GLOBALISATION AS A LEGAL PROBLEMATIC:
BALANCING LEGAL EFFICIENCY AGAINST LEGAL PRINCIPLE – THE CASE OF
MONEY LAUNDERING

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To

My Parents
Thank you for love so generous and unconditional
Over the relatively short period of the last three decades, an extensive body of law, both penal and regulatory, has developed in order to prevent and to control this seemingly burgeoning phenomenon of money laundering. Initial examination of this body of law immediately reveals that it is a legal order that pushes against the traditional frameworks of criminal justice. For example, this new legal order persistently rings "alarm bells" regarding its compatibility with such fundamental principles as the presumption of innocence, the principle of legality, the immunity against double jeopardy, and the rights to privacy especially financial privacy. It also blurs the public nature of policing, the prosecutorial burden of proof and the jurisdictional territoriality of criminal law. Its formation at the international level shows strong signs of supranationalism that challenges State sovereignty and the principle of consent in international law.

This tension between money laundering law and traditional legal principles poses two related questions: (1) What is the reason for this apparent exceptionality of money laundering law?; and (2) How could the tension between law and principle be resolved? As conventional wisdom has it, understanding the law cannot be disassociated from its social context. Certainly, understanding money laundering law is only possible through an understanding of the process of social change that shaped it.

During these past three decades "globalisation" characterised the process of social change that has been gathering momentum. It is this context that has instigated and shaped money laundering law. Globalisation has been propelled by both rapid technological innovation that rendered massive instantaneous communication possible as well as extensive processes of de-regulation and liberalisation. The combined effect of these developments was the emergence of non-state actors that operate across national borders and master substantial economic and informational power. Meanwhile, the State, as the primary agency of governance, has remained jurisdictionally territorial while becoming less dominantly powerful. Both features have resulted in a "governance crisis" and has turned globalisation into a "legal problematic."

The core thesis that emerges from this contextual analysis is that money laundering law is a response to globalisation as a legal problematic. As a solution, it employs six modalities of governance: de-globalisation, extraterritorialisation, harmonisation, co-operation, privatisation and supranationalisation, which are characterised by deviation from traditional legal principles. In terms of its modalities and their characteristics, money laundering law is not a unique response to the legal problematic. It is part of a current and general trend in legal governance. Resolving the tension between this trend and traditional legal principles is a two-way process that involves revising both the law and the principles.

In presenting this thesis, the volume will be organised into seven chapters. Following an introductory Chapter, Chapters Two and Three will analyse the legislative policy underlying money laundering law by conducting contextual and historical analysis. Chapters Four, Five and Six will expound upon the six modalities utilised by money laundering law to address the governance problem posed by globalisation. Finally, Chapter Seven will sum up the argument and suggest some direction for the future.
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The phrase "money laundering" brings to mind thoughts of an intriguing but reprehensible underworld as described in scores of sensational investigative journalism. It conjures up images of the Italian and Russian Mafia, the Colombian Cartels, terrorist groups, illegal gambling operations and white slave traders. This phrase, however, does not portray the sophistication, the breadth and incongruities of the legal regime that bears this name.

Money laundering law is a complex legal field. It is a juncture point amongst criminal law, regulatory law, banking law, international criminal law and administrative and criminal procedure. Each of these branches of the law has its own concepts, problems, theories and methods. In approaching the subject-matter of money laundering, one can be viewed as having two choices: either to treat the subject as a sui generis law or to approach it from within one of the areas of the law that it touches upon. The first approach tends to generate technical studies that are useful for their purposes. The second approach tends to produce technical or in depth analysis of certain aspects of the law in terms of the field concerned. While these approaches to the study of the subject remain useful, current analysis of money laundering law falls short of providing a conceptual framework that permits a better understanding of

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money laundering law in terms of the relationship between its various parts. Absent such a conceptual framework, the study of money laundering law will remain fragmented. This fragmentation of the subject-matter is prohibitive of coherent evaluation thereof.

This volume is an attempt to fill this gap in the study of money laundering law. It endeavours to provide a policy explanation that helps explain the relationships between its various parts and to its underlying government policies. It is only through such systematic analysis that the contours of money laundering law can be evaluated properly.

1. The Evolution of a Comprehensive Legal Regime

Despite attempts at tracing the origins of the term "money laundering" to the practices of New York Mafia in the 1920s when they opened Laundromats as façades for their criminal activities, it was not until 1970s that "money laundering" became part of everyday speech and journalistic reporting. According to the Oxford English Dictionary, this use of the word launder emerged out of the Watergate inquiry in the United States 1973-4. The Watergate investigation had uncovered the attempts by Nixon's Committee to Re-elect the President (CRP) to hide the origin and the receipt of anonymous campaign contributions and to sever the financial "paper trail" between the CRP and the intruders that broke into the Democrat's campaign headquarters at the Watergate office building. These processes, which were perceived in hindsight as naïve, were described by the press as laundering. The legal use of the term had to wait somewhat longer. In the mid 1980s, as will be discussed in more detail in Chapter Two, "money laundering" entered legal usage. A leading authority on the subject traces this development to a 1982 U.S. Supreme Court case, US v. 84 255 625,39, concerning the civil forfeiture of two large sums of money. It was the Court's conclusion that the financial transfers that took place constituted "more likely than not, a money laundering process[.]

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represent the first recorded use of the term money laundering in a primary legal document.  

No sooner had the concept of money laundering emerged and took hold, than an extensive body of law began forming rapidly. The decisive starting point in this history is the enactment of the United States Bank Secrecy Act 1970 (BSA). The BSA is a federal statute that imposes and authorises the Secretary of the Treasury to impose, a series of duties to report and record certain transactions that are of use for criminal, tax and regulatory enforcement. Since that date, the evolution of money laundering law has gone through different phases and a myriad of national, international and regional instruments have constituted its mosaic. During the 1970s, money laundering law was in its incipient stage. During this period there was an increasing awareness of the problem of hiding ill-gotten assets from law enforcement, which was later on to acquire the label of "money laundering." The emphasis in the 1970s was regulatory and preventive in nature, stipulating the banks' duties to keep records and report transactions that might assist law enforcement agencies in carrying out their functions. Seven years after the United States BSA, a self-regulatory but similar instrument came into being in Switzerland. In 1977 Swiss bankers signed an agreement "on the Observance of Care by the Banks in Accepting Funds and on the Practice of Banking Secrecy." In addition to these domestic regulatory measures, limited developments in international co-operation also began to take place, mainly, the U.S.-Switzerland Mutual Legal Assistance Treaty (MLAT)1973.

The second phase of the evolution of money laundering law and by far a more rigorous one started in the 1980s. In terms of money laundering law, this decade has brought about the criminalisation and internationalisation. In the 1980s, money laundering law ceased to be merely regulatory. A number of money laundering offences came into being. This development took place in the United States and the United Kingdom almost simultaneously. In 1988, this trend towards criminalisation took a major leap. At the end of that year, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter, The Vienna

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9 Supra note 1.  
11 See infra, Chapter Two, Section 2.2.  
12 12 ILM 916 (1973). See below, Chapter Two, Section 2.3.2.  
13 UK Drug Trafficking Offences Act (1986); United States Money Laundering Control Act (1986). See infra, Chapter Two, Sections 3.2. and 3.3.
Convention 1988) was adopted. Without actually using the term "laundering" the Convention defined a very broad offence of handling the proceeds of drug trafficking in any conceivable manner and imposed on State Parties a duty to criminalise this conduct. The Convention's definition continues to be the paradigmatic definition of the offence of money laundering. At around the same time, the Basel Committee on Banking Supervision issued a Statement of Principles on the Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering. While the Vienna Convention internationalised the penal aspects of money laundering, this instrument has internationalised the principles of financial regulations against the use of the financial sector for money laundering.

By the end of the 1980s, a core consensus started to form amongst countries in North America, Western Europe and a few other countries such as Australia and New Zealand. Money laundering of large sums of criminal money through the channels of global financial markets was viewed as a serious threat that needed to be stamped out through collective effort. The basic components of this effort, as defined in the penal provisions of the Vienna Convention and the preliminary regulatory recommendations of the Basel Committee, were now becoming a matter of common agreement. In 1989, money laundering law entered a third phase, the phase of supranationalisation. The Group of Seven established a Financial Action Task Force (FATF). The purpose of the FATF was to develop and co-ordinate the efforts to counter money laundering. This ad hoc informal inter-governmental body was later on to become the institutional centre of a global supranational legal regime. During its relatively short life, this international body has succeeded in placing money laundering as a priority item on the policy agendas of all the leading international financial institutions including the World Bank, the International Monetary Fund and the European Bank for Reconstruction and Development. The FATF, in fact, was to become a part of a transnational financial regulatory system co-ordinated by the Financial Stability

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15 It is committee of central bank Governors of the Group of Ten established at the end of 1974. Its membership include central bank governors and representatives of the prudential supervisory authorities of the following countries: Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Spain, Sweden, Switzerland, the United Kingdom and the United States. The Committee issues non-binding principles and standards and it does not have supranational supervisory authority. See The Basel Committee, "About Basel Committee" at www.bis.org.
Using methods of inducement and coercion (i.e., "carrot and stick"), this regime has catalysed the incorporation of money laundering laws and regulations in the statute books in many jurisdictions around the world.

On 11 September 2001, money laundering law appears to have entered a new phase. In response to the terrorist attacks on the United States, money laundering law was called upon to provide an apparatus to control terrorist financing. The novelty does not lie in the extension of the subject-matter. It lies instead in the impact of the particular nature of terrorism, as a violent threat to peace and security, on the principle-based and due process limitations to money laundering law. In terms of due process and legal principles, money laundering law has always been a challenge. September 11 events take this challenge a step further.

2. "The Fall of Principle"

No degree of rationality could have quieted the hearts of some scholars who perceived money laundering law as a threat to a number of the basic and cherished principles of criminal justice and constitutional law. One prominent criminologist entitled his commentary on the Australian Proceeds of Crime Act (1987) "The Proceeds of Crime Act: The Rise of Money Laundering Offences and the Fall of Principle." In his analysis, the Proceeds of Crime Act and its set of money laundering offences constituted "a new despotism in Commonwealth criminal law." He described the trend embodied in the Act as "regrettable" and as one that is marked by "a totalitarian bent." These proclamations, while not necessarily an accurate description of the practice under money laundering law, are useful in giving an immediate impression of the degree of its particularity as a body of law in the perception of some legal scholars.

The number of basic legal principles challenged, to varying degrees under different jurisdictions, by the offences of money laundering is large. This is particularly disquieting in view of the fundamental character of these principles. The
list of concerns is long and it includes, but not limited to, such basic principles as the
principle of legality, the presumption of innocence, the immunity against double
jeopardy, and the right to privacy. The challenges imposed by money laundering law
has either been direct, through the substantive characteristics and definitions of the
offences, or indirect through the loosening of due process requirements as the
safeguards that guarantee the principles.

One of the dictates of the principle of legality is that there is no crime or
punishment without law. This aspect of the principle is highlighted in the International
Covenant on Civil and Political Rights, which provides that: "No one shall be held
guilty of any criminal offence on account of any act or omission which did not
constitute a criminal offence under national or international law at the time when it
was committed." Article 7(1) of the Council of Europe Convention for the Protection
of Human Rights and Fundamental Freedoms (ECHR), establishes the same principle
using identical wording. This principle is one of fairness. Criminal law poses a
substantial threat to the basic rights and liberties of individuals and fairness requires
that individuals should be sufficiently informed of the law and warned of its precepts
before they can suffer loss of basic rights for contravening it. A corollary of the
principle of legality is the need for maximum certainty in the definition of crimes and
penalties. Absent such certainty, sufficient warning of the law cannot be achieved.

The definition of money laundering offences leaves much to be desired in
terms of the requirements of certainty. The actus reus of money laundering as defined
in the Vienna Convention (1988) is particularly crafted to encompass any possible
transaction involving criminal proceeds. Similar approaches are adopted in national
laws. The vagueness of money laundering offences is inherent in the fact that such
offences aim at capturing activities that are ordinary and commercial in nature. The
illegality of the act, therefore, hinges entirely on the purpose of the Act and on the
mens rea of the accused. One commentator has characterised this as a shift in criminal
legal policy away from the objective dangerousness of the act to the personal

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22 The International Covenant on Civil and political Rights, 999 U.N. T.S. 171 (entered into force 23
May 1976), art. 15.
23 ETS No. 005 (entered into force 3 September, 1953).
24 Ashworth, A., Principles of Criminal Law (3rd ed., 1999), at 70. On the importance of the principle of
legality in the context of criminal justice see Allen, F., The Habits of Legality: Criminal Justice and the
Rule of Law (1996), at 5-6.
25 Ashworth, A., Principles of Criminal Law (3rd ed., 1999), at 76-78; Emmerson B., and Ashworth, A.,
Human Rights and Criminal Justice (2001), at paras. 10-01 et seq.
dangerousness of the person. The vagueness of these offences is reflected in the
number of challenges, albeit unsuccessful, to the constitutionality of the U.S. Money
Laundering Act as "void for vagueness."

The presumtion of innocence is another traditional cornerstone of modern
criminal justice systems. This presumption means that "a person should be presumed
innocent unless and until proved guilty[.]" This principle is a procedural safeguard of
fairness and its basis lies in the coercive nature of criminal law and the need to protect
the accused against the extensive power of the state. This principle is translated into
the procedural requirement that the onus of proving the offence lies on the prosecutor.
This principle of criminal justice, however, has suffered substantial erosion in recent
years. One study of the presumption under English law has found that 40% of the
most serious offences under English law appear to place the burden of proof on the
defendant, thus violating the presumption. Money laundering law represents an
alarming evidence of this trend.

Money laundering is a derivative offence in the sense that its harm is derived
from the harm of the "predicate offence" that generated the money involved in it.
Money laundering in essence is not but an after-the-fact act of complicity in a
previous criminal conduct. In view of the breadth with which it is defined, the
boundaries between money laundering and the predicate offence are not clear-cut.
Inasmuch as a person could be prosecuted for laundering the proceeds of one's own
criminal activity, the prosecution authorities could use money laundering as a
"surrogate offence." This means that the vagueness of the boundaries between
money laundering and the predicate criminal conduct gives the prosecution the
discretion to prosecute for money laundering when the prosecution for the predicate
offence is less likely to succeed because of lack or inadmissibility of evidence. In the
former case, money laundering law becomes a blatant breach of the presumtion of
innocence and in the latter it becomes a way to circumvent the procedural

27 U.S. v. Monaco 194 F.3d 381 (1999); U.S. v. McLamb 985 F.2d 1284 (1993); U.S. v. Kaufmann 985
28 Art. 14 (2) of the International Covenant on Civil and Political Rights provide that "everyone
charged with a criminal offence shall have the right to be presumed innocent until proved guilty
according to law." Supra note 22. Similar principle is stated in Art. 6(2) of The European Convention
on Human Rights, supra note 23.
29 Ashworth, A., supra note 25, at 85.
30 Id.
31 Id., at 86.
requirements of *due process*. The vagueness of the boundaries and the absence of restrictions on the prosecution of money laundering in concurrence with the predicate offence also pose a threat to the immunity against *double jeopardy*. U.S. case law testifies to the fact that this threat is far from theoretical.\(^{33}\)

Money laundering law further erodes the procedural safeguards of the *right to privacy* that are encompassed in the common restrictions on the police rights to *search and seizure*. The regulatory reporting requirements that are imposed on a growing category of business generate an immense personal amount of data to which enforcement authorities increasingly have ready access.\(^{34}\) In the US Supreme Court case of *California Bankers Assn. v. Shultz*,\(^{35}\) these due process concerns were the basis for a challenge of the constitutionality of the BSA. The plaintiffs' main contention was that the Act and its implementing regulations violated the U.S. constitutional Fourth Amendment's guarantee against "unreasonable search and seizure." The Court dismissed the challenge on the basis that "both the legislative history and the regulations make specific reference to the fact that access to the records is to be controlled by existing legal process."\(^{36}\)

Justice Marshall, dissenting from the majority opinion, emphasised the vulnerability of this procedural safeguard when he stated: "This attempt to bifurcate the acquisition of information into two independent and unrelated steps is wholly unrealistic. As the Government itself conceded, 'banks have in the past voluntarily allowed law enforcement officials to inspect bank records without requiring issuance of a summons.' [...] The plain fact of the matter is that the Act's recordkeeping requirement feeds into a system of widespread informal access to bank records by Government agencies and law enforcement personnel. [...] once recorded, [customer's] checks will be readily accessible without judicial process and without any showing of probable cause[.]"\(^{37}\)

These are only selective examples of the threats to basic legal principles that are present in current money laundering legal regime and which cause some scholars great alarm. Other rights as basic and as well-established in the operation of criminal justice have also raised concern. One example is the *right to counsel*. The breadth of

\(^{33}\) Abrams, N., *supra* note 26, at 29 *et seq*.

\(^{34}\) See for example *U.S. v. Conley* 37 F.ed 970 (1994); *U.S. v. Jackson* 983 F.2d 757 (1993);

\(^{35}\) For more discussion on this point see *infra* Chapter Five, Section 3.4.

\(^{36}\) 39 L Ed 2d 812.

\(^{37}\) *Id.*, at 835.
the money laundering offence technically captures the conduct of a lawyer who receives a fee for defending a person charged of drug trafficking or any other criminal conduct that constitutes a predicate offence for the purpose of money laundering law. Absent statutory or judicial limitations or restrictive prosecutorial policy, such a conflict could constitute a serious obstacle to the defendant's exercise of the right to counsel.

