CLEANING UP ANTI-MONEY LAUNDERING STRATEGIES: CURRENT FATF TACTICS NEEDLESSLY VIOLATE INTERNATIONAL LAW*

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I. INTRODUCTION

In recent months, the war against money laundering[1] has reached a crisis point. Especially after the events of September 11, 2001, the critical, if unwitting, role financial institutions play in assisting terrorist organizations to achieve their goals has gained prominence.[2] Though public attention to the matter is currently greater than ever, international regulators have been raising the stakes significantly in the war against illicit finance and the jurisdictions they view as nurturing it over the past three years. Specifically, in February of 2000, the Financial Action Task Force (FATF),[3] the most prominent international

1. Money laundering is the practice of processing criminal proceeds to disguise their illegal origin. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, BASIC FACTS ABOUT MONEY LAUNDERING, *at* http://www1.oecd.org/fatf/Mlaundering_en.htm (last updated Feb. 4, 2002) [hereinafter BASIC FACTS ABOUT MONEY LAUNDERING].

2. *See* FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, REPORT ON MONEY LAUNDERING TYPOLOGIES, *at* http://www1.oecd.org/fatf/pdf/TY2002_en.pdf (last visited Feb. 21, 2002).

3. At their summit in Paris in July of 1989, the governments of the seven major industrial nations (G-7), joined by the President of the European Commission, created the Financial Action Task Force ("FATF") to address the related problems of drug production, use, and trafficking as well as the "laundering of its proceeds." Dr. William C. Gilmore, *International Initiatives, in* BUTTERWORTHS INTERNATIONAL GUIDE TO MONEY LAUNDERING: LAW AND PRACTICE 24 (Richard Parlour ed., 1995) [hereinafter BUTTERWORTHS GUIDE TO MONEY LAUNDERING]. Now comprised of twenty-nine countries and two jurisdictions, the membership of the FATF includes Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Greece, Hong Kong, China, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, the

body engaged in eradicating the practice,[4] stepped up the stakes by issuing a "Report on Non-Cooperative Countries and Territories."[5] In an effort to "encourage constructive [anti-money laundering] action,"[6] the report outlines a plan involving the singling out of jurisdictions which, the FATF believes, have not done their part in stamping out money laundering.[7] Ultimately, the FATF has threatened an economic embargo of any recalcitrant state refusing to mend its wayward ways.[8]

This development is disturbing and suggests a policy redolent of extraterritorial bullying. From a policy perspective, economic sanctions have a history of negatively impacting the general populace without accomplishing the desired effects upon the behavior of those for whom the sanctions were intended.[9]

Kingdom of the Netherlands, New Zealand, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States, as well as two regional organizations: the European Commission and the Gulf Co-operation Council. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, MEMBERS AND OBSERVERS, *at* http://www1.oecd.org/fatf/Members_en.htm (last updated Feb. 4, 2002) [hereinafter FATF MEMBERS].

4. WILLIAM C. GILMORE, DIRTY MONEY: THE EVOLUTION OF MONEY LAUNDERING COUNTERMEASURES 79 (2d ed., rev. 1999).

5. *See* FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, REPORT ON NON-CO-OPERATIVE COUNTRIES AND TERRITORIES (2000), *available at* http://www.oecd.org/fatf/pdf/NCCT_en.pdf [hereinafter FATF REPORT].

6. *Id*. para. 37.

7. *See id.* para. 38; The more recent FATF Review to Identify Non-Cooperative Countries or Territories has removed four jurisdictions (the Bahamas, the Cayman Islands, Liechtenstein and Panama) from the list and added Egypt, Guatemala, Hungary, Indonesia, Myanmar and Nigeria. *See* REVIEW TO IDENTIFY NON-COOPERATIVE COUNTRIES OR TERRITORIES: INCREASING THE WORLDWIDE EFFECTIVENESS OF ANTI-MONEY LAUNDERING MEASURES (2001), *available at* http://www1.oecd.org/fatf/pdf/NCCT2001_en.pdf (last visited Feb. 20, 2002) [hereinafter FATF REVIEW].

8. *See id*. para. 54. Specifically, at paragraph 54, the report advocates as an "ultimate recourse" the possibility of "condition[ing], restrict[ing], target[ing] or even prohibit[ing] financial transactions with [non-cooperative] jurisdictions." *Id*.; In December 2001, the FATF recommended that its members apply countermeasures to Nauru. *See* FATF DECIDES TO APPLY COUNTERMEASURES TO NAURU, *available at* http://www1.oecd.org/fatf/pdf/PR-20011205_en.pdf (last visited Feb. 20, 2002). As of February 2002, Nauru is the only jurisdiction against which FATF countermeasures have been recommended. *See id*. Because this is the first application of FATF countermeasures, the full import of this step has yet to be unveiled. *See id*.

9. *See* MANFRED KULESSA & DOROTHEE STARCK, STIFTUNG ENTWICKLUNG UND FRIEDEN (SEF) DEVELOPMENT AND PEACE FOUNDATION, PEACE THROUGH SANCTIONS? RECOMMENDATIONS FOR GERMAN UN POLICY, *at* http://www.Globalpolicy.org/security/

More importantly, the FATF's hard-line approach violates both the letter and the spirit of at least two articles of the United Nations Charter,[10] as well as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[11] (Vienna Convention of 1988) and a host of international agreements which grew out of these. Viewed from this coign of vantage, the FATF's latest efforts risk alienating those jurisdictions whose cooperation is critical in stamping out money laundering worldwide.[12] What is more, any move to compel compliance with the FATF's recommendations that simultaneously violates these guidelines may well threaten the integrity and legitimacy of the decades-long international effort to clean up the flow of dirty money and eradicate the underlying crimes that are its source.

Rather than coercing nations into compliance, the FATF should adhere to a policy of encouraging regulation at the national level and, in so doing, pass the costs of risks associated with illegal transactions onto the offending nations while simultaneously respecting national sovereignty. This essay will examine the attempts to eradicate money laundering from the late 1960's to the present day. Part I provides an overview of the major anti-money-laundering efforts of the last thirty years or so in the United States and abroad, culminating in the formation of the FATF in 1989. Part II casts a critical look at the FATF's latest enforcement strategy, emphasizing that strategy's inconsistencies with the letter and spirit of current international law. And part III will propose several alternative solutions that promise to meet the FATF's pronounced goal of global compliance with its Forty Recommendations,[13] but do so in a

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sanction/kulessa.htm (Dec. 1997).

10. *See infra* Part II.A.1.(a)–(b) (discussing violation of articles 2 and 41).

11. *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* U.N. ESCOR, U.N. Doc. E/CONF.82/15 (1988), 28 I.L.M. 493 [hereinafter Vienna Convention of 1988].

12. *See infra* Part II.A.3.

13. The FATF's most notable publication, and the one upon which much of their work has been based, is their Forty Recommendations. *See* FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, THE FORTY RECOMMENDATIONS, *at* http://www.oecd.org/fatf/40Recs_en.htm (last visited Nov. 17, 2000) [hereinafter FORTY RECOMMENDATIONS]. Generally speaking, these recommendations, first published in 1990 and revised in 1996,

manner that is in keeping with international law.

II. BACKGROUND

A. *What Is Money Laundering?*

Money laundering is the practice of processing criminal proceeds to disguise their illegal origin.[14] The term derives from the fact that certain organized crime rings in the 1920's commingled the proceeds of their illicit operations with the practically untraceable proceeds from coin laundries operated by the ring, thereby making the funds appear to be legitimately derived.[15] Though the term "money laundering" may have originated in the twentieth century, the practice of disguising ill-gotten gains pre-dates recent history and indeed traces its roots back to the dawn of banking itself.[16] For instance, when the Roman Catholic Church in medieval times condemned usury, or lending money at interest, financiers devised methods to

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ask banks to, among other things: place certain restrictions upon their acceptance of large deposits, make careful notes of "unusual" transactions and other irregularities, implement a stricter banking regulatory scheme, and allow authorities access to certain banking records. *See id.* at paras. 10, 12, 14, 18.

14. BASIC FACTS ABOUT MONEY LAUNDERING, *supra* note 1.

15. Peter W. Schroth, *Bank Confidentiality and the War on Money Laundering in the United States, in* BLANCHIMENT D'ARGENT ET SECRET BANCAIRE MONEY LAUNDERING AND BANK SECRECY 290 (Paolo Bernasconi ed., 1996). Interestingly, the practice of money laundering is replete with colorful terms. Take for instance the term "smurfing," which is used to describe the practice of breaking up or structuring transactions so as to avoid having to file a Currency Transaction Report ("CTR"). *See id.* at 295, 299. CTR is a synonym for Internal Revenue Service Form 4789, which "must be filed by most 'financial institutions' with respect to each currency transactions [*sic*] exceeding $10,000." *Id.* at 295. What often happens is that an amount in excess of the $10,000 CTR threshold is laundered by breaking it down into smaller amounts and depositing it in several smaller amounts. *Id.* at 299. This term reportedly derives from the tiny blue cartoon characters (called Smurfs) popular in the 1980's when money laundering emerged as a serious threat. Sarah N. Welling, *Smurfs, Money Laundering, and the Federal Criminal Law: The Crime of Structuring Transactions*, 41 FLA. L. REV. 287, 288 (1989).

