 specifically provides that mutual legal assistance shall be performed in accordance with each country’s laws and treaties. However, according to the Commentaries and the 1997 Revised Recommendation, parties are requested to revise their laws and arrangements on mutual legal assistance and incorporate any means that are likely to improve their efficiency.

The Convention tackles two possible obstacles to the effectiveness of international co-operation and attempts to resolve them:

- Countries often make mutual legal assistance conditional on the existence of dual criminality. This creates problems where the sources of criminalisation and the forms thereof vary from one country to another. The Convention, in an attempt to avoid this problem, provides that the dual criminality condition shall be deemed satisfied as long as the acts for which the application for assistance is made fall within the scope of the offences as defined in the Convention. That is regardless of whether the source of prohibition is a criminal statute on the bribery of foreign officials, a criminal statute on the bribery of government officials in general or even a non-criminal statute sanctioning legal persons who engage in corrupt practices. The latter case is specifically important in view of the fact that the legal system in some countries does not allow for criminal liability of legal persons. It is the approach of the Convention throughout to accommodate differences in legal systems without requiring any change in fundamentals while establishing functional equivalence that renders co-operation possible.

- Bank secrecy has traditionally been an insurmountable obstacle to mutual legal assistance. Since the offences with which the Convention is concerned are economic in nature, such an obstacle can prove detrimental to any investigation and prosecution. Hence, Article 9(3) provides explicitly that “a party shall not decline to render legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy.” [emphasis added] The specific addition of ‘for criminal matters’ emphasised above poses the question whether this is intended to exclude the functional equivalence between the criminal and

74. *Id.* §30.
non-criminal proceedings for the acts covered by the Convention in this specific case. In other words, would a party be able to decline mutual assistance on the basis of bank secrecy where the proceedings are non-criminal as in the case of the proceedings against a legal person in countries where criminal liability of such persons is not possible according to the general legal principles?

On the question of extradition, Article 10 establishes that bribery of foreign public officials is an extraditable offence. Where extradition is conditional upon the existence of an extradition treaty between the requesting and requested country, this Convention shall be deemed sufficient with respect to the offence covered by its provisions. Where dual criminality is a condition the solution discussed above applies.

The Convention also addressed the problem of extradition of a country’s own nationals. And in that respect it imposed an obligation to prosecute or extradite upon the parties, which means that where the laws of the country do not allow for the extradition of its own nationals, this country must take necessary measures to proceed against the person concerned within its jurisdiction.

Monitoring and Follow-up:

The work of the OECD in controlling corruption in transnational business transactions is not concluded with the entry of the Convention into force. The actual effectiveness of the Convention rests on the implementation thereof by the Parties and the operation of the resulting legislation. The drafters of the Convention were aware of this obvious conclusion and they provided for a mechanism to meet its requirements. Article 12 provided that the Parties must carry out “a programme of systematic follow-up to monitor and promote the full implementation of this convention.” This programme is carried out within the framework of the OECD Working Group on Bribery in International Business Transactions.

Here I come to the end of the summary of the OECD Convention’s provisions. It is obvious from the nature of the acts criminalised by the Convention that its success depends on the genuine co-operation between Member countries, a matter that the Convention sought to promote through its system of international co-operation and to enforce through its follow-up procedures. Now I move to a similar discussion of the Inter-American Convention against Corruption as the second most important multilateral legal instrument against corruption.

3. The Inter-American Convention against Corruption

In May 1992, the General Assembly of the Organisation of American States resolved to place the issue of corrupt international trade practices on the agenda of the Organisation as one of the economic and social challenges of the 90s that it must address. The General Council justified its concern on the basis of the detrimental effects that corrupt practices have on democracy, integral development, economic growth, and social justice. The General Assembly also expressed its conviction that corrupt practices impose

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constraints on free trade and hence undermine investment and the flow of financial resources.

In pursuance of this decision, the issue of controlling corruption was examined by the various organs of the Organisation. A special working group on Probity and Public Ethics was established and "charged with the compilation and study of national legislation in effect with regard to matters of public ethics, the discussion of experiences in the control and oversight of existing administrative institutions, the development of a checklist of crimes related to public ethics as defined in national laws, and the preparation of recommendations on juridical mechanisms to control the . . . problem."\[7\]

As a result of these efforts and on the basis of a proposal by the Government of Venezuela for an Inter-American Convention against Corruption, a draft Convention was prepared by the Working Group on Probity and Public Ethics and adopted by the third plenary session in Caracas, Venezuela on March 29, 1996.\[78\] This Convention constitutes the core of the Inter-American anti-corruption mechanism. While it precedes the OECD Convention and actually constitutes a milestone in the multilateralisation of anti-corruption efforts, I have chosen to discuss the OECD Convention first because of its importance that stems from its membership and the extensiveness of its enforcement and follow-up mechanisms. While the membership of the Inter-American Convention is not without significance, the same cannot be said for its enforcement and follow-up mechanisms, a point to which I will turn later on.

The 1992 decision of the General Assembly discussed above\[79\] placed primary focus on corruption in the context of international trade, which was reflected in its title "Corrupt International Trade Practices." Pursuant activities by the Organisation, however, reflected a much wider view of the problem, and a shift of emphasis to the impact of corruption on democracy and the legitimacy of government. This was expressed in the preamble to the Inter-American Convention where it was stated that the Member States of the Organisation of American States are convinced that "corruption undermines the legitimacy of public institutions and strikes at society, moral order and justice, as well as the comprehensive development of peoples . . ." This definition of the basis for concern had its impact on the scope of the Convention giving it a much wider focus than that of the OECD Convention with its focus on the impact of corruption on competition in world markets.

**Elements and Scope of the Offences:**

The Inter-American Convention, unlike the OECD Convention, is concerned with both the demand and the supply side of corruption and with the national and the transnational forms of corruption. The Convention imposes upon the State Parties an obligation to prohibit and punish:

- National acts of corruption which include the solicitation or acceptance of bribery by a person who holds or performs a public function, the offering or

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79. See Resolution of the General Assembly of the Organization of American States, supra note 76 and accompanying text.
granting of bribery to such a person, any other form of abuse of public function for private gain and any fraudulent use or concealment of property derived from the aforementioned acts.  

- Transnational bribery where the offering of a bribe is carried out by an individual or business that is linked to its territory by virtue of nationality or domicile.

- Illicit enrichment understood as any significant increase in the assets of a government official that he cannot explain in relation to his lawful earnings.

It should be noted that the Convention defines bribery very broadly to include both direct and indirect offering. It also encompasses the granting of an article of monetary value or any other non-monetary benefit. According to the Guide for the Legislator prepared by the Inter-American Juridical Committee, indirect bribery includes bribery offered or received through a third party whether or not that party was tied to the State Party by nationality or domicile.

The Convention defines "public function" very broadly to include "any temporary or permanent, paid or honorary activity, performed by a natural person in the name of the State or its institutions, at any level of its hierarchy." It defines "public official" with comparable breadth to include "any official or employee of the State or its agencies, including those who have been selected, appointed, or elected to perform activities or functions in the name of the State or in the service of the State, at any level of its Hierarchy."

Acts of bribery can be performed by both individuals and legal persons. The Inter-American Juridical Committee in its Guide to the Legislator defines legal entities very broadly indicating that it is the intention of the Convention to include "all entities that manage capital and labor and which could receive benefits." The Committee proposes that governments should consider including within the definition of a legal person, entities of corporate or non-corporate status, non-profit entities, State-owned enterprises or companies under its control.

The scope of each of the above offences is not identical. While the giving or receiving of bribery within the national boundaries must be rendered criminal whatever the purpose of such act, transnational bribery is only criminal according to the Convention when it is carried out "in connection with any economic or commercial transaction." This difference in scope is understandable in view of the rationale and purpose of each

80. The Inter-American Convention Against Corruption, supra note 78, art. VI(1).
81. Id. art. VIII.
82. Id. art. IX.
84. The Inter-American Convention Against Corruption, supra note 78, art. I.
85. Id.
86. Guide for the Legislator, supra note 83.
87. Id.
88. The Inter-American Convention Against Corruption, supra note 78.
form of criminalisation. While the main purpose of criminalising transnational bribery is to secure a level playing field in the competition for markets, the primary purpose of penalising bribery within a country is to protect the integrity of its government institutions and equity amongst its citizens in both commercial and non-commercial contexts.

Jurisdiction:

Article IV of the Convention establishes that it is concerned with corrupt acts only when they are committed or have effect in a State Party. Applying this principle, the Convention adopts territoriality as a basic and obligatory criteria for a State Party's jurisdiction over the offences established in accordance with its provisions. Nationality and habitual residence are, on the other hand, proposed as optional basis for extending national jurisdiction. The Convention also establishes a duty to prosecute or extradite where the accused is present within the territory of a country whose laws prevent his/her extradition.

In the case of transnational bribery, the offence can only be committed by a national or habitual resident of the State Party or by a business domiciled therein. This approach is different from that of the OECD where transnational bribery may be committed by any person subject to rules of jurisdiction. The approach of the Inter-American Convention was explained by the Inter-American Juridical Committee as aiming at securing “a clear link between the active perpetrator of the crime and the legislating State” and “to avoid exaggerated or illegal extensions of the national criminal jurisdiction.” In view of the transnational character of corruption and the failure of some countries to enforce their anti-corruption laws, the OECD approach that extends the jurisdiction of the State to any act of bribing a foreign official committed within its territory seems to be more effective as well as justified.