In the early days of money laundering laws, one might have hoped that stricter judicial interpretation and discriminate prosecutorial policy would tame money laundering law and reconcile it with the dictates of principle. The practice has not always met these expectations with substantial variations amongst different jurisdictions in this regard. The events of "September 11" further undermine the attempts at reconciliation: in this sense money laundering law has entered a new phase. Whatever timidity the implementation of money laundering law has displayed prior to these events now seems to be eroding.

The questions that this substantial deviation from principle combined with the near sudden birth of money laundering law compels the observer to ask are why did money laundering law emerge with such force and why does it possess such exceptional deviational features?

3. The Roots of Change
The speed with which money laundering law has emerged and spread and the exceptionality that characterises its arrangements leads one to examine the context in which the process of evolution has taken place. At the same time that money laundering law was taking shape, a number of other phenomena could be observed. Instantaneous communication was becoming a household facility for many. Financial services were being transformed by these new developments in information technology. Money "as information" was beginning to move instantaneously and in bulks around the globe. Categories of private actors that possessed unprecedented informational and economic power were rising. These categories included both legitimate enterprises and criminal enterprises among others such as non-governmental organisations, multinational corporations and organised criminal groups.

37 Id., at 860-861.
As people became aware of these changes in their surrounding, another word gained currency. It became common to describe these signs of change as *globalisation*. Understanding this contextual change provides a good place to start the search for an understanding of money laundering law and its rationales, underlying policies, goals and boundaries. Achieving the type of understanding that provides an explanation for changes in legal institutions requires answering a number of questions, such as: What is globalisation? Why did it happen? How did it happen? When did it start? What is its extent? Is it reversible? And how does it intervene with and impact the money laundering legal regime?

"Globalisation" is a multi-disciplinary subject. A number of disciplines have taken serious academic interest in the subject. These included Sociology, International Relations, Economics, Political Geography and Communication Studies. The term globalisation has been used synonymously with other existing concepts such as liberalisation, internationalisation, homogenisation, interdependence, or transnationalisation. There are common elements amongst these various concepts. Globalisation, however, remains distinct both as a concept and as an analytical tool.

Close analysis of "globalisation" reveals that as a term it is used to denote two characteristics of the present social context either simultaneously or interchangeably. The first feature that this term describes is geographic in nature. It refers to the de-territorial nature of present social and economic interactions. The second feature is political. It describes the retreat of the State vis-à-vis other actors in society. Therefore, references to globalisation are often geographic referring to the increase in cross border activities. They are also not infrequently political. The use of the adjective "global" to describe a certain activity frequently denotes that this activity

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38 See infra Chapter Three, Section 2.1.
involves non-state actors. One can therefore define globalisation as a process of social change of both geographic and political dimensions. In the geographic sense globalisation describes compression in the space within which we conduct our social relations and a growing consciousness of this compression. In the political sense, globalisation denotes a shift in the balance of power and the pre-eminence of actors away from the state and in favour of non-state actors.\textsuperscript{44}

The primary causes of this profound change in the social context are, to a large extent, technological. Telecommunication and information technologies have had two effects that were of crucial significance for the materialisation of globalisation. First, instantaneous telecommunication technologies, such as the telephone and the Internet have developed so rapidly and became cheaper. The impact of their availability to an increasing number of people is the elimination of distance to the extent that it is measured by time. The total effect of this is a sense of the compression of the space within which we conduct our social activities. Second, the unprecedented technological capacity to store information and the growing availability of this capacity to individuals and private parties have empowered private actors in disproportion to the state. According to this analysis, information technology was instrumental to both the political and the geographic dimensions of globalisation.\textsuperscript{45}

Without rational regulatory intervention, technological innovation could not have brought globalisation about. Several regulatory policies were instrumental to the process of globalisation. These include standardisation, liberalisation, de-regulation and privatisation. Standardisation was a precondition for the effectiveness of technology.\textsuperscript{46} Variations in earlier national telegraphic systems have resulted in situations whereby the telegraph operator had to physically cross the border in order to deliver a message to the telegraph operator on the other side of the border.\textsuperscript{47} Global technological trends have systematically bred regulatory standardisation.

The roles of liberalisation and privatisation were equally important.\textsuperscript{48} While liberalisation, as the removal of regulatory barriers to the movement of goods and services across borders, affects directly the geographic aspect of globalisation, privatisation bears directly on its political one. Extensive privatisation programmes

\textsuperscript{44} See infra, Chapter Three, Section 2.2.
\textsuperscript{45} See infra, Chapter Three, Section 3.1.
\textsuperscript{46} See infra, Chapter Three, Section 3.2.2.
\textsuperscript{47} Braithwaite, J. and Drahos, P., Global Business Regulation 332 (2000).
\textsuperscript{48} See infra, Chapter Three, Sections 3.2.3 and 3.2.4.
that were implemented by some countries around the world in the 1980s and the 1990s have resulted in massive transfer of property to the private sector. Depending on the extensiveness of the privatisation programme, any large-scale transfer of property is bound to result in a shift in the balance of power in favour of the transferee, in this case the private sector.

4. Theme and Structure
The relationship between globalisation and money laundering is widely acknowledged by writers in this field. Globalisation, in this context, is typically understood as the liberalisation of financial markets and the instantaneous movement of capital flows across borders. The discussion of the relationship between money laundering and globalisation stops at the immediate link between this integration of financial markets and the sophistication of money laundering operations as well as the link between this sophistication and law enforcement efforts. The cursory nature of this analysis fails to show, in a systematic way, how money laundering law purports to address these difficulties that are created by globalisation. In fact, it fails to show the definitive causal link between money laundering law and globalisation and the implications of this link for defining the boundaries of money laundering law.

This volume argues that money laundering law is a specific response to the governance vacuum that globalisation creates as it manifests in the area of crime control. Globalisation creates both a geographic and a political mismatch between the State as the primary agency of governance and the activities that it purports to control and regulate. While the State is territorial in nature, social activities including their criminal forms are becoming increasingly transnational. Also, private actors including criminal organisations are gaining immense informational and economic powers, while the State is losing its relative power pre-eminence. Money laundering law, as this volume argues, deals with the challenge of criminal law enforcement against powerful and transnational criminals as one manifestation of the governance crisis. In order to re-enforce order, money laundering law employs a number of "modalities": de-globalisation, extraterritorialisation, harmonisation, co-operation, privatisation and supranationalisation.
These modalities, the study will reveal, are not unique to money laundering law but are equally used in other spheres of global governance. The resulting order is one that pursues *effectiveness* and in this pursuit tends towards informality, relaxes the hold of traditional principles, suffers an accountability deficit and fuses the public and private spheres. Innovative legal and policy approaches are required to redress the balance between the effectiveness of governance and its fundamental legal principles.

Chapters Two and Three of this volume aim to conduct a policy analysis of money laundering. The analysis starts in Chapter Two, which conducts a systematic analysis of the evolution of money laundering law and its main instruments. This analysis seeks to introduce the reader to the notions of money laundering law as it provides a thematic account of its evolution. This historical account is followed by an evaluation of the scope of money laundering law as, it is reflected in the definition of the harm that it seeks to curb. This discussion reveals that there are discrepancies between the scope of the law as it should be defined according to the legislative history of the various instruments and its scope as defined in the legislative instrument and reflected in implementation and enforcement policy. Generally speaking, money laundering law has been applied to categories of actions that depart starkly from those that triggered legislative intervention. Resolving these discrepancies and tackling the problems of over-breadth requires a clear understanding of the functions that the law seeks to serve. This can only be achieved by an understanding of the context in which money laundering law has evolved and the relationship between money laundering law and its context. Chapter Three is dedicated to this task. It argues that money laundering law occurred as a response to globalisation and sets out to establish a coherent understanding of globalisation as a social process. It will also explain the ways in which globalisation represents a problem for legal order.

Chapters Four, Five and Six explain critically how money laundering law purports to respond to the legal problematic of globalisation. The response is categorised into the six modalities referred to above. Chapter Four deals with de-globalisation, extraterritorialisation, harmonisation and co-operation as state-oriented modalities. The common element in these modalities is their focus in resolving the governance crisis on strengthening the State as opposed to searching for another governance agency. Chapter Five and Six, on the other hand, will focus on the use of other agencies including private actors and supranational organisations and bodies to solve the problem. The analysis of the response in terms of specific set of modalities
serves to provide a framework for evaluating this form of legal governance systematically by reference to general principles. These modalities also serve to conceptualise the nature of the departure from traditional state-based forms of legal governance.

The discussion of each of the modalities in Chapters Four, Five and Six are not restricted to their utilisation within money laundering law. Instead, an overview of the use of the modalities in other areas of the law precedes the discussion in the context of money laundering law. An analysis that is narrowly focused on money laundering law was judged by the author to be limited and to an extent distortive, in that it might suggest that the modalities are unique to money laundering law. This broader view permits reaching conclusions that may be generalised to apply to the emerging structure of global governance.

Chapter Seven concludes by drawing on the analysis of the previous Chapters highlights the trends that seem to be manifest in the current model of global governance, emphasises the challenges and suggests some direction for the future.
CHAPTER TWO
MONEY LAUNDERING LAW: HISTORY AND SCOPE

Chapter Outline

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   2.1. The U.S. Bank Secrecy Act (BSA) 1970
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7. Conclusion

1. Introduction

In the early 1970s, "money laundering" as a concept came into being. During the following three decades an elaborate legal regime of very particular characteristics has developed with the explicit aim of controlling, preventing and penalising money laundering in all its forms. First in the United States and later on elsewhere, governments became aware of the growing financial power of criminal organisations. In an attempt to curb this power, penal policies shifted towards the emphasis on removing profit out of crime. In their pursuit to achieve that aim through forfeiture and confiscation laws, governments faced the challenge of the cross border character of criminal activities and the cross border character of criminal money flows.

In response to the challenge of criminal money transfers, "money laundering" as an activity acquired its independent criminal status and an elaborate set of rules were developed to control it, to prevent it and to penalise it. For the purpose of the following discussion, one can here accept as a working definition that money
laundering means "the processing of [...] criminal proceeds to disguise their illegal origin."\(^1\)

This Chapter is concerned with a discussion of the history and scope of money laundering law. This historical exposé is essential for the contextual analysis in subsequent chapters. Its purpose is to introduce the reader to the notions and elements of money laundering law as it thematically shows how the money laundering legal order has rapidly developed in the span of three decades. This historical account will also serve as a summary of the policy discussions that have shaped the main legal instruments of money laundering law. Building on this legislative history, a final section will be dedicated to the discussion of the scope of money laundering law in terms of the harm it seeks to prevent, as this is envisioned in the policy discussions, explicit policy definitions, legal definition and implementation approaches. On the basis of this analysis, it will be argued that the boundaries of money laundering law are poorly defined and that there are core discrepancies at the various policy levels.

As will gradually become apparent in this Chapter and volume, money-laundering law is a complex and a very legal regime. Mapping its history can be an elusive process. The brief account presented in this Chapter, therefore, will focus on deciphering the trends and highlighting crucial legal developments rather than on comprehensive chronicling.

The evolution of money laundering law can be neatly organised in four phases. The First Phase starts with the enactment of the Bank Secrecy Act in the U.S. in 1970. This is a phase of incipience when money laundering as a term had not yet entered the legal lexicon and the system that was later on to grow into great complexity and to spread worldwide was still taking its initial form. The Second Phase was one of criminalisation and internationalisation. It starts in 1980 with a recommendation on the matter of money laundering issued by the European Commission. The Third Phase starts with the formation of the Financial Action Task Force (FATF) by the G7 in 1989. This phase, as will be argued in this Chapter, have transformed the money laundering legal regime into a supranational one and expanded it both geographically and in terms of its subject-matter. The Fourth Phase is an unfolding one that started abruptly with the 11th of September 2001 attack on the World Trade Centre in New

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York City. At this stage the money laundering legal regime that has been growing in detail over the past three phases has been put into full play. As a system that was developed in peacetime, it so alarmingly proved most fitted to address the exceptionality of war. This indirectly confirms the potential of money laundering law as a tool of an efficient rather than principled legal order.

2. The Early Signs of Money Laundering Law in the 1970s

Searching for the term "money laundering" in the legal documents of the 1970s, whether primary or secondary, would render no results. The term "money laundering" had to wait for another decade before entering the legal language and becoming accepted as a term of art. The use of the word laundering in that sense in common parlance was, however, a development of the 1970s. According to the Oxford English Dictionary, this use of the word launder to mean "to transfer funds of dubious or illegal origin, usually, to a foreign country, and then later to recover them from what seem to be 'clean' (i.e., legitimate) sources" emerged out of the "Watergate" inquiry in the United States in 1973-4. The Dictionary refers to the Guardian's reporting of the scandal as the earliest evidence of the term "laundering" in the press.

Money laundering law started predominantly at a domestic level. The earliest legal development took place in the U.S. when what is commonly known as the Bank Secrecy Act was passed on Oct 26, 1970. The Federal Act was regulatory in nature, and in hindsight could be described as geared towards preventing money laundering rather than controlling or repressing it. Seven years later, a similar development, albeit a private one, took place in Switzerland when the Swiss banks, the Swiss Union of Banks and the Swiss National Bank signed the "Agreement on the Observance of Care by the Banks in Accepting Funds and on the Practice of Banking Secrecy." Each of these legal initiatives was highly influential in shaping the future of money laundering law. The concepts and the mechanisms that were introduced in these two initiatives continue to form part of money laundering law through today. It is for this

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2 On 11 September 2001, four American civilian aeroplanes were hijacked. Two of the hijacked aeroplanes were crashed deliberately into the World Trade Centre at the heart of the financial district of New York City. To the shock of the entire world, the crash resulted in the collapse of the monumental twin towers and the loss of thousands of lives. The third aircraft targeted and hit the Pentagon while the fourth crashed in an open plane in Pennsylvania as a result of its passengers' resistance.

3 The Oxford English Dictionary, Volume VIII (2nd ed., 1989) at 702. For brief summary of this scandal and its relevance to money laundering see supra Chapter One footnote 3 and accompanying text.
reason that they merit attending to in some detail in this historical overview. This will be followed by a discussion of limited but relevant developments at the international level.

2.1. The U.S. Bank Secrecy Act (BSA) 1970

The U.S. Bank Secrecy Act of 1970 represents the first legislative sign of the meeting of minds between the various member agencies of the law enforcement community that is characteristic of the money laundering legal regime as we know it today. During a period of extensive hearings before the Committee on Banking and Currency, law enforcement agencies including: "the Justice department, the United States Attorney for the Southern District of New York, the Treasury Department, the Internal Revenue Service, the Securities and Exchange Commission, the Defense Department and the Agency for International Development" submitted concurring testimonies in support of a law imposing certain record-keeping and reporting requirements on the financial community.

During these hearings, the U.S. Congress was presented with a number of problems relating to the enforcement of the United States criminal, tax and regulatory laws. First, law enforcement agencies argued, to the conviction of the Congress, that the growth of financial institutions during the 1960s had been accompanied by an increase in their use by a wide range of criminals including petty criminals, white-collar criminals and tax evaders. Second, while this meant that crime prevention had become more dependent on good financial record-keeping, banks’ record-keeping practices had become more lax and many such procedures had been abolished or limited. Third, there had been an increasing use by American citizens and residents of foreign financial facilities located in "secrecy jurisdiction" for the purpose of frustrating the enforcement of U.S. law.

On basis of these findings, the Congress enacted the Bank Secrecy Act, which imposed record-keeping and reporting requirements on a wide range of financial institutions for the explicit purpose of maintaining and providing evidence that has "a
high degree of usefulness in criminal, tax and regulatory investigations and proceedings."

**Record Keeping Requirements:**

One of the Act's most enduring and now universally accepted requirements is the "Know Your Customer" provision, which required financial institutions to maintain records of the identity of each individual account holder at the bank as well as each individual authorised to use the account. Financial institutions are also required to keep a record of the identity of any individual who engages in any transaction that is required to be recorded or reported under the Act.  

Title I of the Act further required financial institutions to keep a copy of each cheque, draft or similar instrument drawn on the bank. The bank must also keep a record of any such instrument when it is submitted to it for deposit or collection. In the latter case the bank is not required to keep a copy of the instrument. The implementing regulations were amended in 1973 limiting the copying requirement to cheques in excess of $100.  

The record-keeping requirements of the Act were supported by civil and criminal penalties. It is an aggravating factor to wilfully violate the requirements of the Act in furtherance of a Federal felony. This factor raises the offence from a misdeameanour to a felony punishable by imprisonment of not more than five years or a fine not more than $10,000 or both.  

**Reporting Requirements**

According to Chapter 2 of Title II of the Act and its implementing regulations, financial institutions are required to report any domestic transaction involving any payment or transfer in currency of more than $10,000. This is probably the most well known provision of the Act. While this approach to reporting remains one of the

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9 Id., §101. Note, however, that the actual formulation of the KYC regulations has been problematic and approaches varied in different countries.
12 Id.
alternative approaches available under the current money laundering prevention regime, it is not widely accepted.