16. *See* Dennis Campbell, *Preface* to INTERNATIONAL BANK SECRECY, at vii (Dennis Campbell ed., 1992) (tracing the doctrine of banking confidentiality to the Code of Hammurabi); Marcus Mandel, *Israel, in* INTERNATIONAL BANK SECRECY, at 383 (tracing the doctrine of banking secrecy to the "Trapezitica Oration" written by Isocrates between 391 and 393 B.C.).

circumvent this restriction that are still in practice today.[17]

In its simplest form, money laundering involves three stages; placement, layering, and integration.[18] The placement stage is the process during which criminally derived funds are used to purchase an asset or are deposited into a financial institution.[19] Next, launderers engage in one or a series of transactions to distance the funds from their original source.[20] This is the layering stage, which may include such transactions as multiple funds transfers between accounts and across state and international borders, complex loan arrangements, and purchases and resales of assets.[21] Finally, there is the integration stage. This is the point at which the illicitly derived proceeds are reintegrated with the legal financial system and made available for use without suspicion.[22] As with any criminal enterprise, the variations on these three steps are myriad and have evolved apace both with the sophistication of the financial systems upon which they depend and the law enforcement tactics which threaten their existence.[23] Thus, regrettably, the extent of the money laundering problem has increased in recent years.[24]

B. The Scope of the Problem

In 1990, at the outset of the world-wide push to hang money launderers out to dry, FATF officials estimated that "as much as

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17. Kelly Patricia O'Meara, *Dirty Dollars*, INSIGHT MAG., May 15, 2000, at 10, *available at* 2000 WL 22983597.

18. *See* Schroth, *supra* note 14, at 290.

19. *See id*. The term "financial institution" has increasingly expanded and, in the United States at least, now embodies such facilities as currency exchanges, casinos and other venues for placing wagers, and insurance, brokerage, and mutual fund companies. *See* 31 U.S.C. § 5312 (1994).

20. Schroth, *supra* note 14, at 290.

21. *See* Paul Bauer & Rhoda Ullman, *Understanding the Wash Cycle*, ECONOMIC PERSPECTIVES: THE FIGHT AGAINST MONEY LAUNDERING, May 2001, at 19, 19–20, *at* http:// usinfo.state.gov/journals/ites/0501/ijee/ijee0501.pdf.

22. *See* Schroth, *supra* note 14, at 290. For a more expansive explanation of the mechanics of the money laundering process, see GILMORE, *supra* note 3, at 29–44.

23. *See* GILMORE, *supra* note 3, at 42 (discussing the challenge posed by the development of new payments technologies).

24. *Id.*

$85 billion per year could be available for laundering and investment" from the proceeds of drug trafficking in the United States and Europe.[25] In 1993, official estimates placed the scope of the dirty money problem at some $300 billion.[26] Most recently, the figure was raised to more than $600 billion.[27] While some commentators have questioned the accuracy of these numbers,[28] this problem is one of enormous proportions—even after a decade of intense lobbying by the FATF to assure that banks and non-bank financial institutions adopt the FATF's Forty Recommendations.[29]

And the stakes are high. Primarily, money laundering aids in the criminal enterprise; it helps criminals to do what they do best—commit crimes—with greater resources at their disposal and with less chance of detection.[30] More broadly, money laundering destabilizes the global economy.[31] Banks having ties to criminal activities (or the proceeds thereof) are likely to

25. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, REPORT 6 (1990), *available at* http://www1.oecd.org/fatf/pdf/AR1990_en.pdf (emphasis omitted).

26. *See* Berta Esperanza Hernandez, *RIP to IRP: Money Laundering and Drug Trafficking Controls Score a Knockout Victory over Bank Secrecy*, 18 N.C. J. INT'L L. & COM. REG. 235, 235–36 (1993).

27. LAWRENCE H. SUMMERS & JANET RENO, THE NATIONAL MONEY LAUNDERING STRATEGY FOR 2000, 1 (2000).

28. Michael Levi, *Pecunia Non Olet: Cleansing the Money-Launderers from the Temple*, 21 CRIME, L. & SOC. CHANGE 217, 299 n.3 (1991). The problem, of course, is that illegal activity is by its very nature difficult to measure. As the United States Department of the Treasury's Financial Crimes Unit, FinCEN, has explained: "[a]lthough attempts have been made over the years by a number of countries and organizations to estimate the extent of money laundering, these studies have only exposed the lack of sufficient, available data and highlighted the need to develop a model or models for determining the magnitude of money laundering." U.S. DEP'T TREASURY FIN. CRIMES ENFORCEMENT NETWORK, 1997–2002 STRATEGIC PLAN 6, *at* http://www.ustreas.gov/fincen/strtpl97.pdf (last visited Nov. 5, 2001). As a result of this problem, it is unclear whether money laundering has increased, whether fluctuations in currency or inflation differentials have had an effect upon these measurements, whether reporting and measuring methodologies have become more sophisticated and precise, or whether a combination of any or all of these factors are at play. In any event, enforcement agencies presently seem to be operating on the premise that the problem is increasing.

29. *See* Eric Helleiner, *State Power and the Regulation of Illicit Activity in Global Finance*, in THE ILLICIT GLOBAL ECONOMY AND STATE POWER 53, 68–69 (H. Richard Friman & Peter Andreas eds., 1999).

30. *See id.* at 55.

31. *See id.* at 59.

undermine public confidence in the safety and security of the financial sector.[32] Additionally, substantial amounts of laundered funds are misappropriated from the scant resources of developing or financially troubled nations.[33] As one commentator has characterized it, "[c]ombatting money laundering is not just a matter of fighting crime but of preserving the integrity of financial institutions and ultimately the financial system as a whole."[34]

C. Efforts to Clean up Money Laundering

While the idea of whitewashing the proceeds of illicitly obtained lucre is as old as crime itself, only in the last 25 years or so has the growth of money laundering prompted regulatory action on a major international scale.[35] Beginning in the United States and radiating toward the other major industrialized nations, anti-money laundering initiatives have become complex even during their comparatively short gestation period.

1. The United States

During the latter part of the 1960's, the U.S. government became increasingly concerned about the use of secret "offshore" bank accounts by Americans engaged in illegal activity.[36] One oft-cited Congressional report[37] concluded that these bank

32. *See id.*

33. *See* Colin Woodard, *Off-Shore Banking: Clean Beaches, Dirty Money*, BULL. ATOMIC SCIENTISTS, May/June, 2000, at 18, 19 (attributing in part Russia's economic collapse to the theft of an estimated $150 to $350 billion during the 1990's).

34. Helleiner, *supra* note 28, at 59 (quoting Tom Sherman, *International Efforts to Combat Money Laundering: The Role of the Financial Action Task Force*, *in* MONEY LAUNDERING 20 (1993)).

35. *See* L. H. Verwoerd, *Foreword* to BUTTERWORTHS GUIDE TO MONEY LAUNDERING, *supra* note 2, at v.

36. CHARLES W. BLAU ET AL., U.S. DEP'T. OF JUSTICE, CRIMINAL DIV., INVESTIGATION AND PROSECUTION OF ILLEGAL MONEY LAUNDERING: A GUIDE TO THE BANK SECRECY ACT 4 (1983) [hereinafter GUIDE TO THE BANK SECRECY ACT]. Most likely, this increased concern grew out of the Bahamas' enactment in 1965 of the Banks and Trust Companies Regulation Act, section 10 of which imposes the duty of secrecy upon bank officers, directors, employees, and agents. G.A.D. Johnstone, *Bahamas,* INT'L FIN. L. REV.: INT'L BANKING: A LEGAL GUIDE, Sept. 1991, at 23, 24–25.