The principles of jurisdiction established by the Convention are not restrictive. States are free to adopt other basis for criminal jurisdiction. The Convention endorses other domestic rules of criminal jurisdiction with an open-ended provision to that effect.

International Co-operation:

The activities of the Organisation of American States in the area of controlling corruption have always been premised on a belief that international co-operation is essential for tackling this problem. This belief was reflected in the purposes of the Convention. It is stipulated as one of its purposes to “promote, facilitate and regulate co-operation among States Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance.”

89. Id. art. V(1).
90. Id. art. V(2).
91. Id. art. V(3).
92. The Inter-American Convention Against Corruption, supra note 78.
94. Id.
95. The Inter-American Convention Against Corruption, supra note 78, art. V(4).
96. Id. art. II(1).
The Convention provides a number of co-operation mechanisms:

- **Extradition:** The Convention establishes that the offences created according to its provisions are extraditable offences, that they are deemed to be included in any extradition treaty existing between State Parties, and that they must be included in any such future treaty. Where extradition is conditional on the existence of an extradition treaty, the Convention shall provide the legal basis for extradition with respect to offences established in accordance with its provisions.

- **Mutual legal assistance:** The Convention imposes a duty on Member countries to co-operate in the enforcement of domestic criminal law of corruption. This co-operation can take place with regard to collecting evidence or any other aspect of investigating and prosecuting corruption. Mutual legal assistance must also be exercised in the identification, tracing, freezing, seizure and forfeiture of the proceeds of any of the offences covered by the Convention.

- **Mutual technical co-operation:** The Convention encourages mutual technical co-operation between Member States for the purpose of devising the most effective means of preventing, detecting, prosecuting, and punishing corruption. Technical co-operation can take the form of arrangements between the competent institutions as well as at grassroots level.

**Safeguards:**

The Convention provides a number of measures against possible gaps in the application of the Convention that might render it ineffective:

- It imposes a duty on the State concerned to prosecute the accused within its jurisdiction where extradition is not possible. This is designed to avoid the possibility of criminals taking refuge in countries that do not have jurisdiction to prosecute them and do not have the legal power to extradite them to countries where such jurisdiction resides.

- To circumvent the dual criminality requirement as a hindrance to international co-operation, the Convention provides repeatedly that where a State Party has not criminalised one of the acts covered by the Convention it remains under an obligation to provide assistance to other State Parties with respect to that act.

- The Convention also prevents State Parties from refusing to co-operate on basis of bank secrecy.

**Evaluation:**

As I have indicated earlier, the Inter-American Convention constituted a milestone in the multilateralisation of anti-corruption efforts. By including within its membership both capital-exporting countries such as the United States and major capital-importing countries such as Brazil, the Convention strikes an important balance and secures a valuable partnership between the importing and exporting sides of bribery. However, the failure of the Convention to incorporate any institutionalised follow-up and mutual monitoring mechanism similar to that introduced by the OECD Convention undermines greatly the effectiveness of the attempt. With the parallel membership of some countries (Argentina, Brazil, Canada, Chile, Mexico, and the United States) in the OECD and the Inter-American instruments there could be some hope in a better enforcement of the Inter-American Convention as the pressure of the OECD mechanisms is transmitted through this common membership.
D. Conclusion

In this section I have attempted to lay the groundwork for the following discussion by establishing a clear definition of corruption, the causes of the current concern with the problem and the role of the international community in tackling it. It emerged from the above exposé that consensus has been formed to treat corruption as an international policy concern. This consensus was reflected in the activity of almost every international organisation including the United Nations, the World Bank, the IMF, the OECD, the Organisation of American States and many others. In the current work I focus on the legal instruments against corruption. I have thus far provided a summary of two of the main multilateral legal instruments against corruption, namely the OECD and the OAS conventions. In the following section I will offer a similar, though more concise, overview of money laundering and the international instruments that attempt to prevent it and/or control it.

III. Money Laundering: Definition and Overview

A. Definition of Money Laundering

The term ‘money laundering’ is of recent and debated origin. According to the Oxford English Dictionary, the term first came into use in the mid-1970s in connection with the Watergate scandal. Some have argued that it is derived from the early practice of criminal organisations in the United States, who used to operate Laundromats as cash intensive businesses to hide criminal wealth. Whatever the metaphoric source of the term, it seems irrelevant in view of its widespread use. It entered legal parlance for the first time in United States v. $4,255,625.39. It has become accepted as a term of art ever since and used extensively in the titles of relevant legislation and legal texts. It can be found for example in the titles of the U.S. Money Laundering Control Act (1986) and the 1990 European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds for Crime.

The concept of ‘money laundering’ at the current state of the art is almost open-ended. While authors often introduce their definitions as commonly accepted, closer inspection of the elements of these definitions immediately reveals stark and fundamental differences. This reflects different priorities and perspectives between prosecutors, defence lawyers, intelligence agents, bankers, regulators and others who take interest in

98. Id.
the discussion of money laundering. The difference may even be embedded in state policy and its economic goals, which results in divergence between developed and developing countries and within each of those categories.

For the purposes of the current discussion, I define ‘money laundering’ as the process of manipulating legally or illegally acquired wealth in a way that obscures its existence, origin or ownership for the purpose of avoiding law enforcement. This definition has four elements:

- A process or series of acts.
- A specific outcome of such process: obscuring the existence, origin or ownership.
- An object of the process: illegally acquired wealth.
- Specific goal or purpose: avoiding law enforcement.

In the following few paragraphs I will discuss each of those four elements. The discussion will show some of the different approaches to defining money laundering and where they differ.

1. The Process of Laundering

Money laundering as I have indicated consists of a process or series of linked transactions with respect to specific funds or assets for a specific purpose. The acts or transactions are limited only by the purpose for which they are structured and the skill of the launderer. There is an almost unlimited number of ways in which the launderer can achieve his/her purpose. To make sense of this unmanageable variety in a way that facilitates understanding and policy making, analysts reduced the process schematically to three stages:

- Placement: It is the first stage of money laundering where money is first brought into the light and injected into the legitimate economy. This often happens by placing cash into a bank, or by using bureaux de change to convert large sums of money from one currency to larger notes in another currency hence reducing the bulk.
- Layering: At this stage the link between the wealth and its owner or holder is severed through a multiplicity of transactions whose primary aim is to obscure the paper trail. Electronic wire transfers are often used at this stage with the launderer taking advantage of the instantaneous nature of these transactions and their daily volume. Both features make legal pursuit very difficult.
- Integration: This is the final stage, which involves re-introducing illegally derived wealth into the legal economy after giving it an appearance of legitimacy. The use of shell companies and fabrication of foreign and domestic loans and other business deals are common tools at this stage.


103. For an extensive discussion of the modus operandi of money laundering, see ANTI MONEY LAUNDERING GUIDE, ¶¶5-250 to 5-450 and ¶¶6-800 to 8-350 (Barry A. K. Rider & Chizu V. Nakajima eds., 1999).
This schematic presentation is not watertight. Where one stage ends and another begins is not always clear. It is also obvious that this scheme is developed with cash as the form of illegal wealth in mind. Where the wealth generated is not in cash, the scheme needs to be adapted if it is to be usable at all. This paradigmatic presentation remains useful, however, in understanding a process that is so complex and heterogeneous.

2. The Outcome of the Laundering Process

Defining money laundering broadly, one can envisage several outcomes of the laundering process. The launderer could seek to:

- Hide the existence of the wealth or its amount, as in the case of a tax evader who wants to shelter his wealth from the reach of tax authorities;
- Hide its ownership, as in the case of a drug lord who wants to obscure the money trail that might lead to his detection by severing the link between himself and the funds through a shell company or a trust;
- Hide its disposition where the money is intended for investment in a criminal or terrorist organisation; or
- Disguise its origin by fabricating another legitimate source of wealth.

The outcome of the laundering process depends on the purposes of the launderer himself as well as on the law and the law enforcement in the jurisdiction where the activity is taking place. If the launderer aims at re-investing his illegal wealth in another illegal enterprise, he will be keen on hiding the ownership of the money or its trail to the illegal destination. Disguising the source and legitimising it will be irrelevant in this case. Legitimation will also be irrelevant when the launderer invests his wealth in a jurisdiction with lax approach to the illegality of funds.

Some commentators consider false legitimation to be a core element in the definition of money laundering, without which an operation cannot be defined as one of laundering. This approach has a lot to commend it in terms of logical coherence and commitment to a clear policy goal. However, it will leave outside the gamut of money laundering control laws the majority of the acts that aim at putting wealth that is due to the law outside the reach of law enforcement. This will defeat the purpose of money laundering control as essentially law enforcement policy. The first to benefit from such a narrow approach will be corrupt foreign officials who loot their countries and export their ill-gotten wealth to where it rests out of the reach of its legitimate owners and without any attempt at legitimising it.