Chapter 3 of Title II requires persons to report transportation of monetary instruments into or out of the United States, or the of such instruments in the United States from places outside the United States, if either involves instruments of a value in excess of $5000.\textsuperscript{14}

Finally, Chapter 4 of Title II requires United States citizens, residents and others who are conducting business within the United States to file reports of their relationships with foreign financial institutions.\textsuperscript{15} This provision, as the legislative history indicates, was a direct response to the frustration of tax enforcement officers by the use of affluent persons of financial facilities in bank secrecy jurisdictions to keep their assets beyond the reach of United States tax enforcement. In the hearings before the House Committee in connection with this provision, "the former U.S. Attorney for the Southern District of New York has characterized the secret foreign bank account as the largest single loophole permitted by American Law."\textsuperscript{16}

Response and Controversy

The requirements and the novelty of the BSA proved too difficult to accept without challenge.\textsuperscript{17} In June 1972 various plaintiffs including: several bank customers, the Security National Bank, the California Bankers Association and the American Civil Liberties Union brought a case to the United States District Court for the Northern District of California challenging the constitutionality of the BSA. One of the results of this challenge was that the reporting provisions of Title II of the act were subject to a "temporary restraining order" by the District Court which enjoined their enforcement. It was not until the final decision of the Supreme Court in April 1974, upholding the constitutionality of the Act in its entirety, that the Act enjoyed full enforcement.

\textsuperscript{14} Bank Secrecy Act (1970), supra note 8, §231.
\textsuperscript{15} Id., §241.
\textsuperscript{16} H.R. Rep. No. 91-975, supra note 5, at 4398.
\textsuperscript{17} See California Bankers Association v. Shultz, supra note 10, especially dissenting opinions 851-862; See also Case Comment, "Recordkeeping and reporting Requirements of the Bank Secrecy Act", 88 Harvard Law Review 188 (Nov. 1974).
Two features of the Act proved particularly controversial. First, the Act represents in both its record-keeping and reporting requirements an extensive delegation of power from the Congress to the executive. According to §101, the Secretary of the Treasury is empowered to prescribe regulations requiring the maintenance of appropriate type of records where the Secretary determines that they have a "high degree of usefulness in criminal tax, or regulatory investigation."\(^{18}\) The Act also delegates to the Secretary of the Treasury the power to determine the time, the manner and the detail in which currency transactions are to be reported under §221.\(^{19}\) These are only two examples of the extensive delegation of power characteristic of the BSA. In the \textit{California Bankers Association v. Shultz}, Justice Douglas indicated in a dissenting opinion that "This legislation is symptomatic of the slow eclipse of Congress by the mounting Executive power."\(^{20}\) He further argued that because of the potential implications of the BSA to the constitutional rights of the citizenry, the provisions of the BSA exceed the Congress' power of delegation.\(^{21}\)

Second, the record-keeping and reporting requirements give the government a sweeping access to private information and transforms the role of financial institutions into government agents. This aspect of the Act has raised great controversy. It has been argued by a number of plaintiffs in \textit{California Bankers Association v. Shultz} that compulsory record-keeping and reporting by financial institutions amounts to search and seizure and lacks the procedural safeguards mandated by the Fourteenth Amendment to the U.S. Constitution.\(^{22}\) The plaintiffs, dissenting judges and commentators on the case were particularly disturbed by the absence of any obligation on the recording institution to inform the customer of any government request for information. In view of the amount of private information that a study of a person's financial transactions can reveal, this sweeping and unregulated search and seizure was feared and argued to be profoundly detrimental to the constitutional privacy rights of the citizens.\(^{23}\)

\(^{18}\) \textit{The Bank Secrecy Act (1970)}, \textit{supra} note 8, §101.
\(^{19}\) \textit{Id.}, §221.
\(^{21}\) \textit{Id.}, at 859.
\(^{22}\) \textit{Id.}, For example at 829, 836, 836 and 840.
\(^{23}\) See in particular Justice Douglas dissenting opinion. \textit{Id.}, at 851-857.
In sum, the BSA constitutes an important piece in the history of the money laundering legal regime. Some of the concepts and rationales, which were established in that legal instrument continue to apply and form the basis of anti-money laundering law as we understand it today. According to its legislative history, the Act was passed as a response to certain difficulties in criminal, fiscal and regulatory enforcement resulting from cross-border financial activities. The controversy surrounding the enactment and implementation of the BSA in its early days is extremely telling of the exceptional nature of this legal regime. We are increasingly taking for granted this exceptionality thirty years after the enactment of the Act.

The U.S. Congress and the U.S. Supreme Court in passing this legislation and in upholding its constitutionality were particularly conscious of wider changes in the social context. The Supreme Court in arguing for the constitutionality of the Act against challenges of established constitutional principles said: "While an Act conferring such broad authority over transactions such as these might well surprise or even shock those who lived in an earlier era, the latter did not live to see the time when bank accounts would join chocolate, cheese, and watches as a symbol of the Swiss economy. Nor did they live to see the heavy utilization of our domestic banking system by minions of organized crime as by millions of legitimate businessmen."^{24}

2.2. The Swiss Banks' Agreement on the Observance of Care (1977)

While this reputation of the Swiss financial sector was viewed with appreciation by its growing and often foreign clientele, other countries viewed it with suspicion. Countries, whose law enforcement efforts came repeatedly crashing against the Swiss financial secrecy walls, had grown in resentment during the 1960s and 1970s. It was, however, the embarrassment resulting from the "Chiasso Affair" that finally prompted a Swiss reaction.^{25} In 1977, it was revealed that the director of the Chiasso, Tessin branch of Credit Suisse had abused his capacity by accepting over 2.2 billion Swiss francs constituting the proceeds of violation of Italian currency restrictions and reinvested them through a Liechtenstein finance company.^{26}

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^{21} Id., 823.
^{26} Peters, R., id., at Footnote 3.
In a private self-regulatory response, all the banks in Switzerland entered into an "Agreement on the Observance of Care by the Banks in Accepting Funds and on the Practice of Banking Secrecy." The original objective of the agreement was "to ensure the careful clarification of the identity of bank customers and to prevent that transactions contrary to the Agreement are made possible or facilitated through an abuse of the right to banking secrecy." The agreement's primary achievement was imposing upon banks the duty to identify their customers and the beneficial owners of assets deposited with them. The impact of this obligation was effectively to outlaw anonymous bank accounts.

The first version of the agreement was understandably rigorous in attempting to stamp out any symbiosis between the Swiss financial sector and the underworld as to dubious and criminal funds, however, later amendments in 1982, 1987 and 1992 diluted significantly this rigour. The objective of the agreement was redrafted in the more neutral terms of "confirming, defining and laying down in a binding way the established rules of good conduct in bank management." The revised versions of the Agreement, until 1992, deliberately left out obligations such as investigating the origin of funds, or refraining from entering into transactions involving criminally derived funds.

The significance of the 1977 Agreement, however, should not be underestimated. Similar self-regulatory instruments continue to bind Swiss banks up until today and some of the obligations that were first established in this agreement eventually found their way into Swiss law. In 1982, the Swiss Supreme Court confirmed that the requirement to identify the economic origin of funds, which was originally established in the agreement, has become part of Swiss law.

27 Sansonetti, R., "Money Laundering: An International Perspective from Switzerland", in Rider, B., and Ashe, M., Money Laundering Control 251 (1996), 265-267. The author characterises the agreement as a "private law agreement which also indirectly protects the public interest", id. at 265.
28 Id., at 111.
29 Giovonoli, M., supra note 25; Peters, R., id., 112-120.
31 Peters, R., supra note 25, at 112. Note that in the 1998 version of the Agreement, fighting money laundering was stated in the preamble as one of the objectives of the Code. Agreement on the Swiss Banks' Code of Conduct with Regard to the Exercise of Due Diligence (January 28, 1998), available at the Swiss Bankers Association's website www.swissbanking.org/en/home/allgemein.htm (last visited January 10, 2002). (Hereinafter, CDB)
32 Stessen, G., supra note 30, at 101.
33 See CDB, supra note 31. This private regulation has inspired subsequent criminalisation of money laundering. Sansonetti, R., supra note 27, at 265.
34 Swiss Supreme Court AFT 109 lb 146 (1982), cited in Stessen, G., Supra note 30, at 102-103.
2.3. Relevant International Legal Development

2.3.1. Overview

A depiction of the early signs of the money laundering legal regime is not complete without addressing the 1970s developments in inter-state co-operation in penal matters, particularly in its more recent modality of mutual legal assistance. In 1973, the United States and Switzerland signed a Mutual Legal Assistance Treaty (MLAT) thus bringing to a fruitful end four years of strenuous negotiations. So far, as in the case of the European Convention on Mutual Legal Assistance in Criminal Matters (1959), mutual legal assistance was confined to arrangements between countries sharing both common legal tradition and geographic proximity. The U.S.- Switzerland MLAT marked an obvious departure from both these features of earlier arrangements. This MLAT was particularly significant in that it was the first such legal arrangement to be concluded between a country belonging to the civil law tradition and another belonging to the common law tradition. In this regard, its negotiations were described by one commentator as "a fascinating exercise in comparative law." The geographic disparity between the two parties to the treaty is also a blatant example of the growing complexity of transnational criminality.

Mutual Legal Assistance Treaties impose obligations on each party to the treaty to provide assistance to other parties in criminal investigations and proceedings. This modality of inter-state co-operation in penal matters emerged as a direct response to the increasing cross-border character of criminal activities and the corollary problem of gathering evidence abroad. The purpose of this modality was to provide efficient and effective assistance in securing evidence that lies outside the territory of the investigating or prosecuting State. Efficiency is primarily achieved


through establishing direct links between relevant central authorities thus circumventing the slow processes of diplomatic channels. Effectiveness, on the other hand, is facilitated by MLAT through their provisions on the authentication of documents and records and the supply of assistance in a manner that generates evidence admissible in the courts of the requesting State as a pre-condition for an effective prosecution.

MLAT's provide for a number of forms of assistance in criminal matters. While such forms vary amongst instruments, they have been summarised to include: (1) executing requests relating to criminal matters; (2) taking testimony; (3) production and authentication of documents, records and articles of evidence; (4) serving judicial documents; (5) effecting the appearance of witnesses before the courts of the requesting State; (6) locating parties; and (7) effecting seizure and forfeiture of assets. This latter form of assistance is a feature of the more recent MLATs rather than the earlier ones. 40

Because of the historical significance of the U.S.-Switzerland MLAT in the development of the money laundering legal regime, this treaty will be discussed in brief detail with a view to highlighting the aspects that are relevant to money laundering control.

2.3.2. U.S.-Switzerland MLAT 1973 41
Mutual assistance in legal matters between the U.S. and Switzerland was proposed by the U.S. out of domestic concern over the use of the Swiss financial sector to hide assets from U.S. law enforcement. 42 The frustration of law enforcement agencies in the U.S. by the impact of the Swiss secrecy on their law enforcement efforts have triggered an agreement amongst officials in State, Justice and Treasury Departments and the Securities and Exchange Commission to formally seek mutual assistance

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41 U.S.-Switzerland MLAT, supra note 36. For a thorough analysis of the negotiation of this treaty the excellent article by Nadelmann, E., supra 38. For a background and comparison to other U.S. MLATs see Ellis, A., and Pisant, R., supra note 40. For discussion of the Treaty with particular reference to its impact on Swiss bank secrecy laws see Knapp, J., supra note 39; and Field, B., "Improving International Evidence-Gathering Methods: Piercing Bank Secrecy Laws From Switzerland to the Caribbean and Beyond", 15 Loyola of Los Angeles International and Comparative Law Journal 691, (1993).
42 This was reflected in the legislative history of the Bank Secrecy Act 1970, which was discussed above. Supra Section 2.1.
arrangements with the Swiss.\textsuperscript{43} In other words, one may conclude in retrospect that the U.S.-Switzerland MLAT was a direct response to money laundering operations and an enforcement tool against it although the concept and the term describing it had not yet publicly emerged at that stage.

According to one commentator on the negotiations the objective of the Americans in the negotiations was to create international legal obligations piercing the veil of secrecy created by the Swiss domestic law and facilitating the collection of evidence by American authorities.\textsuperscript{44} In view of the fact that Swiss law allowed broad disclosure of information to Swiss investigative authorities, achieving the objectives of the negotiations hinged on securing a treaty obligation binding Switzerland to grant similar access to information to U.S. investigators. It is in those terms that the "piercing of the veil of secrecy" took place. Paragraph 1 of art. 10 provides that "A Person whose testimony is requested under this Treaty shall be compelled to appear, testify and produce documents, records and articles of evidence in the same manner and to the same extent as in criminal investigations or proceedings in the requested State."\textsuperscript{45} Swiss negotiators remained jealous of the Swiss banking secrecy laws and this was reflected in various treaty provisions restricting access to financial information where such information pertains to an innocent third party.\textsuperscript{46}

There has been a meeting of minds amongst the parties to the Treaty with respect to the threat of organised crime. This common concern was reflected in the willingness of the Swiss to offer more assistance in this context and to impose fewer restraints on the rendering of such assistance. These concessions were incorporated in a separate Chapter entitled: "Special Provisions Concerning Organized Crime." The most important concession made under this Chapter relates to assistance in investigations or proceedings involving violations of provisions on income taxes subject to certain stringent conditions.\textsuperscript{47} This constitutes an exception to the general rule regarding the non-applicability of the Treaty to investigations or proceedings concerning tax violations.\textsuperscript{48}

\textsuperscript{43} Nadelmann, E., \textit{supra} note 38, at 470.
\textsuperscript{44} \textit{id.} at 472-473.
\textsuperscript{45} U.S.-Switzerland MLAT, \textit{supra} note 36.
\textsuperscript{46} \textit{See for example, id.}, art. 10 paragraph 2, and art. 12 paragraph 2(d).
\textsuperscript{47} \textit{id.}, art. 7 Paragraph 2.
\textsuperscript{48} \textit{id.}, art. 2 paragraph 1.c (5).
The Swiss Treaty was generally celebrated as a success. Throughout the history of the Treaty it has been used by both parties for the purpose of securing evidence in the other's territory. A ratio of three to one appears to be maintained in favour of the United States.49 According to a U.S. government study published in January 1983, the evidence obtained under the Treaty during the first six years if its life has contributed to around 145 convictions at both federal and state levels.50

These international developments have been significant. Later commentators on the MLATs and money laundering control have indicated that this modality of cooperation is indispensable for curbing money laundering as a transnational crime.51 Further, it was in the context of these treaties that the early formulation of money laundering legal regime took shape.

3. Criminalisation and Internationalisation in the 1980s:

3.1. Overview

It was in the 1980s that money laundering control and prevention acquired its distinctive form as a legal policy. It was also in the 1980s that legal instruments dealing with money laundering explicitly started proliferating. The developments in the 1980s were substantial and certain enduring trends in money laundering control and prevention began to be set.

The first development to be noted in this period is the adoption of the term "money laundering" in legal language. According to a leading authority on the subject,52 This particular development is pinned back to the 1982 court decision in US v. $4 255 625,39.53 This was a case of "civil forfeiture" brought by the Government against two sums denominated in U.S. Dollars. The facts of the case involved the delivery of large sums of money from a money exchange business (Molina) in Colombia to another such business (Sonal) in Miami- Florida, which then deposited the sums into the company's bank account in Capital Bank in Miami. In deciding for the Government the court concluded that "Molina to Sonal to Capital Bank was, more

49 Knapp, J., supra note 39, at 414.
50 Id. at 415.
likely than not, a money laundering process..." The court used the term "laundering" repeatedly in its decision. Although the court did not explicitly define the term, it could be seen from the wording and the context that the term has been used with a degree of precision and legal clarity regarding its connotation.\(^5\)

Concern for money laundering since its early legislative inception in the 1970s has always been a cross-border one. When the United States enacted the BSA in 1970, the Congress was primarily concerned with financial assets held abroad and criminal proceeds roaming the interstate channels of commerce. It, therefore, is not surprising that the legal response to money laundering should soon become international. The first truly international concern with the problem of money laundering emerged within the Council of Europe, which set in 1977 a Select Committee of Experts on Violence in Present-Day Society vested, at its first phase of operation, with the task of examining "the serious problems raised in many countries by the illicit transfer of funds of criminal origin frequently used for the perpetration of further crime."\(^5\) The work of the Select Committee has resulted in the adoption by the Committee of Ministers of the Council of Europe on 27 June 1980, of Recommendation R(80)10, "Measures Against the Transfer and Safekeeping of Funds of Criminal Origin".\(^5\) This Recommendation is the first international instrument, albeit an unbinding one, to address explicitly the problem of money laundering and to use the term "laundering" in its wording.

The Recommendation proceeded from assumptions, established principles and proposed a number of measures that continue to apply under the money laundering legal regime to date. According to the Explanatory Memorandum to the Recommendation, the motivation behind this initiative was the assumption that organised violent criminality and the magnitude of its financial resources is on the increase.\(^5\) It has also been assumed that these organised criminals are dependent in perpetuating their conduct on money laundering practices through normal banking

\(5\) Id., at 325.
\(5\) Id. at 322, 324 and 325.
\(5\) Id., at 169.
\(5\) Id., 171.
operations. Further, it was assumed that the prevention and control of these practices cannot succeed without international co-operation. The Explanatory Memorandum expresses repeatedly and emphatically the importance of the role of Banks in this process. The key measure proposed by the Recommendation is a "Know Your Customer" requirement. Paragraph (a) recommends that banks should establish measures to identify their customers who: open an account, rent safe-deposits, conduct cash transactions or make bank transfers of certain magnitude. The Recommendation was progressive in that it warned against the breaking down of transactions as a way of avoiding the identification requirement. The Explanatory Memorandum also offered a definition of the term "customer" that expands it beyond the client of the Bank to the person who actually owns the funds.