37. *See* WILLIAM PROXMIRE, FOREIGN BANK SECRECY AND BANK RECORDKEEPING, S. REP. NO. 91–1139 (1970).

accounts were frequently used, among other things, to "act as a depository for money obtained from illegal activity" and to "bring money from illegal sources back into the United States as 'clean' money loans."[38] When diplomatic efforts (most significantly involving Switzerland) to circumvent foreign laws prohibiting disclosure of banking information seemed unlikely to solve the problem, Congress introduced legislation aimed at curtailing the problem within the United States' borders and extraterritorially.[39]

a. Domestic Initiatives

The most notable domestic result of these efforts was the Bank Secrecy Act[40] ("BSA"). Under the provisions of this Act, financial institutions and securities brokers and dealers are required to keep extensive records of the transactions and accounts of their customers.[41] Briefly stated, financial institutions, as the act has been amended, are now required to file Currency Transaction Reports (CTRs) for every transaction in excess of $10,000.[42] Congress intended that these reporting requirements would create a paper trail of criminal proceeds, enabling government enforcement agencies to track down lucrative and illicit criminal enterprises without the assistance of bank secrecy jurisdictions.[43] The Bank Secrecy Act was also intended to make apprehension of criminals easier by establishing an alternative means of convicting criminal and tax and regulatory violators.[44] Further, Congress hoped that the imposition of these reporting requirements would deter the violations themselves.[45] Later, driven in large part by the explosive growth of the international drug trade in the 1980's,

38. GUIDE TO THE BANK SECRECY ACT, *supra* note 35, at 4; *see also* S. Rep. No. 91-1139 at 3–4.

39. *See* GUIDE TO THE BANK SECRECY ACT, *supra* note 35, at 3, 5–7.

40. Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended in scattered sections of 12 U.S.C., 15 U.S.C., and 31 U.S.C.).

41. *Id.*

42. Schroth, *supra* note 14, at 295.

43. *See* GUIDE TO THE BANK SECRECY ACT, *supra* note 35, at 8.

44. *Id*. at 9.

45. *See id*.

efforts to combat the problem generally expanded proportionately.[46] For example, the United States passed the Money Laundering Control Act of 1986,[47] which criminalized money laundering and knowing assistance in money laundering criminal acts.[48] Later amendments and expansions of the provisions of the Money Laundering Control Act followed in 1990,[49] 1992,[50] 1994[51] and 1996.[52]

b. Extraterritorial Efforts of the U.S. Judiciary

Significantly, the United States has not limited its attempts at eradicating money laundering to efforts within its own borders.[53] Apparently, the problem has always been perceived as one of the utmost severity, and as one justifying extraterritorial efforts to stop it.[54] Unfortunately, the legality of these extraterritorial efforts is questionable, but their use has set a poor precedent which the FATF's latest blacklist tactic seems to adopt.[55] In 1968, for example, the Second Circuit, in furtherance of a grand jury investigation, ordered a New York bank to

46. *See* GILMORE, *supra* note 3, at 12–13.

47. Money Laundering Control Act of 1986, Pub. L. No. 99-570, sec. 1352(a), 100 Stat. 3207-18 to -21, (codified as amended at 18 U.S.C. §§ 1956–1957 (1994)).

48. *See* 18 U.S.C. § 1956(a) (1994).

49. Crime Control Act of 1990, Pub. L. No 101-647, secs. 105–108, 1205(j), 1402, 1404, 2506, 3557, 104 Stat. 4789, 4791–92, 4831, 4835, 4862, 4927 (codified as amended at 18 U.S.C. § 1956 (1994)).

50. Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, secs. 1504(c), 1524, 1526(a), 1527(a), 1530–1531, 1534, 1536, 106 Stat. 4055, 4064–67 (1992) (codified as amended at 18 U.S.C. § 1956 (1994)).

51. Money Laundering Suppression Act of 1994, Pub. L. No. 103-325, secs. 411(c)(2)(E), 413(c)(1), 413(d), 108 Stat. 2243, 2253–55 (codified as amended at 18 U.S.C. § 1956 (1994)).

52. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, sec. 246, 110 Stat. 2018 (codified as amended at 18 U.S.C. § 1956 (Supp. IV 1999)).

53. *See* Steven L. Peterson, *Achieving a Sustained Response to Money Laundering*, ECONOMIC PERSPECTIVES: THE FIGHT AGAINST MONEY LAUNDERING, May 2001, at 15, 18, *at* http://usinfo.state.gov/journals/ites/0501/ijee/ijee0501.pdf.

54. *See id*.

55. In United States v. Bank of Nova Scotia, 740 F.2d 817, 824 (1984), a bank faced a considerable fine for failure to comply with a subpoena requesting documents. The FATF advises its members also to consider financial sanctions against non-cooperative jurisdictions. *See* FATF REPORT, *supra* note 4, para. 54.

produce records of its customers in Germany.[56] When the bank refused to produce the German records, the court found the bank in contempt and ruled that the U.S. interest in enforcing its laws was greater than the German interest in bank secrecy.[57]

Likewise, in a 1984 case, a United States federal judge in Florida ordered the enforcement of a subpoena served upon the Miami branch of the Bank of Nova Scotia for the disclosure of the account information of an American customer of the Cayman Island branch of that bank.[58] The court held that, although enforcement of the subpoena impinged upon the privacy interests protected by the Bahamian bank secrecy statute, the interest of the United States in enforcing the grand jury subpoena was greater than the Cayman interest in bank secrecy.[59] Faced with formidable sanctions for non-compliance,[60] the bank yielded to the court's order.[61] In addition, the action encouraged the Cayman Islands (and the Bahamas) to sign a mutual legal assistance treaty to aid the United States in the fight against money laundering.[62]

Despite the short-term success this threat of an economic sanction gained for the United States in 1983, any victory represented by the decision was largely pyrrhic. In fact, the tactic made the United States a target of international protests[63] and was roundly criticized as an "affront to the comity of nations" as well as to the notion of state sovereignty.[64]

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56. *See* United States v. First Nat'l City Bank, 369 F.2d. 897, 898, 905 (2d Cir. 1968). The bank had already produced records located in New York. *Id*. at 898.

57. *See* Hernandez, *supra* note 25, at 254.

58. United States v. Bank of Nova Scotia, 740 F.2d 817, 820 (11th Cir. 1984); *see also* Michael L. Paton, *The Bahamas*, *in* INTERNATIONAL BANK SECRECY, *supra* note 15, at 61, 69 (discussing *Bank of Nova Scotia*).

59. *See Bank of Nova Scotia*, 740 F.2d at 829.

60. The district court levied a $1,825,000 fine for the bank's failure to comply with the subpoena. *Id.* at 824.

61. *See id*. at 905.

62. *Id*.

63. *See id*.

64. *See* Paton, *supra* note 57, at 70.

c. Other U.S. Attempts at Extraterritorial Regulation

On the multinational front, the United States has used its dominant position in international finance circles to compel cooperation with the Basel Accord by threatening to "cut off access to the U.S. Financial system unless [unwilling nations] complied with" the proposed banking standards.[65] Additionally, the United States has in the past conditioned financial aid and tariff concessions with Caribbean territories upon cooperation in the drive to clean up money laundering.[66] Undoubtedly, the above actions were effective in bringing about the desired short-term results.[67] For the reasons stated above, however, these moves rest on an unsound international footing, both legally and economically. As a result, they could well undermine the stability of the financial markets they purport to stabilize by introducing political unrest, local distrust of bank managers and regulators and legal uncertainties.

2. International Endeavors: Generally

On the international front, anti-money laundering provisions multiplied at a comparable pace. Great Britain, for instance, enacted a counterpart to the American Money Laundering Control Act with the 1986 passage of the Drug Trafficking Offences Act.[68] The 1986 Act provides immunity from suit for breach of the implied banking secrecy contract if a person discloses to a police officer "a suspicion or belief that any funds or investments are derived from or used in connection with drug trafficking or any matter on which such a suspicion or belief is based."[69] While the Drug Trafficking Offenses Act, and

65. Helleiner, *supra* note 28, at 72.

66. *Id*. at 73.

67. *Id*.

68. *See* Lisa A. Barbot, *Money Laundering: An International Challenge*, 3 TUL. J. INT'L & COMP. L. 161, 181 n.96 (1995); Sarah N. Welling & Dana Todd, *International Strategies to Combat Money Laundering*, 7 CRIM. L.F. 703, 703 n.2 (1996). This Act was later superseded by the Drug Trafficking Act of 1994. *See* Drug Trafficking Act, 1994, c. 37 (Eng.).