3. Legally or Illegally Acquired Wealth

Concern for money laundering has originated in the context of the fight against the drug trade and has been influenced by this context. For this reason the wealth that could be subject to laundering has and remains to a very far degree confined to that which is derived from a crime. Developments in money laundering control policy, however,
are beginning to take the definition of wealth beyond that limited scope. With tax authorities and anti-terrorism agencies eager to use money laundering control to enforce their laws, the concept of wealth had to be rid of its illegitimacy requirement. Money that is obtained by evading taxes is very often legally obtained, and money that is channelled towards terrorism could be raised from a legitimate source.

Wealth or property must be understood very broadly to include any kind of assets. To borrow the definition of the 1988 Convention Against Illicit Traffic in Narcotic Drugs, "Property means assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets." 

4. Avoiding Law Enforcement

Any money laundering operation aims ultimately at circumventing law enforcement and evading the reach of the law. As one commentator put it: "In other words money-laundering is an act of accounting or fiscal act to bypass the law." The purpose of the launderer could be to avoid the confiscation of his criminal proceeds, or to avoid the taxation of otherwise legal wealth. For those who extend money laundering to proceeds of civil wrong, the launderer's purpose could be to avoid the enforcement of a court ruling against his assets in a divorce case.

In my view, this specific purpose is at the core of the definition of money laundering. It is the one element that distinguishes money laundering from similar acts with comparable outcomes, which aim at achieving a business advantage without breaching the law. Such techniques are used extensively by corporations in takeover battles in order to hide their interests in their targeted business.

B. The Current Paradigm of Money Laundering Control

The problem of money laundering was addressed in the law for the first time in the U.S. Bank Secrecy Act of 1970. A crime of money laundering did not exist until 1986, when it was introduced in the U.S. Money Laundering Control Act (1986), and in the U.K. Drug Trafficking Offences Act of the same year. This concern with the drug trade and its proceeds has proved contagious and resulted, after four years of preparation, in the adoption of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in 1988. The Convention was the first international legal instrument to impose an obligation on its Parties to criminalise the acts of laundering the proceeds of drugs. This initiative was followed by several other initiatives at international and regional levels.

The most important instrument in this respect was drafted by the Financial Action Task Force on Money Laundering (FATF) in 1990. The FATF was created by the G7 in

106. Some argue that money that is derived from some civil wrong could qualify for money laundering purposes. See Barry Rider, The Control of Money Laundering: A Bridge Too Far?, 5 EUR. J. FIN. SERV. 27 (1998).
107. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 1(q) [hereinafter Vienna Convention 1988].
108. Van Duyne, supra note 105, at 60.
their Paris Summit Meeting of July 1989, to be the only international body specialising in designing strategies to control money laundering. In February 1990, the FATF produced its renowned report, which included an assessment of the scope of the problem and forty recommendations establishing a comprehensive strategy for dealing with it. The Forty Recommendations were amended in 1996 to reflect changes in the techniques and the understanding of money laundering. Despite the limited and unrepresentative membership of the FATF and the soft nature of the recommendations, they remain at the foundation of the existing money laundering control paradigm and have been widely reflected in the laws of member and non-member countries.

While variations in money laundering laws still exist, and differences in implementation often accentuate them or even create new ones, one can still speak of a money laundering control paradigm. While this can be explained to a certain degree by the spontaneous force of imitation, it is mainly the result of taxing and deliberate efforts of the FATF and its regional counterparts. The rationale of such efforts is a belief that only through harmonisation and approximation of laws can the legal and regulatory loopholes be closed against the exploitation of the increasingly transnational criminals.

Money laundering control strategy has four prongs: (1) the criminalisation of money laundering; (2) strengthening the methods of tracing, freezing and confiscating the proceeds of illegal activity; (3) implementing regulatory tools to prevent the use of the financial system for the purpose of money laundering; and (4) improving international co-operation. In the following few paragraphs I will elaborate on those four aspects of money laundering control strategies with brief reference to national differences.

1. Criminalising Money Laundering

As I have indicated above, money laundering was not considered a criminal offence until 1986 when it was criminalised in both the United States and the United Kingdom. In 1990, another five countries of the FATF members had already established money laundering as a specific criminal offence; namely, Australia, Canada, France, Italy and Luxembourg. Since those early days, the criminalisation of money laundering has spread much further.

The paradigm definition of the elements comprising the offence remains that of the Vienna Convention of 1988. The Convention imposes on each party the duty to establish money laundering as a crime. It is important, however, to note that the Convention does not use the term ‘money laundering’ to describe the crime. The offence of money laundering established by the Convention is very narrow in that it applies only to property derived from drug-related offences. It is very broad, however, in that it covers any manipulation of such property whether to conceal its origin, location, disposition, movement, ownership or any other rights with respect to the property. ‘Property’ is

109. For a discussion of the background and nature of the FATF, see Gilmore, supra note 100, at 93–98.
112. Vienna Convention 1988, supra note 107, art. 1(p).
113. Id. art. 3(1)(b).
also defined very broadly to include any possible kind of asset.\textsuperscript{114} Such asset is to be considered proceeds of the specified offences whether it was derived directly or indirectly from the offence.

Since the Vienna Convention, criminalisation of money laundering has developed beyond the scope of drug-related proceeds. It became obvious that such limitation is neither justified nor practical. Drug trafficking is not the only serious offence that generates large criminal fortunes. Confining money laundering offences to the proceeds of drug-related crime creates a host of practical problems and renders the law ineffective. For example, a banker who is under a duty to report suspicion of money laundering will be unable to report because of uncertainty about the source of suspicious funds. If the banker reports it turns out that the funds are not derived from a drug-related offence he might be liable for a breach of confidentiality.

Defining the predicate offences of money laundering is a policy issue to which countries give different solutions. While some still confine money laundering to the proceeds of drug-related money, others extend it beyond this scope to all serious offences or to a list of offences, which they deem most likely to result in laundering activity. In making their decisions, countries bear certain considerations in mind. The seriousness of the offence, the size of wealth that it generates, the involvement of organised criminal enterprise and whether the offence threatens the integrity of the financial sector.\textsuperscript{115}

Another issue that breeds differences and demands legislative decision making is the question of the mental element of the offence of laundering. According to the general principles of criminal justice, most notably the presumption of innocence, the prosecution must prove that the launderer knew that the money was derived from an unlawful activity. The prosecution must also prove that by manipulating the funds, the launderer intended to hide its origin, nature, location, ownership or any other aspect thereof as described in the definition of the offence. This burden of proof can be very onerous, especially in view of the complexity of money laundering operations and the extensive use of shell companies and bearer securities. To render this burden manageable, there is a growing consensus to allow for the reliance on inferential evidence. This is the case in the Vienna Convention of 1988, which provides that "knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances."\textsuperscript{116}

Money laundering often involves the use of financial intermediaries. Since financial intermediation is often carried out by the formal financial sector in a country, concern about money laundering has always been entwined with concern for the integrity of the financial sector. Because of these facts the need to criminalise money laundering has always raised the issue of corporate criminal liability. If financial institutions are to be discouraged from getting involved in money laundering their criminal liability must be addressed. Countries differ greatly on the question of criminal liability of corporations; while some accept it and design sanctions that accommodate to the non-corporeal nature of legal persons, others reject this liability on basis of the general principles of their

\textsuperscript{114} Id. art. 1(q).
\textsuperscript{116} Vienna Convention 1988, supra note 107, art. 3(3).
legal system. The FATF, conscious of the national variations in this regard, proposed the establishment of criminal liability of corporations for money laundering only where such liability is acknowledged by the legal system of the country concerned.\footnote{117} This makes corporate criminal liability a third issue that the legislature of any one country must address in a criminal law of money laundering.

2. **Strengthening the Methods of Tracing, Freezing and Confiscating the Proceeds of Illegal Activity**

According to the Vienna Convention of 1988, the FATF Recommendations, and the Council of Europe Convention on Laundering, rules and mechanisms for confiscation of illegally obtained assets constitute a central pillar of any anti-money laundering policy. It is often argued that inadequate provisional and confiscation measures against the proceeds and instrumentalities of crime render money laundering control ineffective. This is true with respect to the rules of tracing, the inadequacy of which results in failure to identify the funds as proceeds or instrumentalities of crime, and to enforce anti-money laundering rules and regulations. The same is true with respect to the inadequacy of provisional measure such as freezing and seizure against the property suspected of being laundered. Failure to impose provisional rules to prevent any further manipulation of the funds can undermine money laundering control especially in an era of instantaneous global money transfers.

However, where confiscation rules are drawn too narrowly as to exclude certain profit-generating criminal conduct from qualifying as predicate for confiscation, money laundering control not only becomes less effective but also loses part of its raison d'être. Money laundering control, in effect, prohibits the use of illegal gains for legal or illegal purposes. One central rationale for this prohibition is to prevent the infiltration of the legal economy by criminals and the consolidation of their social power. A narrowly cast net of confiscation rules defeats this purpose and complicates the enforcement of money laundering where the assets are actually criminal assets but nevertheless not claimed by the state.

According to the Vienna Convention 1988, 'confiscation' means "the permanent deprivation of property by order of a court or other competent authority."\footnote{118} The Convention imposes on the Parties an obligation to take any necessary measures to enable the confiscation of proceeds of any of the offences covered by the Convention or any instrumentalities thereof.\footnote{119} The Convention also imposes on the parties the duty to take necessary measures to enable the identification, tracing, freezing or seizure of such proceeds or instrumentalities.\footnote{120}

Countries have divergent approaches to the issue of confiscation. Systems of tracing, freezing and seizure are also different. While they are mature in some countries they are less so in others. Discussion of these differences is beyond the scope of this overview.