This was only the beginning of internationalisation in the area of money laundering prevention and control. The definitive step of internationalisation, however, did not take place until 1988 with the signing of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter, the Vienna Convention 1988). The significance of this instrument lies in the fact that it imposed an obligation on all parties to criminalise the laundering of drug proceeds. Although the Convention did not use the term "money laundering", its definition of money laundering offences became the accepted definition in all the subsequent instruments. This instrument is dealt with in more detail below.

The criminalisation of money laundering however did not start at the international level. Parallel developments in the United Kingdom and the United States had led to the introduction of a crime of money laundering into their respective domestic law. The year 1986 has witnessed legal development on both sides of the Atlantic. In the United States, the Money Laundering Control Act (MLCA) was passed, making it a criminal offence to engage in the laundering of criminal proceeds, to willingly handle assets that are the fruits of criminal activity, or to use structuring methods in order to evade reporting requirements. In addition, the Act imposed

59 Id.
60 Id.
61 Id., at 170.
62 Id., paragraph a.(i), at 170.
63 Id., 174.
harsher civil and criminal forfeiture laws on money launderers and financial institutions who assist them in their practices. In England, the Drug Trafficking Offences Act 1986 (DTOA) rendering it a criminal offence to enter an arrangement whereby the proceeds of another's drug trafficking activities are laundered. Similar provisions were enacted with regard to terrorist funds under the Prevention of Terrorism (Temporary Provisions) Act 1989.

It is important to note that until 1986, the focus of the legal developments with respect to money laundering has been on prevention through financial regulation. In 1986, with the criminalisation of money laundering in the United Kingdom and the United States a new control or repression component has been added to the legal approach to the problem. The money laundering legal regime that evolved out of these developments places equal emphasis on both aspects of the strategy and reflects the principles and mechanisms already introduced by them. It is for this reason that the key legal instruments of the 1980s at both the domestic and the international level will now be dealt with in more detail.

3.2. United States Money Laundering Control Act 1986

The Bank Secrecy Act was introduced in 1970, but it was not vigorously applied. Enforcement was lenient and banks' co-operation was lacking. In 1981, the General Accounting Office (GAO) conducted a study evaluating the implementation of the BSA to that date. The study concluded that the lack of co-operation and compliance by the financial institutions undermined the usefulness of the reporting requirements of the Act. It was the frustration by this state of affairs and the sense of the seriousness of the problem that grew in the 1980s, which led to the second main Congressional intervention and the enactment of the Money Laundering Control Act.
1986. The spirit that prevailed since the beginning of the 1980s and this criticism of the implementation of the Act by the GAO have resulted in a spree of enforcement measures by the U.S. Treasury Department and the U.S. Justice Department. As part of a large enforcement operation conducted by the Treasury in Florida, Great American Bank of Dade County was indicted, pled guilty and was charged a criminal fine of $500,000. Since the beginning of this operation in July 1980 and over the period of the next five years, several banks and financial institutions across the United States were inspected and fined for non-compliance with the reporting of the BSA.

The main shift in compliance and enforcement attitude, however, is normally related back to the Bank of Boston case in February 1985. The Bank of Boston was indicted for failing to report around $1.2 billion of currency transactions. Also, further investigation revealed that the Bank abused the exemption provisions by granting exemptions to senior members of a well-known organised crime family in Boston. Following a guilty plea, the Bank was fined $500,000 for its failings. It was mainly the result of this case that financial institutions' attitude to compliance shifted drastically. Also, it was the sense of moral neutrality of the offence of failure to report that was expressed during the proceedings of this indictment that induced the Congress to Act. The decision, therefore, was made to introduce money laundering by financial institutions as a primary offence instead of relying on the secondary nature of the offence of failure to report and with the Money Laundering Control Act (MLCA) coming into being.

As already indicated, the primary development under the MLCA was the criminalisation of a number of money laundering and related acts. The main provisions of the Act are sections 1956 and 1957. These two provisions create a number of laundering offences with certain variations in their actus reus, mens rea or some other related factual elements. Section 1956(a) offences could be described liberally as the laundering offences in strict sense. The Section is entitled "Laundering of monetary instruments." The offences created by this section could be categorised

71 Id., 1077.
72 Id., at 1077-1078.
73 Id., at 1078.
74 Id., at 1080-1081.
according to their actus reus into "transaction offences" and "transportation offences."\(^{76}\)

The act criminalised in §1956 on "transaction offences" is the act of conducting or attempting to conduct a financial transaction involving a property that represents the proceeds of a specified unlawful activity as defined in §1956(c)(7).\(^{77}\) This is provided that this act is carried out with knowledge of the nature of the property involved as representing the proceeds of "some form" of unlawful activity. The knowledge need not extend to the exact nature of the unlawful activity that generated the proceeds.\(^{78}\) The section provides two different "transaction offences," differentiated on the basis of the mental element required. The first involves conducting the transaction described above with the intention of promoting "the carrying on of specified unlawful activity."\(^{79}\) The second variation involves conducting the transaction merely knowing that the transaction is designed to "(i) conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or (ii) to avoid a transaction reporting requirement under State or Federal Law."\(^{80}\)

Section 1956 on "transportation offences," on the other hand, criminalises the act of transporting "a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from a or through a place outside the United States."\(^{81}\) According to this Section, there are two types of "transportation offences": the first involves a monetary instrument or funds, regardless of their legal or illegal origin, that are being transported "with the intent to promote the carrying on of specified unlawful activity."\(^{82}\) The second, on the other hand, pre-requires that the monetary instrument or the funds transferred "represent the proceeds of some form of unlawful activity."\(^{83}\) In this second case, the transportation is criminal under this Section only if the person carrying it out has the knowledge of the nature of the monetary instrument or the funds as proceeds. Further, the offender must possess either the knowledge that the transportation is designed to "

\(^{76}\) This categorisation is made by G. Richard Strafer in his now classic article "Money Laundering: The Crime of the 90's", 27 American Criminal Law Review, 149 (1989) at 161.

\(^{77}\) 18 USC 1956(a)(1) (1986).

\(^{78}\) For a critique of this approach see Strafer, R., supra note 76, at 166.


\(^{81}\) 18 USC 1956(a)(2) (1986).


conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity;" or the specific intent "to avoid a transaction reporting requirement under State or Federal law[.]"

Section 1957 creates a "transaction-based" offence. It criminalises any engagement in a monetary transaction involving a property of a value exceeding $10,000 that is derived from a specified unlawful activity. The offence of §1957 is a broader offence in that it does not require any mental element apart from the mere knowledge of the origin of the property involved. The Section does not require any specific intent.

Prior to the MLCA, the courts narrowly interpreted the Currency Transaction Reporting (CTR) requirements of the BSA, thus permitting the "structuring" of transactions as a way of avoiding the reporting requirements of the BSA without reprehension. According to some commentators, blocking this loophole was the primary reason for the Congress' intervention. In addition to §1956(a)(B)(ii) and §1956(a)(2)(B)(ii) that prohibit the carrying out of the prescribed act with the specific intent of avoiding any legal transaction reporting requirement under, Section 5324 of the MLCA deals directly with this problem. This Section renders it illegal to cause a domestic financial institution to fail to file a report, to file a required report that contains "material omissions or misstatement of facts," or to structure any transaction with one or more domestic institution.

Like the BSA, MLCA disturbed the legal commentators in its challenge of many ideas and principles that they held true. One author writing within two years of the passage of the Act argued that the Act poses serious potential interpretation problems for the courts. In this context, this author elaborated that the Act runs afoul of a number of constitutional and criminal justice principles. The list of principles arguably breached by the Act was staggering in terms of the essentiality of the principles. It included amongst others: the presumption of innocence, the

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86 Strafer, G., supra note 76, footnote 72 and accompanying text.
87 31 USC 5324 (1986).
88 31 USC 5324(2) (1986).
89 Strafer, G., supra note 76, 149.
constitutional doctrines of vagueness and "overbreadth" and the legal parameters of vicarious liability. 90

3.3. The British Laundering Statutes in the 1980s

Prior to 1986, laundering activities in the UK were prosecuted under a number of statutory provisions with certain limitations. Section 22(1) of the Theft Act 1968 provided one tool for the prosecution of launderers who dishonestly handle stolen goods. One of the most famous cases of what would be described today as money laundering, which was prosecuted under s.22 of the Theft Act 1968, is the Brinks Mat bullion robbery case. Ex-solicitor Michael Relton was successfully prosecuted under this section for the offence of handling large quantities of gold representing the original stolen property. The scope of this provision, however, was limited in two respects. First, it applied only to theft-related money laundering; and second, it required the handling of the actual stolen property or other goods representing the stolen property. 91

The history of money laundering law in the United Kingdom can be traced back to the House of Lords decision in R. v. Cuthbertson in 1980. 92 This ruling revealed the failure of forfeiture laws, as they were at the time, to deprive the offender of the proceeds of one's criminal conduct once they have taken an intangible form. The facts of the case were that the defendants were engaged in long-term lucrative criminal enterprise involving the supply of controlled substances. Over the period of their conspiracy, their criminal activity generated assets of total value of £750,000, some of which were placed in bank accounts in France and Switzerland. Pleading guilty to charges of conspiracy, they were convicted and the court ordered their assets to be forfeited. The appellants appealed to the House of Lords against their sentence and the forfeiture orders. The question of law presented to the House of Lords pertained to the interpretation of s.27 of the Misuse of Drugs Act 1971 93 and partially concerned what it is exactly that this section empowers a court to order to be

90 See above Chapter One.
93 Misuse of Drugs Act 1971, s. 27. "[...] the court by or before which a person is convicted of an offence under this Act may order anything shown to the satisfaction of the court to relate to the offence, to be forfeited and either destroyed or dealt with in such other manner as the court may order."
forfeited.\footnote{94} In answering this question, the court concluded that the powers of the court under s.27 were restricted to the forfeiture of tangible property and did not extend to \textit{chooses in action} or other intangibles.

In reasoning its decision the court relied on the textual interpretation of the Act and specifically excluded any reliance on any wider or implicit parliamentary intent.\footnote{95} The court specifically relied on the Act's use of the word "destroy" to describe the manner in which the forfeited property could be disposed of. On these basis, the Court concluded that the scope of the Act extends only to property that is capable of being destroyed to the exclusion of any intangible property that is not suited for such disposal.\footnote{96} The court also referred to the difficulties inherent in extending the scope of the Act to intangible property referring specifically to the problems of tracing the assets into bank accounts.\footnote{97} In dismissing the argument that the purpose of Parliament was to "strip the drug traffickers of the whole of the profits of their crime\[.\]" the court rejected that the section could authorise the courts to "follow the assets\[.\]"\footnote{98}

The Court's reasoning illustrates the difficulties that led to the expansion of the concept of forfeitable property under forfeiture law and also to the corollary development of money laundering law. This reasoning reflected and stipulated the status of English law at that stage of its development in the early 1980s. It also revealed its impotence against new forms of continuous enterprise crime that generates large wealth. Despite its conclusive ruling, the Court was aware of the frustrating limitations of the law. This was reflected in Lord Diplock's statement that "it is with considerable regret" that he allows the appeals and discharges the forfeiture orders.\footnote{99}

The House of Lords decision and the inadequacy of the law that it revealed raised substantial public concern. The government was called upon to close the legislative loopholes that permitted offenders to retain the gains of their crimes. In this context, an independent Committee chaired by Justice Hodgson was formed, specifically to consider the law relating to the forfeiture of property associated with crime in light of the House of Lords decision and also to study other related matters

\footnote{94}{R. v. Cuthbertson, \textit{supra} note 92.}
\footnote{95}{\textit{Id.}, at 403.}
\footnote{96}{\textit{Id.}, at 405.}
\footnote{97}{\textit{Id.}, at 406.}
\footnote{98}{\textit{Id.}}
\footnote{99}{\textit{Id.}, at 402.}
such as victim restitution and compensation. The work of this Committee constituted the first methodical study of the idea of confiscation, understood as "the depriving of an offender of the proceeds or profits of an offence or their monetary equivalent[,]" in the context of English law. After thorough examination, the Committee concluded that "Criminal courts should have the power to order the confiscation of proceeds of an offence of which the defendant has been convicted[.]
The Committee, however, did not address any aspect pertaining to the question of money laundering by the offender or by third parties.

In 1986, the Drug Trafficking Offences Act 1986 was passed. This Act constitutes a shift in UK criminal justice policy, in that it introduces the concept of "confiscation orders," which permits stripping drug traffickers of all the proceeds of their criminal activity. Section 24 of the Act creates the offence of assisting another to retain the proceeds of drug trafficking, i.e., money laundering. The incriminated acts include entering any arrangement that (1) facilitates the retention of the offender of his/her own proceeds; (2) secures that funds relating to the criminal proceeds are placed at the offender's disposal; and (3) secures that the offender's proceeds are used for the offender's benefit. Intent is the requisite mental element for the offence. The launderer must know or suspect that the owner of the property has been engaged in drug trafficking or has benefited from drug trafficking. Another feature of the offence is that the term "proceeds" is defined broadly to include any property which in whole or in part directly or indirectly represented the proceeds of drug trafficking.

The offence created by s.24 of the Drug Trafficking Offences Act of 1986, as the title of the Act indicates, is a limited one restricted to drug offences only. This is consistent with the history of the Act as a remedy to the defects of the Misuse of Drugs Act 1971. In 1988, the wide ranging Criminal Justice Act (CJA) of that year was passed and extended the scope of confiscation orders to "relevant criminal conduct," defined as including all indictable offences as well as a list of less serious offences. While it remains relevant, the CJA of 1988 did not introduce a money laundering offence involving the proceeds of "all relevant conduct." This development did not take place until the enactment of the Criminal Justice Act 1993, which is

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100 The Hodgson Committee was formed by the Howard League for Penal Reforms, an independent body concerned with the reform of the criminal justice system. See Howard League for Penal Reform, Profits of Crime and their Recovery: Report of a Committee chaired by Sir Derek Hodgson (1984).
101 Id., at 5.
beyond the historical scope of the present discussion. The only extension of the scope of laundering offences in the 1980s was introduced by the Prevention of Terrorism (Temporary Provisions) Act 1989, which introduced an offence similar to that of s.24 of the Drug Trafficking Offences Act 1988 with respect to terrorist funds.\(^{103}\)

By the end of 1989, there was a general perception that anti-money laundering laws needed to be strengthened. The Home Affairs Committee of the House of Commons started a review of the Drug Trafficking Offences Act 1986 in February 1989, which was completed in November 1989.\(^{104}\) The study was triggered by concern over the increase of drug abuse in the UK and was directed towards investigating this matter and the suitability of the law. There is also evidence in the Report of the Committee that the study was also initiated in order to address North American concerns that the United Kingdom was being used as an offshore financial centre by money launderers.\(^{105}\) The Report also reveals that even at the end of the 1980s the U.K. financial sector was still reluctant to assume further responsibilities in the fight against money laundering. This has led the Committee to recommend that "the Government should instruct the Bank of England, as a matter of urgency to examine the scale of the threat to the banking community posed by money laundering and any legislative measures required to counter it. [...] The government should then come forward with the necessary amending legislation as a matter of priority."\(^{106}\) It was not until 1993 that regulatory requirements were finally put into place imposing specific record-keeping and know your customer duties on the financial institutions.\(^{107}\)

\(^{102}\) Id., Recommendation 9, at 151.


\(^{105}\) During the preparation of the report, members of the Committee visited Washington and liaised with relevant agencies. Also, at various part of the Report the Committee addresses directly the concerns of the United States and Canadian authorities. See excerpts in Bosworth-Davies, R., and Saltmarsh, G, *id.*, at 115-119.

\(^{106}\) *Id.*, at 117.

3.4. The Vienna Convention 1988

As the full title of this Convention indicates, it is an international legal instrument against drug misuse. In its approach to the problem, this instrument constitutes a departure from the previous approach adopted by the main international instruments that had dealt with it. Prior to 1988, the international drug control system was based on two main instruments: the 1961 Single Convention on Narcotic Drugs and its 1972 Amending Protocol, and the 1971 Convention on Psychotropic Substances. The approach to the drug misuse problem under these two instruments was based on controlling the production of illegal drugs and regulating the use of drugs for medical purposes in a manner that prevents their diversion to the illicit market.

In 1984, the UN General Assembly recognised that the drug control system that existed under these two instruments was insufficient to deal with the multifaceted nature of the drug problem and that a new more comprehensive international convention was now needed. One of the key features of the new approach as adopted by the new convention and envisioned in the preparatory resolutions that led to it is the emphasis on strengthening the enforcement of anti-drug trafficking laws and the international co-operation mechanisms in this regard.