69. Drug Trafficking Offences Act, 1986, c. 32, § 24(3) (Eng.), *repealed by* Drug Trafficking Act, 1994, c. 37, sched. 3 (Eng.). The 1994 Act contains an identical provision. Drug Trafficking Act, c.37, §50(3).

its successor, the Drug Trafficking Act, contained a defense against disclosure rather than an affirmative duty to disclose,[70] this latter obligation was not far behind. In fact, just three years later, Parliament enacted the Prevention of Terrorism Act of 1989, which imposed just such a duty upon any person who is "concerned in an arrangement whereby the retention or control . . . of terrorist funds is facilitated."[71] This statute is similar to its more comprehensive U.S. counterpart, which requires the filing of a "Suspicious Activity Report-MSB" (SAR) for any suspicious transaction relevant to a possible violation of law or regulation that exceeds $2,000.[72] In England, as in the United States, more stringent anti-money laundering statutes and regulations soon followed.[73]

Shortly after the United States and Great Britain launched their first targeted strikes specifically against money laundering, the United Nations joined the fight against dirty money.[74] The Vienna Convention of 1988, "[r]ecognizing the links between illicit traffic and other related organized criminal activities which undermine the legitimate economies and threaten the stability, security and sovereignty of States,"[75] enjoined its signatories to criminalize the act of money laundering and to adopt measures to enable the identification, tracing, freezing, seizing and confiscation of illicitly derived

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70. *See* Drug Trafficking Act, c. 32, § 24(3).

71. *See* Prevention of Terrorism (Temporary Provisions) Act, 1989, c. 4, § 11(1) (Eng.), *repealed by* Terrorism Act, 2000, c. 11, sched. 16 (Eng.). Section 18 of the Prevention of Terrorism Act requires disclosure of any information that may assist in preventing an act of terrorism or in bringing terrorists to justice. *Id*. § 18(1). The 2000 Terrorism Act imposes a similar duty. *See* Terrorism Act, c. 11, § 19.

72. 31 C.F.R. § 103.20(a)(2), (b)(1).

73. These include the Money Laundering Regulations, 1999, Criminal Justice Act, 1993, c. 36 (Eng.), and Drug Trafficking Act, 1994, c. 37 (Eng.). *See* George A. Walker, *Latin American Money Laundering Options and the European Model*, 2 NAFTA L. & BUS. REV. AM. 169, 189–94 (1996) (discussing in particular the Criminal Justice Act and the Money Laundering Regulations). For a more comprehensive discussion of anti-money laundering legislation in England, see R.N.S. Grandison, *England*, in BANK CONFIDENTIALITY 20819 (Francis Neate ed., 2d ed. 1997).

74. *See* Jeffrey Lowell Quillen, *The International Attack on Money Laundering: European Initiatives*, DUKE J. COMP. & INT'L L. 213, 216 (1991).

75. Vienna Convention of 1988, *supra* note 10, at 1.

proceeds.[76] The Vienna Convention of 1988 was important not only in that it was the first multi-national recognition of the seriousness of the money laundering problem, but because it marked the first major step in affording to law enforcement officials the same international reach formerly available to drug smugglers and organized crime rings, whose complex laundering schemes regularly involved cross-border funds transfers that made their transactions more difficult to trace.[77]

3. The Financial Action Task Force

a. History

The next, and perhaps most significant, milestone in the battle against dirty money came in July of 1989 with the formation of the FATF.[78] That body is a creation of the governments of the seven major industrial nations (or G-7)[79] to address money laundering.[80] The initial mandate of the FATF was to

> assess the results of co-operation already undertaken in order to prevent the utilization of the banking system and financial institutions for the purpose of money laundering, and to consider additional preventative efforts in this field, including the adaptation of the legal and regulatory systems so as to enhance multilateral judicial assistance.[81]

Now comprised of twenty-nine countries and two jurisdictions,[82] the FATF is widely recognized as the pre-eminent

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76. *Id*. at 5–6, 9.

77. *See* BUTTERWORTHS GUIDE TO MONEY LAUNDERING, *supra* note 2, at 16–18.

78. *See* Barbot, *supra* note 72, at 173–74.

79. *See* FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, MORE ABOUT THE FATF AND ITS WORK *at* http://www1.oecd.org/fatf/aboutFATF_en.htm (last updated Dec. 4, 2001).

80. *See* BUTTERWORTHS GUIDE TO MONEY LAUNDERING, *supra* note 2, at 24.

81. GILMORE, *supra* note 3, at 79 (quoting Group of Seven Economic Declaration of 16 July 1989, para. 53, *at* http://www.g7.utoronto.ca/g7/summit/1989paris/communique/index.html).

82. FATF MEMBERS, *supra* note 2. *See supra* note 2 for a list of FATF members.

force in the war against money laundering.[83] Not surprisingly, the group has been instrumental in just about every multinational anti-money laundering effort undertaken since its inception.[84] These include the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime in 1990[85] (Strasbourg Convention), the 1991 European Union Directive on Prevention of the Use of the Financial System for the Purpose of Money Laundering,[86] and the formation of a sister group, the Caribbean Financial Action Task Force[87] (CFATF).

To the outside observer, this impressive spate of anti-money laundering initiatives would suggest that a nearly world-wide force against the practice has been marshaled, and concomitantly one might expect results in line with these enhanced efforts. Unfortunately, though much has been done to insure harmonization among international anti-laundering law, the impact of these efforts on the money laundering problem itself has been inconclusive.

b. Achievements of the FATF and Effectiveness of the Forty Recommendations

Since the FATF was first established more than a decade ago, it has been a formidable force in the pan-European movement toward greater banking transparency in the name of the fight against money laundering. It was particularly influential in the development of the 1991 E.U. Directive against Money Laundering,[88] which, along with the Forty

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83. *See* BUTTERWORTHS GUIDE TO MONEY LAUNDERING, *supra* note 2, at 24–25.

84. *See id*.; *infra* notes 92–94.

85. Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Nov. 8, 1990, 30 I.L.M. 148 [hereinafter Strasbourg Convention].

86. Council Directive 91/308/EEC of 10 June 1991 on Prevention of the Use of the Financial System for the Purpose of Money Laundering, 1991 O.J. (L 166) 77.

87. The Caribbean Financial Action Task Force was formed at a meeting in Aruba in 1990. *See* CARIBBEAN FINANCIAL ACTION TASK FORCE, OVERVIEW, *at* http://www.cfatf.org/eng/ (last visited Mar. 13, 2002). As a complement to the FATF's Forty Recommendations, the CFATF composed nineteen recommendations to combat the problem of money laundering in the Caribbean. The CFATF recommendations are available at http://www.cfatf.org/eng/ (last visited Mar. 13, 2002).

88. *See* GILMORE, *supra* note 3, at 157.

Recommendations, has been instrumental in criminalizing the act of money laundering, establishing stricter penalties for the offense, and instituting more rigorous reporting procedures within banks and other financial institutions, as well as setting up a "highly intrusive system of peer review" to assure member compliance with FATF guidelines.[89]

Despite the considerable reporting and disclosure burdens imposed upon banks and their resultant costs, the recommendations of the FATF have yet to bear fruit. Indeed, the almost universal assessment is that FATF-type reforms have done little or nothing to curb the practice of money laundering.[90] What is more, since the FATF recommendations were first promulgated in 1990, a number of the most notorious money-laundering busts have occurred in countries already subscribing to burdensome disclosure regulations.[91] Examples include Citibank's recent implication in a scheme by Raúl Salinas, the brother of the former president of Mexico, to move more than $87 million through the bank's private banking division.[92] Additionally, Citibank has been accused of assisting in similar ploys for Omar Bongo, the president of Gabon, now under investigation for bribery, and for the sons of Nigerian dictator General Sani Abacha.[93] Similarly, the Bank of New York was involved in a multi-billion-dollar effort to launder funds originating from Russia.[94] Most recently, several London banks were accused of playing a key role in enabling General Abacha to launder $4 billion looted from Nigeria during his rule.[95] In short, the FATF's work of the past decade has produced only questionable results. Furthermore, the spate of recent money-laundering scandals in nations who subscribe to the Task

89. *See id*. at 135–38.

90. *See* Nigel South, *On 'Cooling Hot Money': Transatlantic Trends in Drug-Related Money Laundering and its Facilitation*, *at* http://www.tni.org/drugs/links/south.htm (last visited Mar. 13, 2002).

91. *See* Woodard, *supra* note 32, at 19 (describing the recent investigations into Citibank's "private banking" divisions, which held over $300 million in private accounts for "corrupt foreign clients").

92. *See id*.

93. *Id*.

94. *See id*.

95. *See London's Money Launderers*, FIN. TIMES, Oct. 20, 2000, at 22.

Force's regulatory scheme casts some doubt on that organization's oft-repeated mantra that the regulations are not working only because they have not yet been adopted across the board.[96] If financial pirates can circumvent the laws of the countries who promulgated the recommendations in the first instance, surely jurisdictions less enthusiastic about the reforms are less likely to see better results.

c. The FATF's Latest Effort

Beginning in 1998, the FATF has taken an active role in identifying "key anti-money laundering weaknesses in jurisdictions both inside and outside its membership."[97] Toward this end, the organization dispatched four regional review groups (Americas, Asia/Pacific, Europe, and Africa and the Middle East) to assess the procedures in place to curb money laundering in a number of jurisdictions against a list of twenty-five "Criteria Defining Non-Cooperative Countries or Territories" it compiled consistent with the Forty Recommendations.[98]

Pursuant to this review, the FATF in June of 2000 released a laundry list of 15 nations it singled out as being "non-cooperative" in the fight against money laundering.[99] U.S.