117. FATF Forty Recommendations, supra note 111, Recommendation 7.
118. Vienna Convention 1988, supra note 107, art. 1(f).
119. Id. art. 5(1)(a)-(b).
120. Id. art. 5(2).
3. Regulatory Measures to Prevent the Use of the Financial System for the Purpose of Money Laundering

Money laundering often involves the use of financial intermediation. Concern about the use of the formal financial sector for money laundering purposes was amongst the most important reasons for the emergence of money laundering control policy. Evidence to this effect is to be found in the fact that money laundering was first tackled in the U.S. Banking Secrecy Act of 1970, which imposed a number of regulatory reporting requirements.

The Basle Committee on Banking Supervision\(^2\) confirmed this concern in a Statement of Principles issued in December 1988. It maintained that "[b]anks and other financial institutions may be unwittingly used as intermediaries for the transfer or deposit of funds derived from criminal activity."\(^2\) The Committee then went on to outline basic procedures that must be implemented by banks' managers in order to suppress the use of the financial system for money laundering activities. These regulatory policies are often classified by analysts of money laundering control regimes as preventive, as opposed to control policies of criminalisation and confiscation, which I have discussed above. As indicated by the Basle Statement of Principles, financial regulatory measures are crucial for the enforcement of criminal and confiscatory measures.

I shall discuss the role of the Basle principles and the role of the financial sector in the enforcement of money laundering measures in the discussion of the use of money laundering control to curb corruption.

4. International Co-operation

International co-operation is as crucial for money laundering as it is for corruption. Transnationalising the laundering process offers the launderer substantial benefits. It allows him to place the assets beyond the jurisdiction of the country where the predicate offence was committed, to benefit from jurisdictions with lax criminal and regulatory systems, and to benefit from problems of co-operation and communication between different criminal and regulatory jurisdictions.\(^2\)

The FATF, aware of the transnational character of money laundering, dedicated Recommendations 30 to 40 to the question of strengthening international co-operation. According to the FATF international co-operation in this regard has two forms, one is administrative and the other is legal. Recommendations 30 to 32 invited the members to establish better administrative co-operation for the purpose of improving the information flow amongst them.\(^4\) The purpose of this measure is to enhance the understanding

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121. The Basle Committee was established in 1974 by the Group of Ten under the administrative auspices of the Bank for International Settlement in Basle, Switzerland. The Committee comprises representatives of the central banks and other financial supervisory authorities of the eleven member countries of the G10 and Luxembourg. See, e.g., JOSEPH JUDE NORTON, DEVISING INTERNATIONAL BANK SUPERVISORY STANDARDS 175–90 (1995).


123. On the global character of laundering and its benefits to perpetrators, see Savona & De Feo, supra note 99, at 54–55.

124. FATF Forty Recommendations, supra note 111, Recommendations 30–32.
of money laundering techniques and the size of the problem in a way that allows them to tackle it more efficiently.

At the legal level, countries were invited to establish money laundering as a basis for mutual legal assistance. Members were also encouraged to establish a network of multilateral and bilateral agreements in this regard.\(^{125}\) Co-operation is also encouraged in the area of investigation and prosecution of money laundering offences, especially in obtaining evidence in foreign jurisdiction.\(^{126}\) The FATF proposed that countries should respond expeditiously to foreign requests for identifying, freezing, seizing and confiscating the proceeds of money laundering or any crime underlying it.\(^{127}\)

Extradition was addressed in Recommendation 40, and the FATF proposed that countries should establish money laundering as an extraditable offence under their laws and any extradition agreements to which the country is party.\(^{128}\) Because of the potential conflict of jurisdiction in money laundering, the FATF proposed that mechanisms should be devised for “determining the best venue for prosecution of defendants in the interests of justice.”\(^{129}\) The same thing was suggested for the co-ordination of confiscation of assets, and the possible sharing of the confiscated proceeds.\(^{130}\)

C. CONCLUSION

One commentator writing about responses to the “globalization of money laundering”\(^{131}\) asserted that concern with the control of money laundering in the past decade “has resulted in an unprecedented level of international cooperation in criminal matters.”\(^{132}\) In the next part of this discussion I shall argue that attempts to control corruption should benefit from this revolution in international cooperation by the expansion of the predicate offence of money laundering to include the offence or offences of corruption in public office.

IV. Using Money Laundering Control to Curb Corruption

A. THE RATIONALE

Maintaining secrecy has always been essential for the corrupt. Corrupt officials have always used what we would describe today as “money laundering” mechanisms, such as shell companies and false invoicing. One commentator describing the “techniques of political graft”\(^{133}\) included in his analysis the methods of maintaining secrecy as

\(^{125}\) Id. Recommendation 33.
\(^{126}\) Id. Recommendation 37.
\(^{127}\) Id. Recommendation 38.
\(^{128}\) Id. Recommendation 40.
\(^{129}\) Id. Recommendation 39.
\(^{130}\) Id.
\(^{132}\) Id. at 107.
\(^{133}\) V. O. Key, Jr., Techniques of Political Graft, in Political Corruption: Readings in Comparative Analysis, supra note 2, at 46.
“subsidiary or ancillary techniques”\textsuperscript{134} thus incorporating them as essential parts in the process of acquiring corrupt benefits.

In the current setting, using the present paradigm of money laundering control to curb corruption derives its rationale not only from the basic characteristic of corruption as an economic crime committed mostly for profit, but also from its modern transnational character. In the following few paragraphs I shall elaborate on how anti-money laundering measures can be used effectively to curb corruption by hitting at the core of its economic nature and by extending the reach of national jurisdictions. The extraterritoriality of anti-money laundering measures will create a balance against the transnational character of the problem of corruption.

1. \textit{Taking the Profit out of Corruption}

The past two decades have witnessed a shift in crime control policy towards more emphasis on taking the profit out of crime. It has been triggered by the perceived increase in the profitability of criminal activity especially drug trafficking and other forms of, often transnational, organised crime. This has resulted in a proliferation of the use of confiscation and forfeiture mechanisms against the proceeds of criminal activity.

Corrupt officials can seek non-economic returns, such as power and favours, for acting corruptly. However, corruption is very often exercised for the purpose of securing economic or even pecuniary gains. The history of dictators such as President Marcos of the Philippines and his wife can provide sufficient evidence of this reality.\textsuperscript{135} Pursuing the proceeds of corruption and confiscating them, if carried out effectively, can reduce the incentive to act corruptly. This is premised on a belief that the individual's economic behaviour is rational and based on a balance of interest and risk.

Anti-money laundering measures are essentially law enforcement mechanisms, the purpose of which is to prevent criminals from hiding the illicit origin of their wealth in a way that renders tracing and confiscation impossible. Unless corruption is acknowledged as a predicate offence for money laundering, corrupt officials will continue to enjoy the gains of their reprehensible and damaging conduct.

2. \textit{Following the Money Trail}

Large wealth without an obvious source raises suspicion. Those who derive their wealth from origins they are not proud to reveal are always keen on hiding it or obscuring the link between the wealth and their patrimony. Criminal law enforcement agencies became aware of the need to follow the money trail in order to detect and prosecute the real orchestrators of the criminal activity, who never touch the illicit drug, for example, but manage the illegal operations and then reap the benefits. Unless criminals are prevented from hiding the money trails, this crime detection mechanism is bound to fail.

Some dictators who perform corruption on a grand scale do not care to hide their wealth. They are content with flagrant appropriation of their country's assets and secure

\textsuperscript{134} \textit{Id.} at 49.

\textsuperscript{135} The size of President Marcos' wealth can be only guessed if you know that he collected $80 million of corrupt payments from a single nuclear power contract. See Patricia Adams, \textit{Odious Debts: Loose Lending, Corruption, and the World's Environmental Legacy} (1991) at 133.
behind their brutal exercise of power. In most cases, however, corrupt officials need to keep a façade of propriety in order to maintain their positions. For them money laundering becomes crucial. Even for brutal dictators, the risk of eventual revolution induces them to seek to keep their wealth or part of it out of the reach of their defrauded people in safe offshore money havens.

Anti-money laundering measures aim specifically at preventing criminals from obscuring the money trail that leads to them. Creating corruption as a predicate offence for money laundering helps prevent the corrupt from maintaining their façade of legitimacy and expose their corruption.

3. Reaching the Extraterritorial
a. The Territoriality of Law and Regulation

The world as we know it since 1945 and the success of the decolonisation movements is made of sovereign states. Each possesses exclusive jurisdiction over a specific territory. Law has been a primary expression of this sovereignty and the result has been deeply entrenched and strongly defended legal territoriality. Each state has authority "to prescribe rules of law, to adjudicate legal questions and to compel, to induce compliance or to take any other enforcement action" primarily within their defined territory. Exceeding the boundaries of their territory is a prima facie assault on another country's sovereignty unless justified by the state that exercises it and accepted by the others.