In the chain of evolution of money laundering law, this convention proved to be the most important step in the internationalisation of money laundering law and the introduction of the concept worldwide. The most important contribution of this Convention to money laundering law is the creation of an international obligation upon State Parties to criminalise a series of laundering offences. While, the

112 A/Res/139/141.
114 The Vienna Convention 1988, supra note 108, art. 3(b) and (c)(i).
Conventio... definition of the offences remains the prototypical definition of money laundering as a crime.\textsuperscript{115}

The Convention defines money laundering offences broadly and the definition of the various offences is not clearly delineated. The definition includes conversion or transfer of drug-derived property for the purpose of concealing the origin or evading the legal consequences of a person's drug-related activities. It also includes the mere concealment or disguise through any process of any fact regarding the drug-derived property such as its nature, location, dispositions movement and rights with respect to it.\textsuperscript{116} The Convention further requires the criminalisation of knowing use, acquisition or possession of drug-derived property.\textsuperscript{117} The latter obligation is however made subject to the constitutional principles and the concepts of the legal system of each country. Whether the mere handling of drug money is or is not a form of money laundering is arguable. The drafting has also been largely influenced by the U.S. legislative definitions incorporated in Sections 1956-57 of the U.S. Code, as it applied during the negotiations of the Convention.\textsuperscript{118}

It is important to note that the Convention does not address the preventive aspects of money laundering law. It, however, was aware of the importance of financial information for the effective enforcement of drug control systems. This recognition is reflected in the text of the Convention where countries are explicitly precluded from denying assistance to other countries merely on the basis of bank secrecy.\textsuperscript{119} The preventive aspects of money laundering law were discussed in detail in a UN soft law instrument that preceded and lead on to the Convention namely "1987 United Nations International Conference on Drug Abuse and Illicit Trafficking: Comprehensive Outline of Future Activities in Drug Abuse Control."\textsuperscript{120} It was also referred to with detail in the official "Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988."\textsuperscript{121} These

\textsuperscript{115} According to the Official Commentary on the Convention, the use of the word "money Laundering" was abandoned because of its novelty and on account of translation difficulties. Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, E/CN.7/590 (1998), at ¶3.51. (Hereinafter, the Official Commentary).
\textsuperscript{116} The Vienna Convention 1988, supra note 108, art. 3(b)(i).
\textsuperscript{117} Id., art. 3(c)(i).
\textsuperscript{118} Id. ¶3.41.
\textsuperscript{119} The Vienna Convention 1988, supra note 108, art.5(3) & Art. 7(5).
\textsuperscript{120} UN Comprehensive Outline 1987, supra note 113.
\textsuperscript{121} The Official Commentary, Supra note 115. at ¶¶ 3.55-3.62.
non-binding references should not be neglected in terms of its impact on building an international consensus in this area of the law.

Although the Vienna Convention 1988 was limited in its scope strictly to drug offences, the Convention did provide great impetus for the internationalisation of money laundering law. Introducing such a novel concept for the first time in the context of drug trafficking was probably strategic in view of the worldwide consensus on the dangerousness of this form of criminality.

3.5. Basel Principles 1988

At the same time as Vienna Convention 1988 was being negotiated and signed, a parallel legal development was taking place in Basel-Switzerland. In December 1988, Basel Committee on Banking Supervision issued a Statement of Principles on the Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering (hereinafter, The Basel Principles 1988). While the Vienna Convention 1988 focused on money laundering control and left out the preventive aspect of money laundering law, this parallel development bridged this gap by attempting to develop some consensus on the preventive money laundering law within the narrower context of the Basel Committee.

The Basel Principles of 1988 are based on the assumption that banks are being used unwittingly for the purpose of money laundering and that the co-operation of financial institutions with law enforcement agencies will be very useful for the purpose of preventing this use. The Principles encourage the banks to put in place effective procedures that (i) ensure the identification of any customer that enters a relationship with the bank; (ii) prevent the engagement of the bank in transactions that appear illegitimate; and (iii) secure close co-operation with law enforcement.

123 It is committee of central bank Governors of the Group of Ten established at the end of 1974. Its membership includes central bank governors and representatives of the prudential supervisory authorities of the following countries: Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Spain, Sweden, Switzerland, the United Kingdom and the United States. The Committee issues non-binding principles and standards and it does not have supranational supervisory authority. See Basel Committee, About Basel Committee, available at www.bis.org. (Last visited February 12, 2002.
124 The Basel Principles 1988, Supra note 122.
125 Id., Preamble, ¶1 and Section I.
126 Id., Preamble, ¶6.
Prior to this instrument, supervisory authorities were ambivalent about their role in the fight against money laundering. While some countries imposed direct responsibility in this regard on its financial supervisory authorities, others did not impose any such responsibility or duty. In the latter case, supervisory authorities lacked jurisdiction to play a role in the suppression of money laundering through the financial system. The value of the Basel Principles 1988 was, therefore, that it established some convergence in approach amongst its members by attempting to create a prudential interest in suppressing the use of the financial system for money laundering purposes.

The "Preamble" to these Principles acknowledge that "the primary function of [banking supervision] is to maintain the overall financial stability and soundness of banks rather than to ensure that individual transactions conducted by bank customers are legitimate."127 It then goes on to argue that a bank's association with criminals is bound to result in adverse publicity that might undermine public confidence in banks and hence their stability. It also argues that association with criminals exposes banks to the possibility of fraud by those undesirable customers as well as by their own employees, whose integrity may be undermined by this inopportune association.128

This logic of the Principles has resulted in tying the money laundering suppression goal with the broader purposes in bank supervision and gradually led to the regulatory aspect of money laundering law becoming a core element of this legal regime as a whole. The influence of the Basel Principles did not remain confined to its limited membership. This extension is typical of the operation of the Basel Committee and was explicitly envisioned in the preamble to the Principles.129 In terms of internationalisation of money laundering law, the Basel principles 1988 were to the regulatory/preventive side of this regime what the Vienna Convention 1988 was to the criminal/control side of it.

4. Supranationalisation in the 1990s
Following a decade of rapid national and international developments in money laundering law, sufficient consensus began to evolve and the political context became

127 Id., ¶3.
128 Id., Preamble, ¶4. and Section I.
opportune for more aggressive growth. The 1990s brought an end to the thirty-year old "Cold War." With the collapse of the Soviet Bloc, the world shifted to a "unipolar" world order. This created the chance for the development of forms of what could be described as supranationalism in the ordering of world affairs. This is the feature that this section will argue most characterises money laundering law in the 1990s.

In the present context, supranationalism is measured by the degree to which the ordering of a certain aspect of social life is conducted by an agency in a manner that derogates from States' sovereignty and the principle of consent in the international order. In the context of money laundering, this supranational regime centres around the Financial Action Task Force (FATF) as a body, which was created by the G7 Summit in Paris in 1989 and given the specific task of studying the money laundering phenomenon and ways to deal with it.

Following its creation by the Summit, the FATF has assumed a life of its own, without any limitations of mandate or time-frame. The FATF was called into meeting by France and it produced its first report ahead of the deadline in February 1990. The most important feature of the 1990 Report is its Forty Recommendations for action. These recommendations as amended and interpreted over the past decade constitute the present blueprint of money laundering law. The FATF and its regime bear many supranational features especially vis-à-vis non-members. Its mission is geared towards achieving the highest degree of convergence and harmonisation not only amongst its limited members but worldwide. This regime, its supranational characteristics and harmonisation efforts will be subject to detailed analysis in Chapter Six of this volume.

5. Post-September 11: The Exceptionality of Money Laundering Law Confirmed
The 11th of September attacks have produced a legal response at national, regional and international levels. Confronted by a very sophisticated form of cross-border terrorism against the most powerful State in the world, the states' responses were frantic. The size of the attacks and the amount of resources appear to have been pooled in order to

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carry them out serves to explain the concern for terrorist financing that predominated the legal response at all these levels. A consensus immediately emerged, or rather seemed to exist, that going after the terrorist money is a key instrument in this war. Such consensus translated into amendments to money laundering laws in the form of extending criminal liability and expanding financial institutions policing duties and obligations.

In the domestic sphere, the U.S. Congress naturally took to action and the result was the enactment of the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism" Act. The Act's deliberately designed acronym "USA PATRIOT ACT" calls upon the patriotism of every American to play his/her part in fending against the terrorist threat. Title III of the Act "International Money laundering Abatement and Anti-terrorism Financing Act," amends U.S. money laundering laws in a manner that capitalises on the inherent draconian character of money laundering law, confirms it and takes it a step further.

A parallel development and one that is significantly influenced by the PATRIOT Act was taking place in the United Kingdom. On 15 October 2001, the Home Secretary and the Chancellor announced proposals to introduce urgent measures giving the Government additional powers to enable it to counter the threat of international terrorism. On 12 November 2001, the "Anti-Terrorism, Crime and Security" Bill was introduced to the House of Commons and passed into law on the 14th of December 2001. The Act, like the U.S. PATRIOT Act, places primary emphasis on the financing of terrorism as a key to the fight against this international threat. The Act deals with this problem in Part I under "Terrorist Property." It defines terrorist cash as "cash which (a) is intended to be used for the purposes of terrorism, (b) consists of resources of an organisation which is a proscribed organisation, or (c) is, or represents property obtained through terrorism." Schedule 1 grants a wide range of seizure and forfeiture powers with regard to this type of property.

At the regional level, the European Union perceived itself to be one of the leading partners in the U.S.-led coalition against terrorism. On 21 September

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131 P.L. 07-56 (October 26, 2001).
132 This acronym is included in the Act's official short title. 18 USC § 1 Note.
133 Anti-Terrorism, Crime and Security Act 2001, s.1(1).
134 For an overview of this response see Overview of EU Action in Response to the Events of the 11 September and assessment of their Likely Economic Impact (Commission of the European Communities, Brussels, 17 October 2001) COM(2001) 611.
2001, the European Council held an extraordinary meeting and adopted a Plan of Action against terrorism. Like other domestic and international instruments, the Council's Plan of Action focuses on: interstate co-operation in penal matters, criminalisation of terrorism, combating terrorist financing and exchange of information for intelligence purposes. The Council has placed particular emphasis on the funding of terrorism and described combating it as a "decisive aspect." The Council also emphasised the importance of extending the EU instruments on money laundering and on the freezing of assets to terrorists' financing.

At the international level, only seven days after the attacks, the Security Council adopted a comprehensive Resolution 1373 affirming its condemnation of the attacks and elaborating steps and strategies to be adopted for the purpose of combating international terrorism. Like other domestic and international responses, the Resolution focused on terrorist financing as the primary target for suppressing this phenomenon. The Security Council envisioned the implementation of its resolution through various mechanisms including the criminalisation of terrorist financing and the freezing of terrorist assets. States were also specifically required to extend maximum assistance to other states in their criminal investigations or proceedings relating to the financing of terrorist acts. This assistance is particularly required with respect to obtaining material evidence in their possession.

One of the most important international legal responses to the attack came from the Financial Action Task Force (FATF). Following the terrorist attacks in the United States, the FATF held an extraordinary Plenary meeting in Washington, D.C. on 29-30 October 2001 for the purpose of launching an initiative to combat terrorist financing. The extraordinary meeting resulted in developing a set of eight recommendations on terrorist financing to complement the FATF 40 Recommendations on money laundering. These recommendations commit the members of the body to the following actions:

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135 The European Council, Conclusion and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001 (SN 140/01).
136 Id., Under "Putting an end to the funding of terrorism."
138 Id., ¶1(a).
140 Id.
(i) To ratify and implement fully the United Nations instruments including particularly the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism.

(ii) To make the financing of terrorism, terrorist acts and terrorist organisations a criminal offence. And to designate such offences as predicate offences for money laundering.

(iii) To freeze and confiscate terrorist assets.

(iv) To report suspicious transactions related to terrorism.

(v) To co-operate as extensively as possible with other countries' enforcement efforts relating to terrorist financing investigations.

(vi) To impose anti-money laundering requirements on alternative remittance systems.

(vii) To Strengthen customer identification measures in international and domestic wire transfers.

(viii) To Amend laws and regulations to ensure that non-profit organisations are not abused for the purposes of terrorist financing.

The convergence amongst these various responses to the 11th of September events is evident but not surprising. It is largely the result of a moment of "shock-induced" consensus. The main feature that characterises these instruments is that they represent further deviation from fundamental principles that were already challenged money laundering law.

For example, the U.S. resorts in the PATRIOT act to more aggressive forms of extraterritoriality. The U.S. PATRIOT Act granted United States agencies extensive direct and indirect extraterritorial powers vis-à-vis foreign financial institutions and individuals. The Act seems to establish the holding of an account by a foreigner in a U.S. financial institution as sufficient nexus for territorial jurisdiction for a variety of purposes.141 This poses obvious challenge to the sovereignty of other countries in addition to the threats to due process and the principle of legality since it threatens certain economic actors by extraterritorial laws.

Also, all the instruments discussed above are invariably also characterised by encouraging informal access to financial information. They mandate more fluid flow of information amongst financial institutions, regulators, the police and investigators, and intelligence agencies. Due process and privacy inhibitions to such unrestricted flow are marginalised.

These features are not a unique response to the terrorist attacks. Such trends have always been a feature of the extraordinary legal mechanisms of money laundering law. But, the amendments to money laundering law that emerged out of the 11th of September attacks are significant. They amount to a "new phase" in money laundering law on account of two facts: first, they water down the due process constraints that somewhat restricted the application of money laundering law; and second, they reveal starkly the extraordinariness of money laundering law, thus creating a compelling need and opportunity for a systematic and balanced revision of this body of law.

6. Shifting Boundaries: The Scope of Money Laundering Law
Money laundering law could be defined as "a set of domestic and international legal norms and provisions designed to control and to prevent" money laundering by creating a number of criminal offences and imposing a series of regulatory measures. The historical account of money laundering law in the previous sections reveals the diversity of this area of the law. What are designated as "money laundering offences" under the Vienna Convention and different domestic laws are varied. Also, the regulatory measures and the transactions that these measures seek to prevent are multifarious. The only common feature of this diversity is its stated purpose of combating the evil phenomenon of money laundering.

Money laundering as a concept is not a natural one. The language describing it is metaphoric in character, which creates an illusion of ordinary meaning. The legal usage of the word "money laundering" departs from the common understanding. The concept of money laundering is, therefore, a legal concept and the definition thereof is, therefore, normative in nature and reflects policy preferences. It is for this reason that examining the scope of money laundering law is better conducted through an examination of what money laundering means at the various policy levels.

The definition of money laundering, as the harm that money laundering law seeks to control, can be found in various sources. At one level, there is the definition
implicit in the historical events that triggered the legislative intervention as well as the policy discussions that informed this intervention. At another level, there is the explicit policy definition of money laundering that can be found in certain policy documents. The third level of defining money laundering is the actual legislative definition of money laundering offences. Finally, there is the definition implicit in the enforcement and implementation of money laundering law. The following analysis will start from the explicit definition of money laundering provided by some domestic and international policy documents. This definition will be deconstructed into its constituent elements. Each element will then be analysed by contrasting the policy description with the legislative history, the legislative definition of money laundering offences and the case law, which reveals how money laundering law actually applies. It will become apparent that the boundaries of money laundering law are continuously shifting at these various levels and that internal discrepancies and contradictions exist. Resolving this tension is contingent on explicit policy honesty regarding the nature of the harm that money laundering law seeks to overcome.

6.1. The Policy Definition of Money Laundering

Governmental and intergovernmental documents addressing the problem of money laundering with a view to designing future solutions often start by defining the problem, i.e., defining money laundering. In this part of the analysis, reference will be made to the policy definition offered in four such documents. The definitions will show common elements but also some variations.

In its first report, the U.S. President's Commission on Organized Crime defined money laundering as "the process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate." The Commission went on to offer two examples of money laundering operations: one involving a narcotic trafficker who wants to disguise his cash from street-level sales into some legitimate form, and the other involves

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142 The President's Commission on Organized Crime was established on July 28, 1983 by Executive Order 12435 with the mandate of studying comprehensively the organized crime problem and advising the President and the Attorney General on appropriate administrative and legislative amendments to improve the federal enforcement measures against organized crime. President's Commission on Organized Crime, The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering (1985), at. 1. (Hereinafter, The Cash Connection)

143 Id., at 7.

144 Id.
legitimate corporate earnings, which are then channelled to pay bribes or unlawful political contributions.145

The Financial Action Task Force (FATF) did not define money laundering in its first Report on the matter in 1990. Its definition appears in its document on "Basic Facts about Money Laundering." It defines money laundering as "the processing of [...] criminal proceeds to disguise their illegal origin." In elaborating on this definition, the FATF referred to the criminal's incentive to "'legitimise' the ill-gotten gains through money laundering," and to "disguising the sources, changing the form, or moving the funds to a place where they are less likely to attract attention."146

The U.S. Financial Crime and Enforcement Network (FinCEN)147 provides that: "Money Laundering involves disguising financial assets so they can be used without detection of the illegal activity that produced them. Through money laundering, the criminal transfers the monetary proceeds derived from criminal activity into funds with apparently legal source."148

Of the four policy documents consulted for the purpose of this analysis, the United Nations Office for Drug Control and Crime Prevention was the most explicit on the matter of defining money laundering. In its commissioned study on "Financial Havens, Banking Secrecy and Money Laundering," it is stated that: "Strictly speaking, money laundering should be construed as a dynamic three-stage process that requires: firstly, moving the funds from direct association with the crime; secondly, disguising the trail to foil pursuit; and, thirdly, making the money available to the criminal once again with its occupational and geographic origin hidden from view. In that respect, money laundering is more than merely smuggling or hiding tainted funds, although those acts may constitute essential constituents of the process."149 This Report emphasises the importance of "legitimation" as an element of money

145 Id.
147 It is a network linking law enforcement, financial and regulatory communities. It was established in April 1990 by Treasury Order Number 105-08. It provides intelligence and analytical work for the purpose of law enforcement in addition to bearing regulatory responsibility.
laundering in strict sense. Any processing of ill-gotten funds that falls short of actually legitimising its source "can scarcely be described" as laundering.