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96. *Compare* FATF REPORT, *supra* note 2, para. 3 (emphasizing the need for comprehensive regulations in all financial centers), *with London's Money Launderers*, *supra* note 99, at 22 (questioning the slow response by British authorities in investigating allegations that General Abacha moved at least $300 million through London banks), *and* Woodard, *supra* note 32, at 19 (discussing Citibank's involvement in laundering funds for Raúl Salinas, Omar Bongo, and General Abacha).

97. FINANCIAL ACTION TASK FORCE, REVIEW TO IDENTIFY NON-COOPERATIVE COUNTRIES OR TERRITORIES: INCREASING THE WORLDWIDE EFFECTIVENESS OF ANTI-MONEY LAUNDERING MEASURES para. 7 (2001), *available at* http://www1.oecd.org/fatf/FATDocs_en.htm [hereinafter FATF 2001 REVIEW].

98. *See id*. paras. 5, 8, 11, app. I at 20–22.

99. The June 2000 list targeted the Bahamas, the Cayman Islands, the Cook Islands, Dominica, Israel, Lebanon, Liechtenstein, the Marshall Islands, Nauru, Niue, Panama, the Philippines, Russia, St. Kitts and Nevis, and St. Vincent and the Grenadines. FINANCIAL ACTION TASK FORCE, REVIEW TO IDENTIFY NON-COOPERATIVE COUNTRIES OR TERRITORIES: INCREASING THE WORLDWIDE EFFECTIVENESS OF ANTI-MONEY LAUNDERING MEASURES, 2–10 (2000), *available at* http://www1.oecd.org/fatf/pdf/NCCT2000_en.pdf (also summarizing the "non-cooperative" faults of those nations). In 2001, the FATF removed from the list the Bahamas, the Cayman Islands, Liechtenstein,

officials described the "naming and blaming" exercise as one of the most important efforts yet in the world-wide effort to curb financial crimes.[100] To be sure, the list has prompted some immediate response from targeted nations. Liechtenstein, the Bahamas, and the Philippines, for instance, have scrambled to review their regulatory schemes and to enact new measures bringing their banking laws up to compliance with FATF standards.[101] Indeed, after the launch of the review FATF review groups, even some countries that were not ultimately targeted rushed to implement anti-money laundering legislation.[102] Just one month before the blacklist was released, for example, Argentina announced its enactment of the Money Laundering Act, which set prison terms for money laundering offenders and created a national enforcement authority to prevent and investigate money laundering.[103]

Once identified as a non-cooperative jurisdiction, the listed states are "strongly urged to adopt measures to improve their rules and practices as expeditiously as possible in order to remedy the deficiencies identified in the reviews" on the domestic level.[104] Meanwhile, on the international front, the FATF has advised that "*financial institutions should give special attention to business relations and transactions with persons, including companies and financial institutions, from the 'non-cooperative countries and territories.*'"[105] Furthermore, the FATF plans to monitor closely the steps these jurisdictions take to improve their compliance with the Forty Recommendations as well as "to provide technical assistance, where appropriate," to assist these jurisdictions to comply.[106] Should any nation fail to

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and Panama, and added to the list Egypt, Guatemala, Hungary, Indonesia, Myanmar, and Nigeria. *See* FATF 2001 REVIEW, *supra* note 103, at 3.

100. *See* Michael Allen, *Laundering Crackdown Intensifies with List of Offending Countries*, WALL ST. J., June 22, 2000, at A18.

101. *See FATF 'Blacklist' Prompts Global Response*, MONEY LAUNDERING ALERT, Aug. 2000, at 2.

102. *See Argentina: Argentina's New Money Laundering Act*, 19 INT'L FIN. L. REV. 78, 78 (2000) (Argentina).

103. *See id*.

104. FATF 2001 REVIEW, *supra* note 103, para. 89.

105. *Id*.

106. *Id*. paras. 92–93.

improve its anti-money laundering regime, the FATF has announced its preparedness to "condition, restrict, target or even prohibit financial transactions with such jurisdictions."[107] While the FATF insists that this last step would be "an ultimate recourse should a country or territory have decided to preserve laws or practices that are particularly damaging for the fight against money laundering,"[108] the message is clear: adopt and implement the Forty Recommendations or face economic sanctions.

Though the threat of this final recourse appears to have given the FATF's anti-money laundering initiatives the boost they needed, especially in a number of the blacklisted jurisdictions, the ultimate authority for imposing such economic sanctions rests on uncertain legal foundations. On the most basic level, with the threat of an economic embargo against states who refuse to comply, the Forty Recommendations risks undermining the sovereignty of the states such sanctions would affect. What is more, the move from blacklisting to blackballing the targeted nations who fail to adopt the Forty Recommendations runs contrary to a host of international agreements including the Vienna Convention of 1988, the European Union directive and, ironically, the Forty Recommendations themselves.[109] Thus, on one hand the FATF is to be commended for its heavy-handed and almost instantly effective approach, especially after a decade of lukewarm results; on the other, the group's threatened "ultimate recourse,"[110] if instituted, might well jeopardize the integrity of

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107. *See* FATF REPORT, *supra* note 4, para. 54.

108. *See id*.

109. *See* Vienna Convention of 1988, *supra* note 10, art. 2, § 2 ("The Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of States."); Council Directive 91/308/EEC, *supra* note 90 ("[I]t is for each Member State to adopt appropriate measures and to penalize infringement of such measures in an appropriate manner . . . ."); FORTY RECOMMENDATIONS, *supra* note 12, at 1 ("The Recommendations are . . . principles for action . . . for countries to implement according to their particular circumstances and constitutional frameworks allowing countries a measure of flexibility rather than prescribing every detail.").

110. *See* FATF REPORT, *supra* note 4, para. 54 (stating that FATF members

some of the most important documents undergirding the anti-money laundering effort. Additionally, the prospect of sanctions would imperil one of the FATF's most impressive sources of legitimacy—the fact that compliance with the organization's guidelines has been secured despite the fact that participation is voluntary and its recommendations non-binding.[111]

III. PROBLEMS WITH THE CURRENT ANTI-LAUNDERING STRATEGY

A. Threatened FATF Sanctions Violate International Law

The most basic tenet of international law is the doctrine of *pacta sunt servanda*.[112] Treaties must be followed.[113] Indeed, this longstanding principle has even been codified in article 26 of the Vienna Convention on the Law of Treaties (Vienna Convention of 1969), which mandates that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[114] Importantly, most of the FATF nations are parties to the Vienna Convention of 1969, as well as to a host of other international agreements whose terms would prevent them from taking the action threatened as an "ultimate recourse" against the blacklisted jurisdictions, or against any other state, solely in retaliation for that state's refusal to implement the FATF's Forty Recommendations.[115] Thus, while the money laundering blacklist seems thus far to have been effective in accomplishing the FATF's goals,[116] the ultimate threat of financial sanctions for non-compliance, and possibly the black list itself, violate international law to the extent that they contravene already extant FATF-member treaty obligations.

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could consider conditioning, restricting, targeting, or even prohibiting financial transactions with non-cooperative jurisdictions as an ultimate recourse).

111. *See* Helleiner, *supra* note 28, at 67.

112. *Pacta sunt servanda*, Latin for "agreements must be kept," is "[t]he rule that agreements and stipulations, esp[ecially] those contained in treaties, must be observed." Black's Law Dictionary 1133 (7th ed. 1999).

113. *See id*.

114. Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 1155 U.N.T.S. 331, 339.

115. *See supra* note 114 and accompanying text.

116. *See supra* note 108 and accompanying text.

1. United Nations Charter

a. FATF Sanctions Would Violate Article 2 of the U.N. Charter

Pursuant to the Charter of the United Nations (U.N. Charter), each member state is deemed equal in sovereignty.[117] Accordingly, each member state is endowed with the sovereign right to govern its own executive, legislative, and judicial affairs.[118] More particularly, at the twentieth session of the U.N. General Assembly, it was declared that

> No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and *all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned*.[119]

Viewed against this interpretive backdrop, the FATF blacklist and its concomitant threat to resort to economic sanctions against nations who fail to adopt the Forty Recommendations violates article 2 of the U.N. Charter.[120] In

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117. *See* U.N. CHARTER art. 2, para. 1.