Confronted by the porous nature of the world system where no country is an island and actions taken wholly in one country have a definite impact on another, states tried to extend their jurisdiction beyond their territories employing various means. This has been done by loosening the territorial link upon which territorial jurisdiction is based. In criminal law, for example, territorial jurisdiction is established over a crime if it is committed "in whole" or "in part" within the territory of the state. Territorial jurisdiction has also been extended to situations where the conduct element of the offence has occurred extraterritorially as long as it produces serious harmful effect within the territory. This basis of jurisdiction is described in relevant literature as "objective territoriality."

Extraterritorial jurisdiction has also been achieved through a variety of jurisdictional bases: protective principle, nationality, universal, and passive personality. I shall give a brief description of each of these jurisdictional bases in view of their relevance to the control of corruption and transnational crime more generally.

The protective principle: According to this principle, jurisdiction over a crime is assumed even if it does not occur in whole or in part within the territory of the state, nor produce any physical harm within that territory provided it threatens the security, integrity or sovereignty of that state. Typical examples of such crimes are terrorism when it is directed against the interests of the state outside its territory and counterfeiting of a

137. Id. at 43.
138. Id. at 50 (this source offers extensive discussion and comparative analysis of the concept as well as comprehensive bibliographic references).
139. Id. at 54.
state currency. The rationale for extending the jurisdiction in such cases lies in the fact that the state where the act took place might not be interested in prosecuting an offence directed against the interests of another state.¹⁴⁰

*The nationality principle*: According to this principle, the state assumes jurisdiction over any crime committed by one of its nationals extraterritorially. The rationale for nationality as a jurisdictional basis is again the sovereignty of the state over its citizens. Jurisdiction based on this principle is generally accepted in international law. This principle is useful in controlling transnational corruption where the nationals of one country offer bribes to the officials of another as a case of increasing international concern.

*Universal jurisdiction*: This principle grants every state the right to prosecute the accused of certain offences of international concern. Examples of such offences are piracy, war crimes, genocide, and hijacking of civil aircraft. Corruption is not yet considered to be of sufficient threat to the international order so as to merit universal jurisdiction.

*Passive personality principle*: This principle gives the state a claim to jurisdiction over crimes committed against one of its citizens. Because corruption is a crime where a specific victim is hard to define, the passive personality principle is irrelevant to our current discussion.¹⁴⁴

b. Corruption as a Challenge to Territoriality

When we speak of transnational crime we are often speaking of a crime the constituent elements of which took place across the boundaries of several states. A textbook example of such crime would be when a "defendant shoots a gun in Italy, wounding a person in France, who travels to Switzerland where he succumbs to his wounds."¹⁴⁵ A crime that has an actual territorial link with several states is a transnational crime in strict sense. However, there are other situations in which the crime is committed entirely within the boundaries of a single state while its impact is felt in other states or within the international community as a whole. In the latter case the transnationality of the impact raises and justifies international concern. Whether we are speaking of transnational crime in strict sense, or of crimes that have transnational impact, the territoriality of the law becomes an obstacle in the way of effective protection of national and international order.

Corruption has many different forms and bribery is its most common example. Some crimes of corruption are transnational in strict sense; for example, when the citizen of one country offers the official of another country a bribe if the offer is made in the country of the briber and the bribe is delivered in the country of the bribee. In this case the bribery is clearly transnational and both states can claim jurisdiction should the act be criminal in both of them. Territoriality in the present example is not an obstacle to establishing jurisdiction. Co-operation is, however, needed for the effective investigation

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¹⁴¹ See Blakesley, supra note 136, at 61.

¹⁴² Id. at 70–81.

¹⁴³ Id. at 67–70.

¹⁴⁴ See Chaikin, supra note 140, at 295.

¹⁴⁵ Blakesley, supra note 136, at 47.
and prosecution of the offence. In the same example, if the whole conduct took place in the country of the bribee, the situation becomes more problematic. The crime is no longer a transnational crime in strict sense. For states to establish their jurisdiction over such an offence, they must first establish that it is a criminal offence to bribe a foreign public official, and then apply the nationality principle to extend their jurisdiction to their nationals when they bribe foreign officials abroad.

In 1977, the United States introduced the FCPA, prohibiting its nationals from bribing foreign public officials. Until recently, the United States was the only country to impose such a prohibition, thus creating a competitive disadvantage for its national business in the race for a share in the international market. Under this situation, corruption exercised by nationals of other countries and foreign public officials had a harmful impact on the interests of the United States. Neither territoriality principle, nor any other conventional principle of extraterritorial jurisdiction could justify the extension of the jurisdiction of the state concerned about such corrupt practices.

The territorial nature of the law is further challenged in the context of development aid. The challenge arises when the donating country or international organisation gives the loan or the grant to a recipient government for the latter to manage its disposition. If the recipient government is corrupt the fund might be misappropriated. Alternatively, the corrupt government might choose to implement the funded project while accepting bribes in the procurement process. Where the bidders are national enterprises, the corruption will be strictly internal. However, the funds dispensed corruptly are of foreign origin, which creates an interest for the donating state, and the taxpayers therein, in seeing that the funds are dispensed efficiently and equitably.

It could be argued that the only check on the recipient government in the development aid case should come from the lenders or donors themselves. The reality is that donors until recently often turned a blind eye. In 1990, the Inter-American Development Bank lent $250 million to the Yacyretá hydro dam on the Paraná River between Argentine and Paraguay. The decision of the Bank was taken despite the long history of misspending in the implementation of this project and the call of Argentinean President Menem to cancel the dam project as a "monument to corruption." This attitude by donors and lenders leaves unprotected the interests of the taxpayers and grassroots donors.

A final challenge to legal territoriality is posed by the practice of corrupt officials, especially corrupt heads of state and high-level politicians in developing countries, who appropriate their country’s assets and expatriate it to offshore financial centers. According to an investigation by the Nigerian government, it was established that in 1978 corrupt officials expatriated $25 million a day. Another commentator reported that "[w]hen Ethiopian Emperor Haile Sellassie was deposed, the revolutionary government reportedly found among his personal papers a letter from his Swiss bankers asking him to hold off shipping gold bars, for they had run out of storage space." Similar accounts were

147. Adams, supra note 135, at 142.
149. Id. at 136.
made of Zairian Dictator 'Mobutu,' whose Swiss, Belgian and French bank deposits were estimated at about $5 billion.\textsuperscript{151}

Stories of such expatriation abound. In the context of the current discussion they serve to prove the inadequacy of the territoriality principle under contemporary global conditions. Money can be transferred from one end of the globe to the other with the press of a button. According to strict application of the territoriality principle, the stories of corruption referred to above are strictly internal and, therefore, beyond the jurisdictional reach of any other country. However, when one considers the people's lack of capacity to enforce the rule of law against the corrupt in these looted countries, and compare the size of this corrupt wealth to these countries' foreign debt, international co-operation based on the rule of law, not political convenience, becomes a necessity.

c. The Extraterritorial Reach of Money Laundering Control Measures

The crime of money laundering extends the reach of criminal law beyond the territorial boundaries of the state. Criminal law proscribes money laundering in an increasing number of countries. Money laundering presupposes the occurrence of a “predicate offence” whose proceeds are being laundered. The predicate offence could have been, and probably more often is, committed within the state where the laundering is taking place. Should the ‘predicate offence,’ however, be committed within the territory of any other state the precondition for money laundering would still be satisfied. Prosecuting money laundering in the latter case will automatically extend the jurisdiction of the court to the ‘predicate offence.’ A conviction for money laundering might even result in the confiscation of the laundered funds and thus impose penalty on a person for an act that originally lied outside the jurisdiction of the state.

The Vienna Convention of 1988 imposes a duty on the Parties to criminalise the laundering of the proceeds of drug-related offences. It is, however, silent on the question of the location of the predicate offence. According to the commentaries “it would accord with recent practice if implementing legislation were to reflect the possibility that the predicate offence was located in a State other than the enacting one.”\textsuperscript{152} On the question of confiscation, the Convention provides that states must enable the confiscation of the proceeds of all the offences established by the Convention, including those of money laundering. The Convention, however, is silent on whether this would include the laundered funds as well as the profit derived from the laundering service where the prosecution is for the offence of laundering only.

The Council of Europe Convention of 1990, on the other hand, establishes the extraterritorial reach of money laundering control explicitly. After imposing the obligation on each Party to establish money laundering as a criminal offence, the Convention goes on to stipulate that, “it shall not matter whether the predicate offence was subject to the criminal jurisdiction of the Party.”\textsuperscript{153} It is not, however, clear whether the funds

\textsuperscript{151} Id. at 239.


\textsuperscript{153} Council of Europe Laundering Convention, supra note 101, art. 6(2)(a).
laundered shall be confiscated in this case as proceeds or instrumentalities of money laundering offence.

According to the U.K. law on money laundering, criminal conduct as a precondition for money laundering is defined very broadly to include any act that constitutes one of the predicate offences for money laundering under the law, or would constitute such an offence if committed in the United Kingdom.154 The law does not require that the act should constitute a criminal offence in the country where it was committed.

This extension of criminal jurisdiction can be most valuable in curbing corruption. As one commentator puts it albeit in slightly different context: "The deterrent effects of a criminal law increase where the jurisdictional net is expanded."155 In the following section, I shall review the various money laundering control and anti-corruption instruments to see how far corruption constitutes a predicate offence for money laundering.