There are subtle variations between these definitions that reflect significant differences in policy. There are also common discernible elements. Each of these definitions refers to a process; the subject of the process is always funds or money; the money is invariably linked to a criminal activity; and finally the process has a purpose which is often to legitimate the funds and sometimes just to hide it, disguise it or conceal some fact relating to it. It is on basis of these common elements that the analysis will proceed.

6.2. Deconstruction and Analysis

In this section, each of the four elements of the policy definitions will be analysed by contrasting the explicit policy approach with the legislative history and actual implementation in legislative instruments and case law.

6.2.1. Laundering as a Process

All the policy definitions reviewed above perceive "money laundering" as a process delimited only by its purpose. The documents provide examples of laundering techniques. The examples range from the very simple, e.g., merely changing to larger denominations street-level drug money to reduce the bulk and enhance portability, to the very complex involving multiple electronic fund transfers, use of false documentation and use of shell companies in offshore jurisdictions. According to these studies, the degree of sophistication is determined by the purpose that the launderer is seeking to achieve. The undefined scope of laundering as a process is reflected in the observations of the President's Commission that "the degree of sophistication and complexity in a laundering scheme is virtually infinite, and is limited only by the creative imagination and expertise of the criminal entrepreneurs who devise such schemes."152

The UNDCP and the FATF breakdown the process of laundering into three constituent steps. Each step is again delimited by its purpose. According to the FATF

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150 "if money is given the appearance of legitimate provenance in a place where sanctions against its illegal origins do exist, then and only then can it be said to be truly laundered-it has its nature disguised." Id., at 5.
151 Id., at 4.
terminology, the first step is *placement*. This initial step involves severing the direct association between the funds and the crime by, for example, introducing the money into the financial system. The second step is *layering*. This means converting and moving the funds through a series of transactions in order to obscure the money trail. The third stage is *integration* where the funds are reintroduced into the legitimate economy.153

Policy documents on money laundering typically proceed from certain case studies and typographies of money laundering. The cases analysed and proffered as examples often have the following characteristics: (1) a cross border-element; (2) large amounts of money often generated by drug trade; (3) sophisticated transactions; and (4) use of financial institutions including banks and securities firms.154

These characteristics are also implicit in the policy discussions that informed the legislative drafting of the various instruments discussed in the previous section. For example, the U.S. BSA as the first money laundering instrument emerged out of concern for the use of offshore financial centres for the purpose of evading U.S. law enforcement.155 In the UK, money laundering law developed out of the failure of the law to deprive drug traffickers of their substantial proceeds which they placed in bank accounts and assets abroad.156 The Swiss Agreement on observance of Care 1977 came as a response to a case involving billions of Swiss Francs earned in contravention of foreign laws in crossing the borders for refuge.157 It is, therefore, clear that the legislative intervention in all these cases and others has occurred in response to large criminal proceeds crossing borders and utilising the financial system.

The legal definitions of the process of money laundering are to be found in the provisions defining the *actus reus* of money laundering offences. As indicated in various parts of this Chapter, the most universally accepted definition of money laundering as an offence is that of Article 3 of the Vienna Convention 1988.158 This

154 Blum *et al.*, *supra* note 149, at 4; FATF, *supra* note 146.
155 See the BCCI case, the Franklin Jurado case, American Express Bank International case and others discussed in Blum *et al.*, *supra* note 149, at 34-46. See also the cases discussed in The Cash Connection, *supra* note 142, at 31-48. These include The Pizza Connection, Great American Bank and Pan American International Bank.
157 R. v. Cuthbertson, *supra* note 92, discussed above in Section 3.3.
158 See above Section 2.2.
159 *Supra* note 108
Article does not delimit the process of money laundering. The Article refers to "conversion or transfer of property" and to "concealment or disguise." The latter designation is clearly based on the purpose of the process and does not provide any hint as to what type of process is envisioned. The former description, without being restrictive, provides more suggestions regarding the process that the State Parties had in mind. "conversion" suggests an alteration in the form of the property and "transfer" suggests physical movement of the property or legal change of title. The Official Commentary is silent on this matter.159

The relevant U.S. Law is more detailed in this regard.160 Section 1956 (18 USC) criminalises as laundering certain financial transactions and certain acts of transportation, transmission and transfer of monetary instruments. The Act defines a transaction to include any "purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond certificate of deposit, or other monetary instrument, use of safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution by whatever means affected."161 The transaction acquires its financial character if it affects in any way or degree interstate commerce and involves transfer of funds, a monetary instrument or the use of a financial institution.

A "financial institution" for the purpose of this provision does not have the ordinary meaning that would automatically come to mind. Instead, it has a much broader and expanding definition based on section 5312(a)(2) of title 31, United States Code. This naturally includes banks along with over twenty other forms of business. For example, section 5312(a)(2) includes within the definition of financial institution brokers and dealers, pawnbrokers, travel agencies, car dealers, and dealers in precious metals. The section further authorises the Secretary of the Treasury to expand this category to other types of business carrying out similar or substitute activities or any cash transactions that has high degree of usefulness in criminal, tax and regulatory investigations. Section 1956 of title 18, United States Code extends the definition of financial institution to these additional categories that might be added by

159 Supra note 115, at ¶3.41 et seq.
Treasury regulations. While the definition of the United States Code is seemingly more detailed, it does not offer any delimitation of the process of money laundering. It simply gives more detailed examples of what is essentially a process of "conversion or transfer of property" in the language of article (3) of the Vienna Convention 1988.

In the U.S. case law, money laundering counts arise more often than not from simple transactions such as, purchasing a vehicle,\textsuperscript{162} cashing stolen casino chips,\textsuperscript{163} cashing cheques,\textsuperscript{164} buying a cabin,\textsuperscript{165} simple wire transfers,\textsuperscript{166} depositing in bank accounts and drawing cheques on those accounts\textsuperscript{167} and using safe deposits.\textsuperscript{168} In one case, the court held that paying the cash bond of $2500 to bail his co-conspirator out of prison was a "financial transaction" within the meaning of money laundering statute and upheld the Defendant's conviction for money laundering on basis of this act.\textsuperscript{169} In the cases referred to here, the acts of money laundering were simple acts that do not bear the mark of sophistication and professional characteristic of the cases that informed the policy discussion behind money laundering statutes.\textsuperscript{170} It is relevant to mention in this connection that using sophisticated laundering techniques is an aggravating factor according to the U.S. Sentencing Commission Guidelines.\textsuperscript{171}

With regard to the transactions that more commonly constitute the basis for money laundering counts and convictions in the United States, it could also be observed that many of these transactions do not transcend the boundaries of a single state let alone the federal boundaries of the United States. Although section 1956 contains an "interstate nexus" in the definition of "financial transaction" discussed above, this nexus has been treated as merely jurisdictional concerning the "Commerce Clause" of the U.S. Constitution as basis for the Congress legal jurisdiction to regulate money laundering processes. In this context, it was held that a minimal effect on interstate commerce is sufficient to satisfy the evidentiary requirement in this regard.\textsuperscript{172} In responding to the Defendant's challenge in the cash bond case referred to

\textsuperscript{162} United States v. Cruz, 93 F.2d 164 (1993).
\textsuperscript{163} United States v. Manarite, 44 F.3d. 1407 (1995).
\textsuperscript{165} United States v. Rockelman, 49 F. 3d 418 (1995).
\textsuperscript{167} United States v. Kunzman, 54 F.3d 1522 (1995).
\textsuperscript{169} United States v. Laurenzana, 113 F. 3d 689 (1997).
\textsuperscript{170} See the cases discussed in The Cash Connection, supra note 142.
above, the court held that the transaction had an effect on interstate commerce because ":\[t\]he money Laurenzana delivered to the officers did, and in the ordinary course of business would be expected to, enter the flow of commerce."\textsuperscript{173} It is important however to note that using offshore financial accounts is an evidence of sophistication for the purpose of sentencing according to the U.S. Sentencing Commission Guidelines.\textsuperscript{174}

In the United Kingdom, the legislative approach to the definition of the process of money laundering is equally open-ended. Money laundering offences are spread over various statutory provisions.\textsuperscript{175} Generally, the process is defined in some provisions as "entering an arrangement" that has a specifically proscribed purpose. This arrangement could involve "concealment, removal from the jurisdiction, transfer to nominees or otherwise."\textsuperscript{176} In other provisions, it is described as concealing or disguising, and converting or transferring for a specifically proscribed purpose.\textsuperscript{177} The language of "conceal and disguise, convert and transfer" reflects the language of Vienna Convention 1988. The cases of laundering as reflected in the U.K. case law often concern conversion of Sterling pounds into another currency and removal from the jurisdiction by means of transportation.\textsuperscript{178}

This analysis confirms that the acts of laundering are so varied that they do not admit to a clear and unitary definition. While the policy analysis of money laundering has always proceeded from very sophisticated case studies involving transnational features and professional launderers, the law was cast so broadly in order to cover all possible laundering processes. This could result, as the case is in the United States, in the application of the law to cases that are often fundamentally different from those on which the criminalisation was based.

\textsuperscript{173} United States v. Laurenzana, 113 F. 3d 689 (1997) at 693.
\textsuperscript{174} Application Note (5), Commentary to §2S1.1. (b)(2)(C), 2001 Federal Sentencing Guidelines, supra note 171.
\textsuperscript{175} Criminal Justice Act 1988; s. 93A & C; Prevention of Terrorism (Temporary Provisions) Act 1989, ss. 11, 12 & 13; Drug Trafficking Act 1994, ss. 49, 50 & 54.
\textsuperscript{176} Criminal Justice Act 1988, s. 93A; Prevention of Terrorism (Temporary Provisions Act 1989, s.12; Drug Trafficking Act 1994, s.50.
\textsuperscript{177} Criminal Justice Act 1988, s. 93C, Drug Trafficking Act 1994, s. 49.
6.2.2. Money or Assets

The subject of any money laundering operation is obviously money or assets of some form. This element is described in many different ways. In the definition of the president's commission it is described as "income," in the FATF's definition it is "criminal proceeds" in the FinCEN's definition it is "financial assets." The Vienna Convention 1988 uses the term "property" to refer to the subject of conversion or transfer and concealment or disguise. This is the same term used by sections 1956 & 1957 of title 18 of the United States Code. Regardless of the nuances of all these variations, the drafters of all these definitions are struggling with one basic problem, which is how to find a term that encompasses all the forms that wealth can take in order to prevent any possibility for evasion.

Despite this widely cast net, the primary concern behind money laundering law was not tangible property that is the direct proceed of crime, such as a stolen vehicle or a stolen gem. It was rather a concern relating to money as a fungible asset or as a value on a balance sheet.\(^{179}\) Money laundering law is not concerned with tracing and retrieving a particular property it is rather concerned with identifying value for the purpose of detecting criminal activity, depriving the criminals of the value of their illicit efforts, or preventing this value from being used to promote further criminal activity. These purposes will be discussed in more detail shortly.

One reason for opting for this broad definition and leaving out any restrictions relating to the type of asset is the fact that a money laundering operation could consist of a number of transactions. One of these transactions could involve using money or other means of payment to purchase a tangible property, which would subsequently be resold. Narrowing the definition of money laundering to exclude dealings in tangible property would exclude this type of transaction from the scope of money laundering law.

Two questions that are pertinent to the arguments presented in this volume are: does the value of the property constitute a material element in the definition of money laundering?, and does money laundering law confine its application to laundering large amounts of money?

\(^{179}\) For this understanding of money as value with some references to its implications for money laundering see Hudson, A., "Money as Property in Financial Transactions", 14(6) JIBL 170 (1999).
The answer to these questions are in the negative. Despite the fact that all the policy documents on money laundering focus on discussions of cases of high economic value, and despite the fact that all the preambles to the international instruments are primarily concerned with organised crime, the legal provisions themselves do not include any qualification on the value of the money involved.

One explanation for this approach could again be expediency. In order to mitigate the prosecutorial burden of proof, the criminal law of money laundering defines money laundering as "a single act offence" rather than a "continuous offence." In this sense, a single transaction satisfying the conditions described in the law is sufficient for conviction of money laundering. Money laundering operations are normally gradual in nature involving the division of large sums of money into smaller amounts and manipulation of these small amounts in separate transactions for the purpose of laundering them. Imposing a value limitation on the definition of money laundering will result in rendering money laundering law ineffective unless money laundering is approached as a continuous offence. The latter approach would increase the prosecutorial burden of proof substantially.

This "wide net" approach to the definition again leaves the law open for application in cases that do not necessarily reflect the policy or even the legislative history of the legal instruments. This point could be illustrated by U.S. v. Ward,180 a case in which the Court of Appeals specifically criticised the District Court stating that "The district court erroneously focused on the nominal value of the concealed assets in concluding that the funds at issue were not laundered. The value of the funds at issue should not be confused with the government's burden of proving that the funds involved were proceeds of a crime."181 The case concerned a bankrupt businessman who concealed bank accounts that contained amounts of $200 and $14,000, which he used as collateral for loans to keep a hidden business running. He was accused of bankruptcy fraud and of laundering the proceeds of this fraud. This case stands in clear contrast with the $3.5 million case of Carlos Marcello, the $11 million case of Deak-Perera and the $25.5 million case of Lockheed Aircraft, which informed the recommendation of the President's Commission on Organized Crime182

181 Id., at 1083.
and the enactment of section 1956 of Title 18 U.S.C.. It is relevant to note in this context that the implementation of money laundering law in the United Kingdom seems to be more in keeping with the problems of powerful criminals that informed the legislation. The U.K. case law seems to indicate that prosecutions for money laundering are directed towards operations of "high value." 

6.2.3. A Criminal Activity

The term "money laundering," in itself, implies that the asset or the property involved in the process is tainted. The taint could be a result of the source from which the asset is derived, i.e.; the asset is the proceed of a criminal activity, or it could be a result of the purpose for which the asset is to be used. Narrow definitions of money laundering, such as the FATF's definition, only envision the taint of the money to be derived from the source. This is reflected in their use of the term "criminal proceeds" to refer to the property subject to laundering. This narrow definition would, on its face, exclude from the scope of money laundering legitimately derived funds that are subject to concealment or disguise and conversion or transfer for the sake of hiding their ultimate criminal use. This could include legitimately earned assets that are directed to financing terrorism and such assets when they are directed to paying bribes.

On basis of this distinction, one can identify in the money laundering legal instruments two types of money laundering offences: the first type involves proceeds of criminal activity. Criminal liability cannot be established unless the prosecution has proved that the money subject to the transaction is derived from criminal activity. The second type involves proceeds regardless of their source, which could be legitimate or illegitimate.

In the language of money laundering law, when the money is derived from a criminal activity, this original criminal activity is referred to as "the predicate

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184 See supra note 178.
185 Mr. Bin Laden provides a case in point. The funds that he pooled into his terrorist activity originated from well-established and legitimate family wealth. Under the FATF's original definition strictly applied, his use of concealment or disguise vehicles to direct his money to committing terrorist acts would remain outside the scope of money laundering law.
186 For example, in the early 1970s, Lockheed Aircraft used false accounting entries and other laundering mechanisms to disguise their illicit payments to foreign public officials.
187 The Vienna Convention 1988, supra note 108, art. 3(b); 18 U.S.C §1956 (a)(1) & (2)(B).
offence." With regard to this element, the legal instruments do qualify the breadth of the policy definitions. Not every criminal conduct is a predicate offence for money laundering. In other words, not all the proceeds of criminal activity are subject to money laundering prohibition. The approaches of the legal instruments to this matter vary.

The Vienna Convention 1988 was a narrow instrument in this regard by virtue of its scope as a drug control instrument. Money laundering offences under the Convention were therefore confined to the laundering of proceeds of drug trafficking activities.\textsuperscript{189} The FATF starts from the definition of the Vienna Convention but recommends that the scope be extended to all serious economic activity.\textsuperscript{190} The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (hereinafter, the European Laundering Convention 1990)\textsuperscript{191} leaves the scope unqualified including any criminal activity that generates proceeds.\textsuperscript{192} National laws adopt one of two approaches. The first approach is to adopt a general provision criminalising the laundering of the proceeds of any criminal conduct that satisfies certain degree of gravity defined by the law. The second approach is a "list-based" approach, where the predicate offence is one of a list of offences that is continually expanding through legislative amendments. This aspect of the definition of money laundering is an aspect that permits expression of policy preferences.

6.2.4. The Purpose or the Outcome of the Process
This is the most important element of the definition of money laundering. So far, the constituent elements of money laundering have been broad and encompassing any handling of criminally tainted assets. The scope of money laundering as a concept, therefore, is contingent on the delineation of this element. In common parlance, as it is captured in the Oxford English Dictionary's definition, laundering must involve turning the illegal funds seemingly clean, \textit{i.e.}, legitimate. This element of legitimation as an ultimate outcome or purpose of the laundering process persists in all the policy definitions discussed in this section. The most vocal about \textit{legitimation} as an element was the UNDCP study indicating that short of legitimation the process can hardly be

\begin{footnotesize}
\textsuperscript{189} The Vienna Convention 1988, art. 3.
\textsuperscript{190} FATF, \textit{The Forty Recommendations} (June 28, 1996 as amended), Recommendation No. 4.
\textsuperscript{191} The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Eur.T.S. No. 141. (Hereinafter, the European Laundering Convention)
\end{footnotesize}
described as laundering. The question in this regard is again whether the legislative
history, the legal instruments and their implementation reflect this policy definition,
fall short of it or go beyond it?