118. *See* LELAND M. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS COMMENTARY AND DOCUMENTS 37 (3rd ed., rev. 1969) ("[S]overeign equality" includes several elements: "(1) that states are juridically equal; (2) that each state enjoys the rights inherent in full sovereignty; (3) that the personality of the state is respected, as well as its territorial integrity and political independence; (4) that the state should, under international order, comply faithfully with its international duties and obligations.").

119. *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 12, U.N. Doc. A/6220 (1965) (emphasis added).

120. *See* U.N. CHARTER art. 2, para. 4. Just as this essay was in the final stages of its preparation, the U.N. Convention Against Transnational Organized Crime, adopted on December 15, 2000, called for strengthened money laundering controls, stricter regulation of financial institutions, the abolishment of anonymous bank accounts, and an end to banking secrecy laws that hinder criminal investigations. *See* United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. GAOR, 55th Sess., 62d mtg. at 2–3, 6–8 (2001). The Convention, which will become international law once it is ratified by 40 countries, ostensibly eliminates the present conflict between the FATF's Blacklist and the sovereignty of states. *See id*. at 30. As evidence of customary international law, this convention arguably should influence the

essence, the blacklist warns that targeted states must legislate in accordance with the directives of the FATF,[121] must exercise their executive powers in commissioning regulatory bodies to implement the FATF's Forty Recommendations,[122] and must employ their judiciaries to carry out FATF aims.[123] Thus, the FATF is threatening not only to violate the spirit of the principle of non-interference and not only to impinge upon the sovereignty of the targeted nations, but, at least with respect to money-laundering related issues, entirely to usurp each and every governmental function of these sovereign states: executive,

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non-FATF-compliant states to adopt appropriate measures to combat money laundering. However, insofar as any targeted jurisdiction has not become a signatory to this convention, and to the extent that the provisions of this convention run counter to those of articles 2 and 41 of the Charter, as well as to the other international agreements discussed below, this convention cannot bind those jurisdictions.

121. *See* FORTY RECOMMENDATIONS, *supra* note 12, paras. 4, 7.

> Each country should take such measures as may be necessary, including legislative ones, to enable it to criminalise money laundering as set forth in the Vienna Convention. Each country should extend the offence of drug money laundering to one based on serious offences. Each country would determine which serious crimes would be designated as money laundering predicate offences.

Id. para. 4.

> Countries should adopt measures similar to those set forth in the Vienna Convention, as may be necessary, including legislative ones, to enable their competent authorities to confiscate property laundered, proceeds from, instrumentalities used in or intended for use in the commission of any money laundering offence, or property of corresponding value, without prejudicing the rights of bona fide third parties.

Id. para. 7. *See also* FATF 2001 REVIEW, *supra* note 105, para. 89 (calling on the jurisdictions mentioned in this report "to adopt measures to improve their rules or practices as expeditiously as possible in order to remedy the deficiencies identified in the reviews").

122. *See* FORTY RECOMMENDATIONS, *supra* note 12, at 5, paras. 26–29 (concerning the "Implementation, and Role of Regulatory and other Administrative Authorities").

123. *See id*. para. 7.

> In addition to confiscation and criminal sanctions, countries also should consider monetary and civil penalties, and/or proceedings including civil proceedings, to void contracts entered into by parties, where parties knew or should have known that as a result of the contract, the State would be prejudiced in its ability to recover financial claims, e.g. through confiscation or collection of fines and penalties.

Id.

legislative, and judicial. Such a move is clearly contrary to the doctrine of sovereign equality as outlined in the Charter.[124] Indeed, the notion that FATF member states "know better" than the states they would regulate contradicts both the letter and the spirit of both the U.N. Charter and the Vienna Convention of 1969.

b. FATF Sanctions Would Violate Article 41 of the U.N. Charter

Under article 41 of the United Nations Charter, the U.N. Security Council is given authority to decide "what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures."[125] Article 41 further clarifies that the non-military measures "may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." [126] Some have maintained that nothing in the Charter prevents any member state from imposing sanctions without the backing of the Security Council,[127] and indeed the Uniting for Peace resolution[128] has determined that "collective political and economic measures" may be taken "on the recommendation of the General Assembly in situations where the Council has failed to deal with a 'threat to or breach of the peace, or an act of aggression.'"[129] Yet, even under this more lenient standard, the justified imposition of such sanctions hinges upon some affirmative aggressive act or an act threatening the peace.[130] Assuming *arguendo* that money laundering does threaten the peace among nations, there remains no international justification for imposing sanctions upon the targeted "non-compliant" jurisdictions for *failure* to act, or for not acting in a way prescribed by G-7 nations. The legality

124. *See* U.N. CHARTER art. 2, para. 1.

125. U.N. CHARTER art. 41.

126. *Id*.

127. *See* LELAND M. GOODRICH ET AL., *supra* note 122, at 314.

128. *Uniting for Peace*, G.A. Res. 377, U.N. GAOR, 5th Sess., Supp. No. 20, at 11, U.N. Doc. A/1775 (1950).

129. *See* Leland M. Goodrich et al., *supra* note 122, at 314.

130. *See* G.A. Res. 377, *supra* note 132, at 10.

of prior economic sanction, such as the U.S. embargo against Cuba, has rested upon the more tangible justification that the sanctions were imposed in retaliation for Cuba's violation of international law in taking U.S. property without compensation.[131]

In the example of Cuba, moreover, the United States' actions were more closely in alignment with customary international law in that the U.S. statute under the authority of which the embargo was imposed, mirrored the standards embodied in the Charter.[132] In particular, the 1917 Trading with the Enemy Act (TWEA) allows the President to exercise "broad authority to impose comprehensive embargoes on foreign countries as one means of dealing with . . . times of war."[133] Similar to its U.N. Counterpart, the Trading with the Enemy Act premises any imposition of sanctions upon a time of war.[134] While the United States has, no doubt very consciously, characterized its charge against narcotics and money laundering as part of a comprehensive "War on Drugs," [135] the culpability of foreign governments for failing to act as the G-7 nations direct them hardly rises to the level of war, emergency, or even illegality. Accordingly, sanctions may not validly be imposed.

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131. *See* John W. Smagula, *Redirecting Focus: Justifying the U.S. Embargo Against Cuba and Resolving the Stalemate*, 21 N.C. J. INT'L L. & COM. REG. 65, 95 (1995).

132. *See* U.N. CHARTER, art. 39; Trading with the Enemy Act, ch. 106, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. app. §§ 1–44 (1994) [hereinafter TWEA]. Section 5 of the TWEA grants to the President the right to prohibit financial transactions during times of war. TWEA § 5(b)(1).

133. Regan v. Wald, 468 U.S. 222, 225–56 (1984) (interpreting section 5(b) of the TWEA as it existed in 1963, which also allowed the President to impose embargoes in peacetime emergencies).

134. 50. U.S.C. app. §5(b).

135. This "war" was formally launched September 5, 1989, during George Bush, Sr.'s first prime-time presidential address in which he outlined a comprehensive strategy to eradicate drug abuse in the United States. *See* Dan Check, *The Successes and Failures of George Bush's War on Drugs*, *at* http://www.tfy.drugsense.org/tfy/bushwar.htm (last visited Mar. 13, 2002).

2. *FATF Sanctions Would Violate the Vienna Convention of 1988*

The Vienna Convention of 1988 was the first global agreement specifically aimed at the complexities of modern drug trafficking.[136] This agreement, to which only three of the fifteen blacklisted nations have committed themselves,[137] repeatedly stresses that signatories "shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States."[138] While the Convention agreement does include some provisions that address "knowing" complicity in the transfer or acquisition of property derived from drug-related offenses,[139] these parts of the treaty apply only to 20% of the targeted nations in the

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136. Prior to this agreement, two important anti-drug UN Conventions addressed the problems of drug abuse and trafficking generally. These were the 1961 United Nations Single Convention on Narcotic Drugs, Mart. 20, 1961, 18 U.S.T. 1408, 520 U.N.T.S. 204, as amended by a 1972 Protocol, and the 1971 United Nations Convention on Psychotropic Substances, Feb. 21, 1971 T.I.A.S. No. 9725. The "conceptual narrowness" of these agreements, however, led to the necessity of the 1988 Vienna Convention, which in addition to targeting the basic problems of manufacture and distribution, also contained additional provisions aimed, somewhat tangentially, at money laundering. *See* Ronald K. Noble & Court E. Golumbic, *A New Anti-Crime Framework for the World: Merging the Objective Subjective Models for Fighting Money Laundering*, 30 N.Y.U. J. INT'L L. & POL. 79, 111 n.124 (1998).

137. *See* Vienna Convention of 1988, *supra* note 10, 28 I.L.M at 493 (listing the Bahamas, Israel, and Panama as signatories).

138. *Id*. at 4.