B. THE PRESENT LAW

In this section, I will review the anti-money laundering instruments and anti-corruption instruments to see whether the former establish corruption as a predicate offence for money laundering and whether the latter consider criminalising the laundering of the proceeds of corruption as a tool towards curbing it.

1. Money Laundering Instruments

Recommendation 4 of the FATF Forty Recommendations on the subject is dedicated to the definition of the criminal offence of money laundering. In the 1990 version of that Recommendation, the FATF focused on the criminalisation of drug money laundering. The FATF was, however, conscious of the evidentiary difficulties inherent in such a narrow definition and of the link between drug trafficking and other criminal activities. For this reason it recommended that states should consider extending the predicate offence to include "all serious offences, and/or all offenses that generate a significant amount of proceeds, or certain serious offenses."156 In 1996, the FATF Recommendations were revised in view of developments in money laundering typologies. Recommendation 4 was amended and countries were specifically advised to extend the predicate offences to serious offences. Each country was allowed the freedom to determine what offences were to be defined as serious for the purposes of money laundering legislation.

The Council of Europe Laundering Convention of 1990 defines the predicate offence very broadly to include "any criminal offence as a result of which proceeds were generated that may become the subject of [laundering]."157 The wording of the Convention and the Explanatory Report do not leave scope for national variations in this regard. While the FATF approach leaves choice to national legislatures to include or exclude corruption as a predicate offence for money laundering, the approach of the Council of Europe does

155. David Chaikin, supra note 139, at 286 (the author is arguing for the criminalisation of the bribery of foreign public officials).
157. Council of Europe Laundering Convention, supra note 101, art. 1(e).
not seem to give such choice. Corruption is definitely a crime that generates economic benefits and therefore is a predicate offence for money laundering.

Looking into U.K. law as an example of a national approach to the question, we find that section 93A of the Criminal Justice Act 1993 extends the predicate offence of money laundering to include any criminal conduct which constitutes an offence triable on indictment in the Crown Court. Accordingly, offences of corruption, wherever committed, are predicate offences for money laundering under U.K. law.

2. Anti-Corruption Instruments

a. The OECD Convention on Transnational Bribery

The OECD Convention, as explained above,158 deals with the problem of bribery of foreign public officials. Its scope as defined in article (1) is confined to the supply side of bribery; that is, to the briber. The Convention, therefore, does not deal with the corrupt foreign official who is the recipient of the bribery.

Money laundering is addressed in article 7 of the Convention. According to this article, "[e]ach party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred."159 It would be consistent with the scope of the Convention as described in article 1 to interpret this provision as applying to the proceeds that the briber accrues from the bribery and not to the bribe that the foreign official receives. However, the wording of the provision and the Commentaries to the Convention both indicate a broader definition of the predicate offence.

According to the Commentaries, bribery of foreign public officials must be treated as equivalent to the bribery of national officials for the purposes of money laundering legislation in each Party's jurisdiction. Therefore, if the receipt of bribery is established as a predicate offence for money laundering within a certain jurisdiction, the Convention requires that the laundering of the bribe payment that is made to the foreign official should be subject to money laundering legislation. This understanding is confirmed by article 3(2) of the Convention, which provides that "[e]ach Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, . . . are subject to seizure and confiscation."160 [emphasis added]

While the Convention leaves it to the discretion of the national legislature to take such approach, it is obvious that it intends to utilise money laundering control to extend the reach of its anti-corruption regime beyond the territories of its Member States. This intention is made clear by the emphasis in article 7 that it should apply "without regard to the place where the bribery occurred."161

b. The Inter-American Convention against Corruption

Under the Inter-American Convention all parties are required to establish as criminal both the offering and receiving of bribery where the party's public officials are concerned.

158. See supra section II.C.2 discussion on OECD Convention.
159. Council of Europe Laundering Convention, supra note 101, art. 1.
160. Id. art. 3(3).
161. Id. art. 7.
On the other hand, the obligation to establish bribery of foreign public officials as an offence is subject to the "Constitution and the fundamental principles of [each Party’s] legal system."\textsuperscript{162} Thus, the scope of the Convention extends to both active (the briber) and passive bribery (the bribee), and to both national and transnational bribery.

The Inter-American Convention places more emphasis on the proceeds of crime than does the OECD Convention. Taking the proceeds out of corruption is part of the rationale for the Inter-American co-operation as stated in the Preamble to the Convention.\textsuperscript{163} This can probably be explained by the link between corruption and illicit drug trade in the region. According to the Preamble the State Members are "[d]eeply concerned by the steadily increasing links between corruption and the proceeds generated by illicit narcotics trafficking."\textsuperscript{164}

As a result of this emphasis, the Convention treats the laundering of the proceeds of national bribery, as opposed to transnational bribery, as a corrupt act in its own right. Article VI of the Convention stipulates that:

"This Convention is applicable to the following acts of corruption:

\begin{itemize}
  \item [d.] The fraudulent use or concealment of property derived from any of the acts referred to in the article,\textsuperscript{165}
\end{itemize}

It is not clear from the provisions of the Convention whether the laundering offence is intended to extend to predicate offences of corruption that are committed outside the territorial jurisdiction of the state where laundering is taking place. The Convention accepts territoriality and nationality principles as minimum bases for jurisdiction.\textsuperscript{166} It also emphasises that the Convention applies only where the "alleged act of corruption has been committed or has effects in a State Party."\textsuperscript{167} It could be argued that laundering the proceeds of an extraterritorial act of corruption within the territory of a party state extends its effect to that state. It must be noted, however, that the Convention does not address the laundering of the proceeds of transnational bribery; that is, the bribery of foreign public officials.

So far I have argued that extending the predicate offence of money laundering to include corruption offences will allow anti-corruption efforts to benefit of the anti-money laundering mechanisms. One important benefit is the extraterritorial reach of money laundering, which will allow anti-corruption efforts to reach into the territories of highly corrupt officials and impose checks on their corrupt practices on behalf of their countries’ victimized peoples. Now I will turn to the role of financial institutions in this

\textsuperscript{162} The Inter-American Convention Against Corruption, \textit{supra} note 78, art. VIII.

\textsuperscript{163} The Preamble states that the Member States are "[c]onvinced of the need for prompt adoption of an international instrument to promote and facilitate international cooperation in fighting corruption and, especially, in taking \ldots appropriate measures with respect to the proceeds of such acts." \textit{Id.} at Preamble.

\textsuperscript{164} \textit{Id.}

\textsuperscript{165} \textit{Id.} art. VI(1).

\textsuperscript{166} \textit{Id.} art. V(1).

\textsuperscript{167} \textit{Id.} art. IV.
effort. My aim is to illustrate how the financial regulatory aspects of money laundering control can be useful in enhancing the efforts against corruption.

The extraterritoriality of the criminal law of money laundering that I have illustrated earlier is paralleled by similar regulatory extraterritoriality, which is equally beneficent in dealing with corruption. The following section will also illustrate the difficulties that extraterritoriality imposes on financial institutions.

C. The Role of Financial Institutions

Secrecy is essential for corruption. To maintain it the corrupt official needs to hide the proceeds of his illegal practices. Money laundering is the mechanism by which the proceeds are hidden or legitimated. Financial intermediation that is committed to secrecy is, thus, essential for both corruption and money laundering. In this section, I will discuss the role of financial institutions in the control of corruption and the difficulties that it imposes on them.

1. Bank Secrecy Reconsidered

Those who view it suspiciously call it "bank secrecy," while those who cherish it call it "duty of confidentiality of banks." Whatever it is called, it can be defined as "the obligation of a financial institution, and of its officers and employees, to protect and withhold information acquired while handling a client's business." The origin of bank secrecy is also debated. Advocates argue that this duty is "as old as banking institutions themselves," and that it existed in one form or another throughout the history of these institutions. Opponents of bank secrecy, on the other hand, argue for the historical contingency of this practice. They link it instead to the political and economic circumstances of the era between the two World Wars. While the advocates' arguments that bank secrecy is old and universal pose financial privacy more as a natural right, the arguments of the opponents for historical contingency open the door for limiting the scope of secrecy on account of technological, economic and political changes.

Whatever the history of financial confidentiality in banking practices, it was not until the 1930s that bank secrecy became institutionalised as a matter of public interest. Before the 1930s, commitment to confidentiality was based on commercial customs, internal regulations of the old western banks and the Civil and Commercial Codes.

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170. Id. at 333.