The first observation to be made in this regard is that the word "legitimation"
or "legitimate" do not appear in the main legal instruments concerning money
laundering. This does not mean that the idea itself is absent. Reading various
instruments, one finds a number of purposes or outcomes that are proscribed by one
instrument or another. The list includes the following:

(i) Concealing or disguising the illicit origin of the asset. This
formulation of the purpose is probably the closest stipulation of the
concept of legitimation;
(ii) Assisting the person involved in the predicate offence to evade the
legal consequences of his actions;
(iii) Concealing or disguising the true nature, source, location, disposition,
movement, right with respect to ownership of property;
(iv) Promoting the carrying on of a specified unlawful activity;
(v) Engaging in conduct in violation of tax laws;
(vi) Avoiding financial regulatory requirements such as transaction
reporting requirements;
(vii) Facilitating the retention or control by another of his/her criminal
proceeds;
(viii) Securing that the funds are placed at the disposal of the perpetrator of
the predicate offence;
(ix) Avoiding prosecution for the predicate offence and

192 Id., art. I(e).
193 The Vienna Convention (1988), supra note 108, art. 3(b)(i); The European Laundering Convention
(1990), id., art. I(a).
194 The Vienna Convention (1988), Id., art. 3(b)(i); The European Laundering Convention (1990), id.,
art. 1(a).
195 The Vienna Convention (1988), Id., art. 3(b)(ii); The European Laundering Convention (1990), id.,
art. 1(6); 18 U.S. C. § 1956(a)(1)(B) & (2)(B)(i); Drug Trafficking Act (1994), s.49; Section Criminal
Justice Act (1988), s. 93C.
199 Drug Trafficking Act 1994, s.50(1)(a); Prevention of Terrorism (Temporary Provisions) Act 1989 s.
11(1); Criminal Justice Act 1988, s. 93A(1)(a).
(x) Avoiding the making or enforcement of a confiscation order.\textsuperscript{202}

These various extrapolations of the purpose or outcome of a money laundering operation can be grouped into four categories:

- **Legitimation**: When the legislature speaks of "concealing the illicit origin" or "concealing or disguising the true nature or source", what it is really speaking of is the legitimation concept as understood in the common sense of money laundering and the various policy discussions. In a way this could be described as money laundering in the strict sense.

- **Evading the law**: This could take different forms. Some forms of law evasion as an outcome of money laundering are specifically proscribed by some legislatures. Of the list above one finds evading the legal consequences of committing the predicate offence (nos. ii, ix, and x) including prosecution for the offence or the making and enforcement of a confiscation order, evading tax laws, and avoiding transaction reporting requirements. This idea of evading the law is also expressed indirectly in the proscription of "facilitating the retention or control by another of his or her criminal proceeds" and placing the funds at the disposal of the perpetrator of the predicate offence.

- **Concealing or disguising more broadly**: This includes concealing or disguising other facts about the property apart from those concerning its legitimacy. This could be the location of the asset, the control and ownership of the asset or its movement.

- **Investment for a criminal purpose**: The outcome of money laundering as defined by some legislators could take the form of investing or re-investing in a criminal enterprise or scheme (no. iv). A typical example of this type of money laundering is one which has been repeatedly prosecuted in the United States; the purchasing of a vehicle for the purpose of using it in drug trafficking.\textsuperscript{203}

\textsuperscript{200} Drug Trafficking Act 1994, s. 50(1)(b)(i); Criminal Justice Act 1988, s. 93A(1)(b)(i).
\textsuperscript{201} Drug Trafficking Act 1994, s. 49(1)&(2); Criminal Justice Act 1988, s. 93C (1) & (2).
\textsuperscript{202} Drug Trafficking Act 1994, s. 49(1)&(2); Criminal Justice Act 1988, s.93C (1) & (2).
\textsuperscript{203} U.S. v. Cruz, 993 F. 2d 164 (1993). [the defendant was convicted under section 1956(a)(1)(A)(i) of conducting financial transaction involving the proceeds of a specified unlawful activity with the intent
Contrasting this legislative approach to the purpose of money laundering with the legislative history of the main instruments, one finds that the main pre-occupation of the drafters was "law enforcement". For instance, the U.S. Bank Secrecy Act came into being as a result of agreement amongst various law enforcement agencies and their success in convincing the U.S. Congress of the seriousness of the use of financial institutions to frustrate their enforcement efforts. The Vienna Convention 1988 was essentially an enforcement instrument. The enactment of the U.S. MLCA was primarily geared towards putting more pressure on financial institutions to perform their duties under the BSA. In that sense it was also an enforcement tool.

Some of the U.S. case law confirms this concern for enforcement as implicit in the proscription of legitimating or disguising the illicit origin. In U.S. v. Bowman, the court concluded that the defendant intended to hide the nature of the money in that it was stolen by using multiple safe deposits. The test of concealment applied by the court was that the defendant's conduct has rendered tracking the money difficult. In U.S. v. Norman, the court upheld the defendant's conviction of money laundering for purchasing a vehicle using criminal funds and titling it in the name of a business he controlled. The court held that the crucial point was that the defendant "made it more difficult for the true owner of the money to trace what had happened to it."

This trend in the U.S. case law is not predominant in that it does not restrict the application of money laundering law to cases where enforcement has been seriously undermined or rendered more difficult and costly. As the cases cited above show, the acts constituting money laundering offences are typically simple and normally do not amount to serious hindrance of law enforcement. Further, money laundering offences are normally prosecuted in conjunction with other offences of the nature of the predicate offence, which results in aggravating the sentence and enhancing the position of prosecution in plea-bargaining.

of promoting the carrying on of specified unlawful activity. The conviction was based on D's purchase of a car, which he used within six weeks of its purchase while carrying twenty pounds of marijuana.

\(^{204}\) See above Section 2.1.

\(^{205}\) See above Section 3.4.

\(^{206}\) See above Section 3.2.

\(^{207}\) U.S. v. Bowman, 235 F. 3d 1113.

\(^{208}\) Id., at 1116.


\(^{210}\) Id., at 378.

\(^{211}\) See supra footnotes 162 et seq. And accompanying text.
In addition to these forms of purposeful money laundering offences, money laundering law criminalises another category of conduct, which involves mere spending and receiving of criminal proceeds without any attempt at legitimisation, concealment or disguise, promotion of further criminal activity or evasion of the law. Article 3(c)(1) of the Vienna Convention 1988 provides for this category of offences in a language that appears in other instruments. It stipulates that, subject to its constitutional principles and the basic concepts in its legal system, each State Party shall establish as an offence when committed intentionally: "The acquisition, possession or use of property, knowing at the time of receipt, that such property was derived from an offence or offences established in accordance with subparagraph (a) of this paragraph." Similar language is reproduced in 6(c) of the European Laundering Convention. At the domestic level, the U.K. law introduces a similar offence with respect to the proceeds of drug trafficking and the proceeds of criminal conduct. 212

Section 1957 of Title 18 of the United States Code creates a purposeless money laundering offence equivalent to those referred to here. The section is, however, more detailed. It provides that: "Whoever [...] knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished[.]

The logic that informed this type of offence was expressed in the words of a Congressman defending the provision: "I am sick and tired of watching people sit back and say, 'I am not part of the problem, I am not committing the crime, and, therefore, my hands are clean even though I know the money is dirty I am handling.['] The only way we will get at this problem is to let the whole community, the whole population, know they could very well be convicted of it if they knowingly take these funds. If we can make the drug dealer's money worthless, then we have really struck the chord, and we have hit him where he bruises, and that is right in the pocketbook[.]

So, in essence, this offence aims at blocking the criminals out of the legitimate economy completely and blocking all their transactions with this economy whatever its purpose.

212 Drug Trafficking Act 1994, s. 51(1); Criminal Justice Act 1988, s. 93B (1).
The analysis above reveals that the definition of the harm targeted by money laundering law occurs at different levels. This is implicit in the cases that triggered the legislative intervention and the debates that form its history. It is explicit in some policy documents that attempted to sum up the debate and inform the legislative efforts. Then, there is the actual translation of this harm into legal definitions, such as the definition of money laundering offences, and finally there is the implementation of money laundering law and how it affects this definition.

The analysis above reveals that there is clear discrepancy between the policy definitions proposed in some of the main policy documents in the field and the legislative history and cases that inspired these definitions and underlined the legislative intervention. The policy definitions tended to be much broader than the cases that instigated the concern and raised the alarm. This breadth was incorporated into the legal definitions of the offences of money laundering, which tended to be open ended and unqualified. The only restriction of the actus reus in a money laundering offence tends to be the criminal source of the funds. Apart from that, the acts forming the offence are general enough to encompass any possible handling of these proceeds. Further, the purpose of the acts is also all encompassing.

While one should not generalise and speak of "a general enforcement policy" with impunity, it remains safe to say that over-breadth of the definitions has resulted in an incoherent enforcement policy, to say the least. Further, in a country, like the United States, with aggressive enforcement policy, the implementation of money laundering law has exploited all the permissiveness of the concepts and has resulted in applying it to cases that depart starkly from the situations originally targeted.

These issues are serious in the context of criminal law enforcement in that they undermine fundamental legal principles. For example, the principle of legality mandates that there is no crime without a law. A broad legal definition that fails to put those concerned on sufficient notice would fail to satisfy the mandates of the principle of legality. Further, this extensive prosecutorial discretion would undermine the principle of equality before the law: equal cases will be treated unequally.

One question that needs an answer at this stage is: should the law be refined to reflect more strictly the policies that triggered it? Answering this question is contingent on a clearer understanding of the purposes of money laundering law and the harm that it seeks to prevent.
7. Conclusion

Money laundering law has evolved rapidly over the past three decades. As discussed above, its evolution has gone through four clearly defined phases. The 1970s constituted a phase of incipience that concentrated on the preventive aspect of money laundering law and mainly localised in the United States. Limited international developments have also taken place. The 1980s was a decade of maturation where money laundering law acquired strongly repressive and international dimensions. Supranationalisation of money laundering law emerged with the first days of the 1990s, institutionalised in the creation of the FATF. Finally and abruptly, a new phase commenced with the events of September 11, which generated anti-money laundering measures that are less inhibited by considerations of legal principles and that brought the exceptionality of money laundering law into stark relief.

In discussing the historical evolution of money laundering law, it becomes apparent that it has emerged as a response to law enforcement concerns in cases that involved sophisticated forms of criminality and large sums of money. Law enforcement officers became aware of the nexus between financial institutions and criminal money transfers, and the ways in which this association facilitates the transfer of money beyond their jurisdiction and defeats their law enforcement efforts. The result of this recognition was a plethora of legislative activity at national, international, regional and supranational levels.

The legal regime that emerged is multifaceted. Its complexity leaves ample scope for confusion and incoherence. In order to structure the analysis of the scope of the law and to assess its coherence and its purpose, this Chapter proceeded from a definition of money laundering, as the harm that this body of law seeks to avert. The analysis revealed that there is a clear discrepancy between the legislative policy as distilled from the legislative history of the main legal instruments and the legal definitions of the offences. It has been argued that the legislative definitions of money laundering offences have tended towards over-breadth exceeding the original situations that the law sought to tackle. This over-breadth has resulted in inconsistent enforcement policies and ones that further broadened the net of the law by lax interpretation. Over-breadth of penal provisions constitutes a breach of the principle of legality as a fundamental principle of criminal justice. It also grants very wide
prosecutorial discretion in a manner that undermines the principle of equality before the law.

A basic question that needs to be addressed is whether the law needs to be refined to reflect the issues that triggered the legislative intervention. Answering this question requires deeper understanding of the purposes that money laundering law seek to serve and the harm that it purports to control. Such understanding cannot be achieved without a contextual analysis of the social circumstances in which money laundering law has evolved. This is the task assumed in the next Chapter.
CHAPTER THREE
GLOBALISATION: UNDERSTANDING THE CONTEXT

Chapter Outline

1. INTRODUCTION
2. DEFINITION: WHAT IS GLOBALISATION?
   2.1. CROSS DISCIPLINARY ANALYSIS
   2.2. A PROPOSED DEFINITION
3. CAUSES: HOW DID GLOBALISATION HAPPEN?
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5. THE TIMEFRAME: WHEN DID GLOBALISATION BEGIN?
6. GLOBALISATION AS A LEGAL PROBLEMATIC
   6.1. TERRITORIALITY V. DE-TERRITORIALITY
   6.2. SOLVING THE GOVERNANCE PROBLEMATIC: A FRAMEWORK FOR UNDERSTANDING MONEY LAUNDERING LAW
7. CONCLUSION

1. Introduction

Over the past three decades, and as money laundering law was unfolding, lawyers, sociologists, economists, political scientists, and many others had been noticing an unfamiliar intensification of a number of disparate phenomena in their surroundings:

- production processes were being fragmented and stretched across borders;
- the number of transnational non-governmental organisations have increased phenomenally;
- companies with foreign operations have increased and the assets of the larger ones exceed the GNP of various countries;
- international organisations such as the WTO, the IMF, and the World Bank were acquiring greater powers and competence;
- the cross-border criminal organisations have developed economic power that rivals that of the multinational corporations;
- communication technology were progressing at an unprecedented rate;
- countries worldwide were changing their regulatory regimes towards more
liberalisation;

- separatist and fundamentalist movements have acquired new momentum all around the world; and

- individual national governments were increasingly unable to control their territories and enforce national policies.

In their attempts to understand these various phenomena, analysts from the different disciplines discovered an intricate web of causal relations that linked them all into a single set of intertwined processes. This unity has been expressed in the emergence of the term ‘globalisation’ To describe this set of seemingly disparate processes. This Chapter attempts to devise a possible working framework of analyses of globalisation that could be useful for the purposes of policymakers, lawyers, and legal academics generally, and for understanding money laundering law more specifically. In so doing, this Chapter explores a number of those relevant themes. First, the next section addresses what globalisation means, using cross-disciplinary insight and developing a definitional framework that will form the basis for the understanding of the reasons for the emergence of money laundering law, the purposes that it seeks to serve and the methods that it employs to serve these purposes. Building on this framework, the following section will address how globalisation came about by discussing the two primary instruments of globalisation, i.e., technology and regulation. Subsequently, the temporal scope of the study will be defined by establishing the historical parameters of globalisation. This will be followed by an essential analysis of globalisation as a legal problematic. It is this analysis and the outline of possible solutions that will be used to analyse money laundering law as a legal response in the three subsequent Chapters of this volume.

2. Definition: What is Globalisation?

The use of the word ‘globe’ to refer to our planet dates back to the sixteenth century when Magellan circled the earth and proved beyond doubt that it has a spherical shape. According to the Oxford English Dictionary it was not until 1892 that the word ‘global’ began to be used to mean, “involving the whole world”.¹ ‘Globalise’ and ‘globalism’, on

¹ The Oxford English Dictionary 582 (2nd ed. 1989).
the other hand, were not coined until 1944. Despite sporadic references to the concepts of globalism and globality in academic writing during the 1960s and the 1970s, the term globalisation did not acquire its academic significance until the mid 1980s. Since then it has pervaded every discipline and many other languages across the world have coined similar terms.

The term's popularity did not serve the cause for precision and clarity. Journalists, politicians, and business gurus used the word globalisation extensively to denote a variety of meanings, or even no meaning at all. Within academic discourse, the term was further muddled partly because of cross-disciplinary discourse and partly because it was often used loosely to give a pretence of novelty to old debates. The situation was not any better in legal debate, despite the more pressing need for precision. For this reason, this section attempts to clarify the evolving concept of globalisation in a way that provides a better foundation for the debate over legal implications of this process.

The study of globalisation is exemplary of the fusion of disciplines at the end of the twentieth century. Contrasted with the Nineteenth century, where disciplinarity and specialisation find their origin, the second half of the Twentieth century has witnessed an accelerated fusion between disciplines induced by growing consciousness of the interlinks between the various social and natural phenomena. While cross-disciplinary enquiry is inevitable for understanding such a comprehensive social process as globalisation, the task is not easy. Each discipline has its own terminology and internal debates. To benefit from the various disciplinary insights, one must master the terminology and grasp the analysis without getting entangled in the internal debates.

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3 For a survey of such terms see Scholte, id., at 43.

4 Robertson, R., Globalization: Social Theory and Global Culture (1992), at 165. "It is in fact a field of disciplinary, interdisciplinary, metadisciplinary, and paradisciplinary contestation."

5 For a case for the fusion of social sciences see Wallerstein, I., Some Reflections on History, the Social Sciences, and Politics in Wallerstein, I. (ed.), The Capitalist World-Economy vii (1979). For a case for the unity of knowledge and the fusion of humanities, natural, and social sciences see Wilson, E., Consilience: The Unity of Knowledge (1998), at 3.
The main disciplines that contributed to the analysis of globalisation are Sociology,\textsuperscript{6} International Relations,\textsuperscript{7} Economics,\textsuperscript{8} Political Geography\textsuperscript{9} and Communication Studies.\textsuperscript{10} In their examination of the process they vacillate between two sets of questions: the process of globalisation and how that process affects their disciplines and the standard debates within those disciplines. The present author is only concerned with the first set of questions, which centres on a number of specific themes:

- definition (What is globalisation?);
- evidence (Is it a reality or fantasy?);
- history (When did it start?);
- causes (Why and how did it happen?);
- measurement (What is the extent of globalisation?);
- implications (How does it affect our social institutions?);
- evaluation (Is it good or bad?); and
- future (What is the outcome of the process and is it reversible?).