139. *Id*. at 5. Article 3, paragraph 1 provides that

> [e]ach Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally: . . . (i) [t]he conversion or transfer of property, *knowing* that such property is derived from any offence or offenses established in accordance [with the Convention], or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions; (ii) [t]he concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, *knowing* that such property is derived from an offence or offences established in accordance [with the Convention] or from an act of participation in such an offence or offences.

Id. at 5 (emphasis added).

FATF's blacklist.[140] What is more, though the Vienna Convention of 1988 does impose some affirmative obligations on the part of those nations who have signed on to it, some obligations are qualified significantly by the introductory phrase that anti-money laundering measures need be taken only "as may be necessary" and subject to the "constitutional principles and basic concepts of [each party's] legal system."[141]

Framed as they are within this context, the treaty obligations of the three targeted jurisdictions who are parties to the Vienna Convention of 1988 are themselves insufficient grounds for the FATF to allege a breach of this agreement. To the extent they have deemed necessary, for example, the Bahamas has taken a number of steps in line with the FATF recommendations.[142] While the Bahamas does have a "large degree of bank secrecy," its officials maintain that it is not "a sanctuary for illicit proceeds."[143] If satisfied that a plaintiff's case is well-founded, its courts "will readily compel the disclosure of account information."[144] In fact, the Bahamas, a charter member of the CFATF,[145] maintains that its banking industry "is determined in its efforts to eliminate the problem [of money laundering]."[146] For the FATF, therefore, to allege that the Bahamas or any other signatory to the Vienna Convention of 1988 is not taking every step "necessary" in the fight against money laundering[147] is itself a violation of the principle of non-interference and an affront to the sovereign equality of those states, whose independent decisions must be respected and upheld.

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140. *See id*., 28 I.L.M. at 493.

141. *Id*. at 6.

142. *See* FATF 2001 REVIEW, *supra* note 105, para. 21.

143. *See* Paton, *supra* note 57, at 71.

144. *Id*.

145. *See* CFATF OVERVIEW, *supra* note 91.

146. Paton, *supra* note 57, at 71.

147. "Serious deficiencies were found in [the Bahamas'] anti-money laundering system." FATF 2001 REVIEW, *supra* note 105, para. 19. The Bahamas has now been removed from the list, largely because it has "addressed the deficiencies identified by the FATF through the enactment of legal removes," and because it has taken "concrete steps to implement these reforms." *See* FATF REVIEW, *supra*, note 6.

3. *FATF Sanctions Would Run Contrary to the Letter and the Spirit of the FATF's Own Forty Recommendations*

When first drafted and adopted, the Forty Recommendations of the FATF were designed to be "principles for action . . . for countries to implement according to their particular circumstances and constitutional frameworks allowing countries a measure of flexibility rather than prescribing every detail."[148] Contrary to these principles upon which the FATF was founded, the FATF's "Criteria Defining Non-Cooperative Countries or Territories"[149] advocates legislation in very specific detail and, if the ultimate recourse of choking off the financial flows from targeted nations is implemented, the group would appear greatly to impede the "freedom of capital movements" from those jurisdictions.[150]

Again to take the Bahamas as an example: as regards that State, the FATF has charged that there are "serious deficiencies . . . in its . . . system."[151] The report mentions specifically that there is a "lack of information about beneficial ownership as to trusts and International Business Companies (IBCs), which were allowed to issue bearer shares."[152] There is also a "serious breach in identification rules, since certain intermediaries could invoke their professional code of conduct to avoid revealing the identity of their clients."[153] The report goes on to say that "[i]nternational co-operation was marked by long delays and restricted responses to requests for assistance and there was no scope for co-operation outside of judicial channels."[154]

One first notices the specificity of the FATF's "suggestions"

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148. FORTY RECOMMENDATIONS, *supra* note 12, at 1.

149. FATF REPORT, *supra* note 4, annex.

150. *Compare* FORTY RECOMMENDATIONS, *supra* note 12 (stating that the Recommendations are "principles for action . . . allowing countries a measure of flexibility . . . . The measures . . . [do not] threaten economic development.") *with* FATF REPORT, *supra* note 4, annex para. 5 (listing requirements for effective laws and regulations to verify a client's identity).

151. FATF 2001 REVIEW, *supra* note 105, para. 19.

152. *Id*.

153. *Id*.

154. *Id*.

for improvement.[155] Indeed, the report is filled to the brim with very detailed legislative and administrative directives, in marked contrast to the organization's founding mandate not to "prescrib[e] every detail" with respect to implementation of its Forty Recommendations.[156] Indeed, these attempts at extraterritorial legislation are far from flexible and are more redolent of supervisory micro-management. By any account, they violate the principles of sovereign equality and non-interference as embodied in the U.N. Charter and as reflected in the original FATF literature.[157]

Not only is this type of extraterritorial legislation a violation of international law, but insofar as the FATF's Review of Non-Cooperative Jurisdictions runs counter to the preface of the group's Forty Recommendations, this contradiction could present a more fundamental breach to the integrity of the FATF's laudable mission. Indeed, one of the most impressive characteristics of the FATF's crusade against money laundering has been that compliance with its Forty Recommendations, if "strongly encouraged," is voluntary.[158] Thus, even should we assume the skeptical view that some jurisdictions have outwardly pledged compliance to FATF standards only to afford themselves an air of legitimacy while they may never have intended fully to implement the recommendations with good faith, these states nevertheless have assumed a public-relations-inspired obligation to feign compliance and to provide assistance to other member states when specifically requested to do so. Furthermore, such outward compliance has the added benefit of encouraging other similarly situated jurisdictions to comply with the FATF Recommendations in good faith, under the impression that neighboring states have done so. Alternatively, some

155. *See id*. para. 22. While the section above addresses the case of the Bahamas, the reports on other blacklisted territories are comparably specific.

156. *Compare* FATF 2001 REVIEW, *supra* note 105, para. 22 (stating that the FATF will closely monitor, inter alia, the "progress made in applying customer identification requirements to pre-existing accounts") *with* FORTY RECOMMENDATIONS, *supra* note 12, at 1 ("The Recommendations . . . allow countries a measure of flexibility rather than prescribing every detail.").

157. *See* GOODRICH ET AL., *supra* note 122, at 36–40 (discussing the principles of sovereign equality found in article 2, paragraph 1 of the U.N. Charter).

158. *See* Helleiner, *supra* note 28, at 67.

nations may well have signed onto the FATF campaign tentatively, willing to apply the recommendations on a trial basis pending any serious administrative or economic snags, yet secure in the knowledge that implementations of the recommendations is subject to the provisions of domestic law.

The FATF's new "comply-or-else" policy will not only discourage provisional membership, it is sure to breed resentment and more probably, a greater degree of disingenuous conformity than the former model. What is more, those nations whose financial institutions are dragged kicking and screaming into the anti-money laundering campaign are likely to subvert the compliance process into which they have been compelled, perhaps by supplying "mistaken information" to those authorities who request it or by passing anti-laundering legislation which they do not enforce.[159] In any event, common sense dictates that the adoption of the most effective legislation, without the full political backing of the state, is unlikely to yield the desired results.

B. Economic Undesirability of Sanctions

Ever since the volume of cross-border capital flows reached a level meriting multinational review after World War I, there has been a concerted effort to condemn all restrictions to the cross-border movement of capital.[160] While the negotiations leading up to the Bretton Woods conference in 1944 validated the right of governments to use capital controls, the allowance of such restrictions has been the exception, not the rule.[161] In fact, while some nations have resorted to the use of capital controls over the years,[162] there have been no international efforts in support of

159. Arguably, this type of behavior is precisely the type that could be curbed or eliminated by the imposition of economic sanctions. The fact is, however, that the more outward steps a jurisdiction takes in line with the FATF code, the more difficult it would be for the FATF to justify the imposition of sanctions.

160. *See* Helleiner, *supra* note 28, at 62.

161. *Id*. at 63–64.

162. *See* HAL S. SCOTT & PHILIP A. WELLONS, INTERNATIONAL FINANCE: TRANSACTIONS, POLICY, AND REGULATION 1280–81 (7th ed. 2000) (discussing inward capital controls used by Chile).

such policies.[163] By and large, the thinking embraced by the IMF and other national and international bodies is that capital controls distort international capital flows and are ultimately unenforceable.[164] In short, any restriction on the free flow of capital is widely regarded as inefficient and futile.