171. Id. at 334.

172. Id. at 334–35.

173. NAYLOR, supra note 150, at 233.

In 1934, Switzerland passed its Federal Banking Law rendering it a criminal offence punishable by imprisonment to violate bank secrecy.\textsuperscript{175} This shift was triggered by the need of Switzerland to maintain its neutrality as well as its national sovereignty against the intrusion of the Nazi government in Germany.\textsuperscript{176} In the 1920s, the Nazi government began its persecution of the Jews and as a result money flooded out the country seeking refuge in neutral Switzerland. In an attempt to restore the fleeing capital, the Nazi government sought financial information in Switzerland and exerted pressure on employees of financial institutions, which resulted in the 1934 consolidation of the duty of confidentiality and the aggravation of penalties for any breach thereof.\textsuperscript{177}

Several rationales have been offered to justify bank secrecy. It has been argued that bank secrecy serves a personality right in financial privacy, that they are analogous to client-lawyer or doctor-patient privileges, that they help the individuals against unfair tax systems, or that they give financial refuge for those who are being persecuted on religious, political or racial basis.\textsuperscript{178} Each of those arguments has been debated vigorously by opponents of the practice.\textsuperscript{179} The twin-pillars of bank secrecy, however, remain those that resulted in the Swiss Federal Banking Law, that is, state sovereignty and individual rights.\textsuperscript{180}

Social change catalysed mostly by technological developments have weakened the state, rendering it unable to maintain law and order within its territory without the help of other actors in the international and global arenas. This has resulted in erosion of the concept of sovereignty in its traditional sense. It also resulted in the emergence of individuals or groups of individuals, for example, multinational corporations and criminal organisations, that are more powerful than the single state or at least capable of undermining its capacity to control them. In this context it was natural that bank secrecy, as a practice rooted in state sovereignty and the defence of a weak individual against the powerful state, should come under attack.

In the BCCI and the Barings cases, this change in the global condition has been clearly illustrated.\textsuperscript{181} In the BCCI case, bank operations in Grand Cayman and Luxembourg were controlled from an office in the City of London. In the Barings case, a trader's 'gambling' in Singapore was funded by the Bank's head office in London. So in both cases cross-border operations took place with the benefit of instantaneous wire transfers. And in both cases bank secrecy laws excluded supervisory authorities in all

\textsuperscript{175} Id.
\textsuperscript{176} Id. at 334.
\textsuperscript{177} Id. at 336. But cf. Naylor, supra note 150, at 233–34 (arguing that the Federal Banking Law was actually a response to the tight fiscal controls imposed by France on its people and an attempt to attract the pursuit flight of capital to Swiss Banks).
\textsuperscript{178} George J. Moscarino & Michael R. Schumaker, Beating the Shell Game: Bank Secrecy Laws and Their Impact on Civil Recovery in International Fraud Actions, in Corruption: The Enemy Within, supra note 140, at 303, 315–17 (offering a brief discussion of the justifications for bank secrecy and the counter-arguments).
\textsuperscript{179} Id.
\textsuperscript{180} See Preiss, supra note 168 (arguing that bank secrecy is really about state sovereignty more than it is about individual rights).
\textsuperscript{181} Thomas C. Baxter, Jr., Breaking the Billion Dollar Barrier: Learning the Lessons of BNL, Daiwa, Barings and BCCI, in Corruption: The Enemy Within 113, supra note 140, at 124.
the countries' involved from discussing their suspicions and sharing information on the suspicious transactions.\textsuperscript{182} This fact accounts at least partly for the delay in tackling the problems, which resulted in the collapse of both institutions and the loss of depositors' money as well as threatening a systemic crisis.

Even jurisdictions most committed to bank secrecy became aware, either voluntarily or through international pressure, of the criminal use of the financial system and the threat that it poses in terms of law and order. This was reflected in the proliferation of bilateral and multilateral instruments that are designed to facilitate international cooperation in penal matters, and to limit the hindering effect of bank secrecy. In 1996, the United States alone has entered into twenty-three Mutual Legal Assistance Treaties with other countries.\textsuperscript{183} Both anti-money laundering and anti-corruption international instruments reflected this shift. It has become standard in all such instruments to stipulate "A Party shall not decline to render mutual legal assistance . . . on the ground of bank secrecy."\textsuperscript{184}

The Basle Committee and the FATF addressed in detail the question of preventing the use of financial institutions for criminal purposes. In doing so their aim was to design a regulatory framework that redefines bank secrecy in a way that does not hinder international co-operation in both supervisory and criminal matters. I shall discuss this regulatory framework in the following section.

2. Financial Regulations against Money Laundering

In 1988, the Basle Committee on Banking Supervision issued a statement of general principles that financial institutions should implement to guard against the use of the banking system for the purpose of money laundering.\textsuperscript{185} The Principles are not legally binding, and their implementation depends on national practice and law.\textsuperscript{186} The primary function of banking supervision is to "maintain the overall financial stability and soundness of the banks."\textsuperscript{187} In justifying its concern with money laundering and the competence of national supervisory authorities with respect to this issue, the Committee provided that concern with the criminal use of the financial system falls within the scope of this primary function. According to the Committee, association with criminals can undermine financial stability by exposing the banks to adverse publicity that weakens public confidence, or to direct losses from internal or external fraud.

The FATF took up the task of elaborating the role of financial institutions in controlling money laundering. It dedicated Recommendations 9–29 to the enhancement of this

\textsuperscript{182} Id.; see also Preiss, supra note 168, at 347–50, for a discussion of a hypothetical case illustrating the difficulties that bank secrecy poses in any cross-border investigation seeking financial information.


\textsuperscript{184} Vienna Convention 1988, supra note 107, art. 7(5); see also OECD Convention on Transnational Bribery, supra note 66, art. 9(3); Council of Europe Laundering Convention, supra note 101, art. 18(7); Inter-American Convention Against Corruption, supra note 78, art. XVI.

\textsuperscript{185} Basle Principles on Money Laundering, supra note 122.

\textsuperscript{186} Id. Preamble 56.

\textsuperscript{187} Id. 53.
role covering a broad spectrum of issues, from internal controls within the Banks, introducing new regulatory obligations or criteria, to proposals to reshape bank secrecy in a way that facilitates financial investigations. I shall now address the different aspects of the regulatory regime established by the Basle Principles and FATF's Recommendations.

a. Access to the Financial Market

The FATF provided in Recommendation 29 that "[t]he competent authorities regulating or supervising financial institutions should take the necessary legal or regulatory measures to guard against control or acquisition of a significant participation in financial institutions by criminals or their confederates." This obligation falls squarely within the competence of banking supervisory authorities, which must scrutinise the applicants for authorisation to conduct financial activity. The rationale behind this stipulation is that allowing criminals to own or control banks is the best way to facilitate their money laundering activities as illustrated in the BCCI case. Money laundering control depends to a very far degree on the internal corporate control; if the owners of the organisation are corrupt, such control will be absent. And if the infiltration of the financial institutions by criminal elements becomes endemic, money laundering control can be rendered totally ineffective.

b. Know Your Customer

Financial institutions are required to satisfy themselves as to the identity of their customers. This applies whether they are dealing with occasional or usual customers. Identification must be established by official or any other satisfactory documents. This requirement aims at enabling financial institutions to screen their customers to avoid dealings with criminal elements. It also aims at creating a paper trail that facilitates investigations by law enforcement authorities.

According to this requirement, banks are no longer allowed to hold anonymous accounts. Where the institution suspects that the customer is just a nominee account holder who is holding the account on behalf of another, or where the account holder is a company, the financial institution must satisfy itself as to the identity of the principals on whose behalf the transactions are being conducted.

c. Transaction Reporting

Financial institutions are required to report certain transactions to designated persons or authorities. The reporting requirement proposed by the FATF is based on criteria of suspicion. Suspicion can stem from the nature of the transactions if they are complex, unusual, and "have no apparent economic or visible lawful purpose."

Some countries impose an objective reporting requirement based on the size of the transaction and without any suspicion requirement. This approach has been implemented in the United States and Australia, and was rejected by the United Kingdom as likely to result in excessive reporting that overburdens the law enforcement agencies.

188. FATF Forty Recommendations, supra note 111, Recommendation 29.
189. Id. Recommendations 12 & 13.
190. Id. Recommendation 14.
The primary purpose of the anti-money laundering regulatory regime is to maintain the money and paper trail visible in a way that facilitates the investigation of crime. To achieve this purpose, financial institutions are required to keep records of the identities of their customers and the reports of suspicious transactions. The records must be "sufficient to permit reconstruction of individual transactions (including the amounts and types of currency involved if any)." The institutions are required to make the records available to competent authorities upon request.

The effectiveness of these regulatory requirements has been largely debated and the burden they place on the financial institutions in what seems more like a police function has been also widely discussed. Both issues are beyond the scope of this discussion.

3. Extraterritoriality of Anti-Money Laundering Regulations

Regulatory extraterritoriality can be achieved through two methods. One is by direct imposition of the regulatory requirements on institutions that are not subject to the regulatory jurisdiction of the state concerned. The other is by exerting pressure on another state to implement anti-money laundering regulatory requirements even though it does not perceive them to be in its best economic interest. Both methods were envisaged by the FATF in its Recommendations. Recommendation 20 required the financial institutions to ensure that anti-money laundering mechanisms are "applied to branches and majority owned subsidiaries located abroad, especially in countries which do not or insufficiently apply [FATF] recommendations." [emphasis added]

By imposing this requirement on the financial institutions in countries that apply the FATF Recommendations, the FATF actually extends the scope of the Recommendations territorially. It also provided in Recommendation 21 that special attention should be given by financial institutions in any transactions with persons or entities from countries that do not apply the Recommendations. In view of the interdependence of financial markets, strict application of this Recommendation will result in placing pressures on states to implement the Recommendations in order to maintain their access to the global financial market.