The FATF's Forty Recommendations themselves envisioned that these anti-money laundering initiatives would not "compromise the freedom to engage in legitimate transactions or threaten economic development,"[165] and would not impede "in any way the freedom of capital movements."[166]

Similarly, this view of preserving the free flow of capital is reflected in the European Union Directive on Prevention of the Use of the Financial System for the Pupose of Money Laundering.[167] Specifically, that document acknowledges that freedom of capital movements should not be impaired, even in furtherance of the war against money laundering.[168] While the European Union ultimately looks to the establishment of a "single market,"[169] the anti-money laundering directive qualifies this objective insofar as the development of this free market among member states may facilitate the cross-border flow of illicit capital.[170] Significantly, the European Union specifically rejected a proposal to include in the directive a provision allowing for the suspension of transfers to third countries who fail "to adopt and/or implement satisfactory regulations to prevent money-laundering."[171]

Thus, putting aside the issue of the legality of the FATF's threatened sanctions, the current push to strengthen anti-laundering rules by imposing sanctions for noncompliance runs contrary to the originally envisioned scheme of anti-laundering

163. *See* Helleiner, *supra* note 28, at 64.
164. *See* SCOTT & WELLONS, *supra* note 166, at 1281.
165. *See* FORTY RECOMMENDATIONS, *supra* note 12, at 1.
166. *See id*. para. 22.
167. *See* Council Directive 91/308/EEC, *supra* note 90.
168. *See id*.
169. *See id*.
170. *See id*.
171. *See* CEES D. SCHAAP, FIGHTING MONEY LAUNDERING 2–3 (1998).

initiatives.[172] While the E.U. Directive and the FATF's original Forty Recommendations recognized the need to balance the fight against money laundering with the need for unrestricted flows of capital, the current FATF campaign shifts the balance drastically in favor of enforcement regardless of its stifling effect upon the free flow of capital. Moreover, by rejecting the pervasive view of economic efficiency holding that money will move to where regulation is lightest, the threatened economic sanctions choke capital flow from the targeted states, thwart regulatory competition, and compel homogenization.

IV. CONCLUSION AND RECOMMENDATIONS

What then is a concerned nation to do? On one hand, regulators are rightly concerned about curbing the free flow of illicit capital across borders and domestically. Yet, on the other hand, these regulators must respect the delicate balance of the international legal system. Having gone this far in advancing its "name and shame" strategy, can the FATF still back down, or tone down this policy, without losing face? The answer, I think, is yes.

Instead of blacklisting all financial institutions within a given jurisdiction that refuse to accept extraterritorial legislative suggestions, regulators would be on a firmer legal and policy footing if they limited regulation to their own shores.[173] Specifically, well-implemented domestic policies could encourage record-keeping regulations such as those currently in force in the United States, Great Britain, and elsewhere, and make transactions between banks and money launderers cost prohibitive.

A. FATF Banks Should Implement "No-Loophole" Record-Keeping Provisions

If national bank regulators cannot legally require banks in foreign jurisdictions to maintain detailed transaction records (such as those required by the United States' BSA), regulators

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172. *See* FORTY RECOMMENDATIONS, *supra* note 12, at 1.

173. The FATF would thereby respect the directives of the U.N. Charter and the Vienna Convention. *See discussion supra* Part III.A.1–2.

may still require *domestic* banks to demand such records from the foreign banks with whom they deal. For example, money laundering activities are currently facilitated by the fact that national banks may effect wire transfers on behalf of foreign banks in the name of those foreign banks generally, without any more detailed information about the client on whose behalf the transfer is made.[174] Such so-called "payable-through accounts" allow non-nationals to conduct business with national banks in the name of a foreign bank alone, thus allowing foreign depositors access to national banking services without divulging their own identities.[175] To be sure, these accounts are convenient for national and foreign banks alike, allowing expeditious transactions without the burden of cumbersome record-keeping requirements. Yet, these accounts are tantamount *domestic* bank secrecy provisions, and as such should be prohibited by national regulators. Though the newly passed Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act)[176] does provide new restrictions on the use of "correspondent accounts," multinational banks continue to skirt these restrictions through the use of interbank transfers using Fedwire, CHIPS and SWIFT systems, pouch/cash letter activity, and payable through accounts.[177]

National banks in every FATF jurisdiction must require client information as detailed as that demanded from domestic depositors. Foreign banks that fail to provide such detailed records would simply be denied access to banking services in that jurisdiction. The net effect of such stringent regulations would be that FATF nations, while respecting the sovereignty of non-FATF states, would compel extraterritorial record keeping provisions akin to their own, without engaging in

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174. *See FDIC Guidelines on Use of Payable Through Accounts* (Mar. 30, 1995) *available at* http://www.fdic.gov/news/news/financial/1995/fil9530.html (last visited Mar. 13, 2002).

175. *Id*. (discussing in detail "payable through accounts" and the U.S. banking system's efforts to discourage them).

176. 107 P.L. 56.

177. *See* NYCH Cuts Risk Areas in New Draft of Correspondent "Guidelines," 13 Money Laundering Alert 7 (2001).

extraterritorial legislation. Denied access to the world's biggest banking countries absent stringent record-keeping requirements, funds held in non-FATF compliant jurisdictions would be illiquid and demand for non-FATF compliant banking would dry up. In order to gain access to FATF financial markets, initially reluctant banks would be forced to comply with FATF standards or lose their competitive edge.[178]

B. FATF Banks Should Adopt "Risk-Based" Transaction Fee Schedules

As the years since the passage of the Bank Secrecy Act have revealed, detailed record-keeping requirements are expensive.[179] No doubt, some financial institutions harbor the belief that these requirements are inefficient and unnecessary to protect against money laundering.[180] If banks and non-bank financial institutions are unreceptive to the "no-loophole" record-keeping provisions described above, the FATF could in the alternative require that banks institute a risk-based transaction fee schedule for transactions with foreign banks. That is, to the extent that non-FATF bank record-keeping policies deviate from those of FATF member banks, member banks could assess upon their foreign partners a service fee proportionate to the risk of incurring money-laundering fines and penalties for facilitating an illicit transaction. Thus, the closer a non-FATF bank comes to adopting FATF-compliant banking regulations, and the easier it is to secure judicial assistance in prosecuting individual depositors of these foreign banks, the lower the fee. Coupled with stepped-up investigatory powers on a national level and daunting penalties for national violations, a risk-based fee schedule would give domestic banks an incentive for assisting in

178. One might argue that such border restrictions would result in the same stifling of capital flows condemned in Part II of this essay; however, such a domestic regime would not restrict capital flow so much as impose a premium for access to a clean money financial system, free from the risks associated with criminal banking. (This same argument would hold true for the risk-based fee schedule outlined below.) Thus, rather than restricting the free flow of capital, these domestic regulations would only create a market for well-regulated funds free of criminal stain.

179. *See* Peter W. Scroth, *United States*, in BLANCHIMENT D'ARGENT ET SECRET BANCAIRE 291, 301 (Paolo Bernasconi ed., Kluwer Law International 1994).

180. *Id*.

the regulatory process, and make it cost-effective for non FATF banks to align themselves closely with the FATF recommendations. Accordingly, in contrast to the current situation where non-compliant banks enjoy the cost benefits of lax record-keeping and minimal liability,[181] a risk-based fee system would make non-compliance expensive and thus encourage all jurisdictions to apply the FATF recommendations as a simple matter of economics. In short, compliance would reduce costs rather than incur them.

C. Conclusion

In today's global economy, the war against money laundering can only effectively be won through a policy of international cooperation. The FATF, made up of the world's most established financial centers, has laudably taken the responsibility of coordinating, and has the power to effect, the type of global initiative that must be implemented to reach this goal.[182] At the same time, FATF nations must be careful to use their influence responsibly and not to take advantage of their dominant position to bully foreign jurisdictions into adopting the suggestions of FATF nations without regard to the central tenet of international law—the integrity of the sovereign state. As a means of rewarding the criminal enterprise, literally of making crime pay, and of reducing the stability of the world financial system, money laundering is indeed an evil to be stamped out. Two wrongs, however, do not make a right. And thus to eliminate one form of lawlessness by resorting to another is a recipe for failure. Accordingly, the FATF should withdraw its threat of sanctions and encourage member nations to implement anti-laundering efforts within domestic borders that yield the same results, while respecting the integrity of non-member jurisdictions.

The FATF can reach many of its pronounced goals through a rigid system of national regulation that respects the independence of non-FATF nations while strongly encouraging compliance with the group's Forty Recommendations. The key

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181. *Cf. id*. (estimating the cost of filling out CTRs at $130 million in 1992).

182. *See* FORTY RECOMMENDATIONS, *supra* note 12, at 1.

here is for FATF nations to take the planks out of their own eyes before offering to remove the specks from the eyes of neighboring nations. A seamless system of domestic regulation would force other nations to comply with FATF recommendations in order to gain a cost advantage in dealing with the coveted markets of member nations. And requiring that all nations pay a premium for access to the most desirable markets would be the most responsible use of the dominant position of the FATF states' power.