The United States serves as an illustrative example of the extraterritorial reach of anti-money laundering regulations. The U.S. Bank Secrecy Act applies equally to U.S. banks and to foreign banks operating within the jurisdiction. U.S. regulators, unless denied access by the host country, will examine branches of U.S. banks that are operating abroad. U.S. banks may be denied the authority to open a branch in a country that is uncooperative and does not have a satisfactory anti-money laundering mechanism.

The criminal law of money laundering extends the regulatory framework further to cover financial institutions that are neither branches of U.S. banks nor operating within the United States. The U.S. criminal jurisdiction extends to offences that are committed in whole or in part within its borders. Because of the very fluid nature of the actus reus in money laundering, this territorial link to the U.S. jurisdiction can be stretched very

191. Id. Recommendation 12.
192. Id. Recommendation 20.
193. Morgan, supra note 183, at 41.
194. Id.
far. For example, if illicit money was wired through a U.S. bank as part of a cross-border process of laundering, this transit will be sufficient to give the United States criminal jurisdiction over the whole process of laundering. Any foreign bank involved in this process shall thus be subject to the criminal jurisdiction of the US.

The case of Banque Leu is an illustrative example of the extraterritorial reach of the U.S. criminal law and how it leads to the extension of its regulatory system extraterritorially.\(^9\) Banque Leu was a Luxembourg bank that had no offices in the United States. In 1993, it entered a guilty plea to money laundering in the United States and agreed to forfeit $2.3 million to the United States and $1 million to Luxembourg.\(^1\) The bank was charged with money laundering under U.S. law because it accepted deposits of $2.3 million in the form of cashier’s checks drawn on banks operating there, which formed part of the money laundering operation initiated in the United States.\(^2\) The bank sent the checks to the United States to clear them, and on basis of this action fell under the country’s criminal jurisdiction. This clearly demonstrates how the loose definition of the *actus reus* in money laundering can result in extending the territorial jurisdiction of the state. As one author commenting on the case put it: “Acceptance of U.S. dollar negotiable instruments by a bank anywhere in the world outside of the United States renders the bank susceptible to U.S. criminal jurisdiction in the money laundering area because all such instruments must necessarily clear through the United States.”\(^3\)

What is of more interest in the current context is the fact that in addition to the forfeiture agreement, the bank agreed to submit to a three-year U.S. audit specifically for money laundering.\(^4\) It also agreed to produce an anti-money laundering monograph that should be updated annually for two years.\(^5\) Such regulatory requirements were imposed as a form of sanction for criminal conduct on a bank that was not regulated by the United States, hence, extending the U.S. regulatory jurisdiction extraterritorially.

The extension of the regulatory jurisdiction in the case illustrated above was temporary and specific. The extraterritoriality of the criminal law of money laundering, however, has a more durable effect on the scope of anti-money laundering regulations. Foreign institutions and countries wishing to avoid prosecution for criminal money laundering and its devastating effects must show good record of fighting against money laundering. The history of a country’s handling of the money laundering problem, and

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196. Id. at 300.
197. Id. at 301.
198. Id.
199. Id. at 302.
200. Id.
201. Within ten days of the indictment of Banco de Occidente (Panama), the United States managed to freeze $80 million of the bank’s assets worldwide. This amounted to over half of the bank’s total assets and resulted in its being placed under the control of the Panamanian Banking Commission. See Munroe, supra note 195, at 299.
the internal controls of a foreign financial institution are relevant factors in determining the occurrence and the outcome of a prosecution under U.S. money laundering law.\textsuperscript{202}

In the case of the Banco de Occidente the reputation of the bank’s owners and management have resulted in a lenient outcome of the indictment for money laundering offences under U.S. law.\textsuperscript{203} Initially, the prosecution sought a total of $824 million in forfeiture and civil penalties.\textsuperscript{204} This amounts to seven times the total assets of the bank, which would have led to its bankruptcy had it been imposed. Instead, the indictment was settled by a guilty plea and an agreement to forfeit $5 million over a period of four years.\textsuperscript{205} This much more lenient settlement, which allowed the bank to survive, was largely due to the reputation of its management and owners.

4. Extraterritoriality as a Problem

Criminal and regulatory extraterritoriality impose serious problems for financial institutions. The regulatory extraterritoriality creates conflict between the laws and regulations of the country under which the bank is regulated and the laws and regulations of the country that is exercising extraterritorial jurisdiction. For example, the extraterritorial application of the law of one country might impose on a bank a duty to report certain transactions while the home country’s laws and regulations prohibit such reporting on basis of strict bank secrecy. In this case the bank will be in the unfavourable position of having to breach the laws of one country or the other and bear the consequences.

In anticipation of such a possibility the FATF recommended that in this situation the financial institution should not breach the home country’s regulation; instead it should inform the extraterritorial jurisdiction that compliance is not possible under the local laws and regulations.\textsuperscript{206} The solution contemplated by the FATF has not always been applied. Some U.S. courts enforced grand jury subpoenas requiring foreign financial institutions to produce account records despite the prohibition of such production under the financial institutions’ local secrecy laws.\textsuperscript{207} Failure to comply with such court order places the institution in contempt of court, while compliance invokes its liability under local laws.

The extraterritoriality of the criminal law of money laundering in terms of its application with respect to foreign predicate offences also creates its problems for financial institutions. The banks are expected to know their customers regardless of where they come from. If the customer is a foreign official the bank is expected to discover this fact as part of its ‘know your customer’ obligation. It is also expected to be able to establish whether the official’s deposits are commensurate with his/her income. A United

\textsuperscript{202} Id. at 303 (arguing that the best way for a small Caribbean country to protect its banks against devastating U.S. prosecution is by implementing a vigorous compliance program within the financial institutions that would convince the United States that the bank concerned is a “a good corporate citizen”).

\textsuperscript{203} Id. at 300.

\textsuperscript{204} Id. at 299.

\textsuperscript{205} Id. at 300.

\textsuperscript{206} FATF Forty Recommendations, supra note 111, Recommendation 22.

\textsuperscript{207} Morgan, supra note 183, at 43.
Kingdom non-governmental Working Group tackling the problem proposed that every bank should keep an internal register of customers who are Public Sector Officials, members of their families, or individuals/entities acting on their behalf. It also proposed that financial institutions must investigate and verify the Public Sector Official's stated sources of funds. To facilitate this task the group proposed that all countries should implement a constitutional provision requiring senior public officials to disclose to the state their full assets. This information must be incorporated in a certificate indicating the net worth of the person. The certificate must then be circulated by the state to the financial institutions worldwide to allow them to compare the official's deposits with its declared assets as means to establishing the propriety of the source.

Conscious of the difficulty inherent in the implementation of such a disclosure procedure, the Group suggested an alternative mechanism that it labelled an "internationally recognized warranty certificate." According to this procedure, any bank transferring funds that belong to a Public Sector Official must certify "they have known the client for $n$ years [and] that there have been no suspicious transaction reports or enquiries by regulatory/judicial authorities in respect of the account/individual during those years." In the view of this author both proposals ignore the fact that in grand corruption either certificate shall be produced by, or under the influence of, the corrupt officials themselves. Both solutions actually give corrupt officials the chance to circumvent the suspicious reporting requirement as well as giving the banks a leeway by legitimising their dealings with the corrupt officials through reliance on the proposed certificates. A better solution would have been to rely on the generally available information on the economic performance of the country and what might accordingly seem to be a legitimate income for an official of a certain rank. Information on the salaries of public servants in different countries may be compiled by a non-governmental organisation such as 'Transparency International' to assist the banks in carrying out their obligations.

V. Conclusion

Growing global interdependence has resulted in the transnationalisation of corruption. Multinational corporations seeking to acquire a share in foreign markets often resort to the bribery of foreign public officials. The latter in their turn, hoping to keep their loot beyond the reach of their people, expatriate their corrupt gains and

208. The Anti-Corruption Working Group is an expert working group that was established in July 1997 by the Executive Committee of The Society of Advanced Legal Studies to look into the issues that arise when financial intermediaries handle the proceeds of corrupt acts overseas. The Society is a company limited by guarantee that was incorporated in February 1997 with the object of promoting advanced legal research.


210. Id. ¶104.5.

211. Id. ¶105.1.

212. Id.

213. Id. ¶105.1.

214. Id.

215. Transparency International is a civil society organisation dedicated to the curbing of both international and national corruption. See http://www.transparency.de.
deposit them or invest them in foreign countries. These considerations have resulted in transforming corruption-control into an international policy matter of concern to a variety of international organisations.

The international community has adopted various tools in its fight against corruption, all of which aim at tightening the control of corruption by involving the largest number of its members in the effort to curb the problem. Money laundering control can serve as a very potent tool in reaching into the territories of countries that are unwilling to carry out their responsibilities in fighting corruption. By extending the predicate offence of money laundering to include corruption wherever it is committed, the international community will be in a better position to prevent the misappropriation of national wealth by dictators who are beyond democratic accountability.

The role of financial institutions in controlling corruption is crucial. After all, it is through such institutions that public officials have been able to transfer their corrupt gains out of the reach of their victims. Money laundering control, through its extensive financial regulatory mechanism is a very effective tool in securing the co-operation of the financial institutions. The problems that this poses for the financial sector are significant. Much effort must be exerted in order to secure the right balance between the need to prevent corrupt officials from using the financial system to evade accountability, and the need to maintain its functionality and efficiency.