2.1. Cross Disciplinary Analysis

The problem of defining globalisation cannot be exaggerated; it is the first problem that faces the student of globalisation. This initial lack of agreement on a definition undermines all the debates over the reality, the value, the implications, and the future of globalisation.

Analysts fail to agree with each other simply because they are referring to different things. To some, globalisation is nothing but intensive market liberalisation.


This definition makes the term simply another vehicle for the debate over free trade versus protectionism and market economy versus command and control. To others, globalisation and internationalisation are synonymous, pre-empting any debates about the implications of the process for governance and other social structures on the ground that there is nothing new to discuss.11

Another strand of the globalisation analysis has confused the concept with unification or homogenisation. This confusion is partly linguistic. Unified or all-inclusive was one meaning that the word global has acquired during its history.12 A certain strand within cultural studies that emphasised the emergence of a common consumer culture specifically promoted this meaning. According to this view, common patterns of consumption create a collective identity based on those consumption patterns.13 Products consumed worldwide, like Coca-Cola, McDonalds, and Levis, are more than simple consumption items catering to specific needs; instead they are modes of self-expression and source of identity.14 The spread of such consumption items across the world and the value connotations attached to them have led some to speak of global cultural homogeneity, i.e., globalisation as homogenisation.

The concepts of ‘interdependence’ and ‘transnationalisation’ are yet another two concepts that figure extensively in the writings on ‘globalisation’ and are often used synonymously. In fact, many issues currently discussed under the heading of globalisation were discussed in the 1970s and 1980s under the headings of interdependence and transnationalisation.15 In other words, these two concepts actually preceded globalisation and were later integrated within it.

Interdependence “refers to situations characterized by reciprocal effects among

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11 For a review of the various usage of the term that confuses it with other concepts see Scholte, supra note 2, at 44-46 (listing four redundant concepts of globalisation: globalisation as internationalisation, liberalisation, universalisation, or westernisation).
13 Ferguson, M., supra note 10 (1992), at 80.
14 Waters, supra note 6, at 140.
countries or among actors in different countries." In other words, it means that what happens in one country affects or determines what happens in another country. Transnationalisation, on the other hand, refers to a State of affairs where the States are no longer the only actors and where cross-border relations are taking place between non-state entities such as corporations, civil associations, or individuals. The concepts of interdependence and transnationalisation are linked causally. Transnational relations work as transmission belts, making each country more sensitive to what happens in another country. Hence, transnational relations cause and intensify the condition of interdependence. This section will not discuss at this stage the differences and the links between those two concepts and the concept of globalisation, but will later on in this paper.

So far this Chapter has indicated that the term globalisation has been used to mean liberalisation, internationalisation, homogenisation, interdependence, or transnationalisation. Many globalisation theorists were discontent with this situation. They believed that if globalisation is to become a conceptual tool for the analysis of social change, then it must have a distinct meaning. For this reason they directed their attention to defining the concept in a way that distinguishes it from all other related concepts.

David Harvey refers to "time-space compression" as characteristic of our contemporary condition. Roland Robertson while accepting the "compression of the world" as the objective aspect of globalisation finds "the intensification of consciousness of the world as whole" to be the subjective element of the process and the most distinctive feature of globalisation in its contemporary form. Anthony Giddens, on the other hand, emphasises what he calls "the disembedding of social systems," meaning "the 'lifting out' of social relations from local contexts of interaction and their restructuring across indefinite spans of time-space." He defined globalisation as "the development of

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17 See id. at 24-25.
18 Id. at 26.
19 Harvey, supra note 9, at 240.
20 Robertson, supra note 4, at 8.
21 Giddens, supra note 6, at 21.
social and economic relationships stretching world-wide." Jan Aart Scholte defines
globalisation as "the rise of 'supraterritorial' relations between peoples." These
relations transcend territorial space and are not constrained by "location, distance, and
borders." Malcolm Waters similarly defines globalisation; it is "[a] social process in
which the constraints of geography on social and cultural arrangements recede and in
which people become increasingly aware that they are receding."  

In addition to these definitions, which could be said to emphasise the core or
catalyst of social change, one encounters another set of definitions emphasising the
direction of this change, i.e., where this process of globalisation is heading. According to
the Encyclopaedia of Business and Management: "Globalization is the process of
increasing integration in world civilization." Richard O'Brien speaks of the "end of
geography" and asserts that we reach this condition only as the "nation becomes
irrelevant" and a "global, integral whole" emerges. Anthony Giddens asserts that "for
some purposes we have to regard the world as forming a single social order."

In sum, globalisation has been used by some as synonymous with already existing
concepts such as internationalisation, liberalisation, homogenisation, interdependence,
and transnationalisation. While these processes are linked to the process of globalisation
in various ways, globalisation theorists rejected this confusion and worked on developing
definitions of globalisation that bring out its distinctive characteristics. Their definitions
of the concept are not mutually exclusive. Instead, they merely emphasise different
aspects of the process and look at it from different angles. This Chapter develops a
definitional framework of the concept that attempts to reconcile the previous definitions
and to clarify the links between globalisation and other similar concepts.

23 Scholte, supra note 2, at 46.
24 Id. at 48.
25 Id. at 49.
26 Waters, supra note 6, at 3.
29 Giddens, supra note 22, at 727.
2.2. A Proposed Definition

This part endeavours to extract out of the myriad of studies on globalisation a straightforward working definition for lawyers. In doing so, this Chapter will try to avoid what might seem to be jargon, but in describing this specific new phenomenon one must use some unfamiliar words for their descriptive power. Familiar words may not capture the idea's real content and may only continue to confuse it with older concepts. Questions guiding the following analysis are: (1) What is common between the various new phenomena that we are witnessing around us?; (2) What are the differences and the relationship between globalisation and the other concepts of liberalisation, internationalisation, homogenisation, interdependence, and transnationalisation?; and (3) How do the various definitions of globalisation fit together?

There are two prominent features to the examples earlier discussed. They all express a process of change or transformation, and space is a central element in this change. Taking the first example on the list, production is one of society's main economic activities. In the past, production activities used to be localised within the one State's territory; thus products used to have a distinct nationality. We are now witnessing an increasing fragmentation of the production process whereby products are the outcome of a series of activities stretching across various countries. As a result, it is increasingly difficult to determine the nationality of certain products. Robert Reich, an economist who built a thesis around this observation, offers the following example, "A jet air plane is designed in the State of Washington and in Japan, and assembled in Seattle, with tail cones from Canada, special tail sections from China and Italy, and engines from Britain." What is the plane's nationality as a product? Where did its production take place?

The same two elements of change and space are captured in the definitions of globalisation surveyed above. David Harvey talks about "time-space compression," Roland Robertson discusses the "compression of the world," Jan Aart Scholte refers to the "rise of supraterritorial relations," Richard O'Brien foresees the "end of geography",

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30 See Scholte, supra note 2, at 49.
31 See supra Part I (list of phenomena occurring over the last three decades).
32 See id.
33 Reich, supra note 9, at 112.
Anthony Giddens emphasises “the ‘lifting out’ of social relations from local contexts,” and Malcolm Waters finds the centre of change in the recession of “the constraints of geography on social and cultural arrangements.” Thus, globalisation is always about change, which is often spatial change.

Although the term globalisation is geographic in nature and the element of space is incorporated within it, it is not always about spatial change. Referring again to the list of phenomena at the beginning of this Chapter, the prominence of non-state actors (i.e., corporations, criminal organisations, civil associations, and international organisations) and the relative decline of State power are both important elements of the globalisation process. Globalisation is used for its omission of any reference to the State as much as it is used for its geographic connotation. When we speak of ‘global’ relations, we often mean cross-border or worldwide interactions between non-state actors. Global is used because it omits any reference to the State as the geographic scope of social relations and the dominant actor.

This Chapter chooses to define globalisation as a process of social change of both geographic and political dimensions. In the geographic sense globalisation describes a change in the space within which we conduct our social relations and a growing consciousness of this spatial change. In the political sense, globalisation denotes a shift in the balance of power and the pre-eminence of actors away from the State to non-state actors. This definition is neither all-inclusive, nor is it entirely exclusive. It does not include within it all the characteristic features of globalisation. The definition also fails to indicate the distinctive direction of the spatial change and its accompanying consciousness, hence allowing a random number of spatial changes to fall within it.

The only case for such a skeletal definition is that the process to which globalisation refers is too dialectic and complex to be compressed into a short, comprehensive and exclusive definition. The terms proposed above simply place globalisation generically within the processes of social change and identify both spatial change and its accompanying consciousness and political change as core features of the process. The proposed definitional framework also implies that there are other defining

34 See supra, Section 1, Introduction.
35 See Waters, supra note 6, at 3.
features.

2.2.1. A Process of Social Change

Defining globalisation as a process of social change is unhelpful without an understanding of what “social change” means. This is specifically important when we realise that change is a constant in every society. New technologies are frequently introduced, new laws are enacted, old laws repealed, governments change, and society’s economic performance undergoes periodic fluctuations. Do these changes constitute social change? Or does social change have another more specific meaning?

Social change is not just any change occurring within the society. Changes like those mentioned above might constitute triggers or symptoms of social change processes. They do not, however, represent processes of social change in their own right. Change must satisfy certain criteria in order to qualify as a form of social change. Definitions of social change vary. Some are more restrictive than others. One frequently quoted definition provides “social change is any nonrepetitive alteration in the established modes of behaviour in society.” According to this definition, social change takes place only when the social structure is altered. This includes changes in group relationships, group norms or group roles.

Others define social change more broadly. They view social change more as a process rather than an outcome. This view encompasses a variety of changes in the society that could be fast or slow, incremental or comprehensive, involving individual modes of conduct or group norms or patterns of relationships. The justification for this broad approach is that what might seem as incremental or merely quantitative form of change often results in more profound changes in the social structure. Social change is rarely revolutionary; rather, it is often incremental and cumulative.

The debate about whether globalisation is a reality or a myth can be restated as a

37 Id. See also Giddens, supra note 22, at 632-633.
38 Friedman, L., and Landinsky, J., supra note 36.
debate regarding whether globalisation constitutes a process of social change. Are there really significant changes to our social life that can be termed globalisation? The differences in answering this question can sometimes be traced back to differences in understanding social change. Those who view social change as essentially a revolutionary event of displacement where one system replaces another would tend to reject globalisation as a process of social change. This is simply because our social institutions, such as capitalism, as a mode of production and the State as an institution of governance seem to remain in place. Others who define social change more broadly and include within its scope changes that are short of displacement tend to view globalisation as a very complex and far reaching process of social change that might eventually settle into more radical systemic changes.

This Chapter clearly subscribes to a broad definition of social change and places globalisation categorically within its boundaries. Capitalism remains the dominant mode of production while undergoing significant changes. With the expansion of commodification, capitalism is expanding by creating new objects of accumulation. The corporation as the main vehicle or organisational structure of capitalism is also subject to fundamental changes. The market as the main institution for distribution is expanding geographically into new areas. The State as the dominant structure of governance for the past two centuries continues subject to fundamental changes in its role and relationship to other institutions and even to the individual. These changes in our social life qualify severely and collectively as forms of social change under the broader approach to the concept and possibly under the more restrictive approach.

Continuity is always an element in change. This is even more important to acknowledge in studying globalisation. The process of globalisation creates new institutions and relationships while maintaining the older ones. The State, for example, continues as a governing structure but multinational organisations and private actors emerge as agents of governance. The role of the State is redefined, but only in some contexts. In certain respects it continues to play its governance role in the same old ways.

41 Commodification means turning a product into a commodity that is exchanged on the market to create surplus. Scholte, supra note 2, at 112.
42 Id., at 112-124.
43 Id., at 124-130.
This pattern of change repeatedly emerges in discussing any aspect of the change introduced by the globalisation process and must be considered in devising any tools to deal with its outcomes.  

Some of the changes in our social life that are taking place are directly reducible to the spatial element of globalisation, namely, the alteration in the geography of social relations. Others, however, are not. Globalisation as a process of social change is therefore larger than its geographic aspect and its consequences. As indicated earlier, globalisation refers not only to the geographic expansion beyond the State, but also to its partial loss of power in favour of other actors.

2.2.2. Spatial and Political Dimensions

Attempts at describing the process of globalisation have often referred to the compression of the world. This compression is essentially a technological achievement. If distance is measured by the time it takes to cross it, then technologies that reduce that time compresses the world. Technologies achieving significant reduction in the time to cross distances are not new. They date back to the invention of the self-propelled ships, the railway, the telegraph, and the aeroplane. Such technologies rendered the world significantly smaller but yet not small enough. The current period is significant because of the instantaneousness with which distance can be crossed. This distinguishes globalisation from transnationalisation. The latter still involves crossing distances over time. It still involves here and there albeit they are both considerably proximate. Satellite communication and the Internet, on the other hand, make individual instant contact between distant places possible, and thus obliterate distance for a lot of practical purposes.

It follows then that if the difference between here and there is the distance between them, and the distance is measured by the time it takes to cross it, then a technological innovation reducing that time to a virtual zero has the effect of compressing here and there into a single place. If that technology spans the globe and connects various localities, then one can say that the whole world is being compressed.

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44 This salient feature of change in the context of globalisation leads commentators to constantly qualify their thesis on globalisation with a series of 'buts'. See Scholte, *supra* note 2, at 8-9.
into a single place. Globalisation is about this instantaneous coverage of distance. It is about compression of the world down to a single place.

The compression of the world changes the space within which we conduct our social life. This change has far reaching implications for every aspect of life. The spatial boundaries of our social life determine to a very far degree our economic activities, our modes of governance, our cultural values and symbols, and our communal relations. A number of differences, for example, between the hunting and gathering societies and the agrarian societies developed out of the change in the space within which they lived. This change influenced their family, governance and religious structures. For this reason, the impact of globalisation on our social life and its political, cultural, and economic structures preoccupies students of globalisation and triggers a process of redefinition within all disciplines, including the legal one.

David Harvey and Roland Robertson both focus on the compression of space. By contrast, all the other surveyed definitions focus on the way social relations are positioned in this new space. When Jan Aart Scholte speaks about the rise of suprateritoriality and Anthony Giddens refers to the "lifting out" of social relations from the locality", what they are actually saying is that the compression of the world affects social relations by taking them out of the territory of the nation-state and stretching them across the world. The social relations are no longer localised; they no longer take place within a specific locality. They are happening on earth, but where on earth we cannot specify without resorting to arbitrariness or formality. Malcolm Waters and Richard O'Brien also had a similar approach; they were both concerned that the compression of the world renders the geographic constraints on social relations irrelevant.

Speaking of compression of space may give the impression that all our social relations and processes are happening within this new space and that locality or territoriality no longer exists, it is very important to dispel such a perception immediately. As indicated earlier, Globalisation creates new space for our social relations, but it does not totally replace the old one. The 'global' and the 'local' coexist, and that is what makes understanding and organising our social life at the beginning of the twenty-first

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45 See id., at 46. For a discussion of the importance of space in understanding social change see Dodgshon, supra note 39.
This contrast between the various definitions indicates that our concern with
globalisation is not concern with the instantaneous physical connection between the
various localities, but with the implications for our social structures: economic, political,
and cultural. On this basis it is important to remember that while the compression of the
world and the consciousness of this compression are core elements of globalisation, the
term is encompasses a much broader process of change that is often political in nature.

2.2.3. Consciousness as an Element

In reality, the globe is still as big as it has always been. The world did not
compress in a physical sense. It compressed in our perception just because we are
capable through technological means to stretch ourselves across and reach its furthest
ends in virtually no time. For this reason our consciousness of the compression is as
much an element of the definition of globalisation as is the new global space that
 technological capabilities have made possible. For some, this consciousness is actually
the most distinctive feature of our contemporary globalisation. It is expressed in the
extensive use of the words ‘global’ and ‘globalisation’ in daily parlange and the
emergence of equivalent terms in all the main languages around the world. It is also
expressed in our persistent concern with organising the whole world, i.e., with the
problem of global governance.

Satellite communication technologies obliterating distance are now available for
the individual. They are home commodities in increasing parts of the world. For this
reason, the consciousness of the world as a single place or at least as a small place is
happening at the individual level. The process of globalisation is a micro level process
not just a macro level process. This distinguishes it very clearly from the processes of

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46 This point is made repeatedly by writers on globalisation. See, e.g., Harvey, D., The Condition of
Postmodernity, supra note 9, at 293-296 (indicating that collapse of spatial barriers in certain respects
accentuates the importance of locality).
47 Robertson, supra note 4, at 78 ("'Globality' refers to the circumstance of extensive awareness of the
world as a whole[].")
48 Id., at 54.
internationalisation and interdependence. In both those processes the focus has been on the relationships between macro entities, mainly between the States. Both Roland Robertson and Jan Aart Scholte trace this consciousness back to the 1960s and explain it by media developments in that decade. According to Scholte, "[g]lobal consciousness perhaps gained its single greatest boost by the transworld publication in 1966 of pictures taken from outer space showing the earth as one location."51

Incorporating our consciousness of the world as an element of the definition of globalisation expresses a certain reality. Globalisation would not have happened without human interference. This is not just because technologies are human inventions, but also because to use technologies we must allow such usage by enacting enabling laws and regulations. Globalisation theorists express this fact by saying that globalisation is a reflexive process;52 It occurs as a result of endogenous as well as exogenous factors.53 In conclusion, for working purposes, this Chapter suggests the following definition: Globalisation is a process of social change that is identified with and substantially triggered by a change in the space within which we conduct our social relations. Both the objective geographic change and the subjective consciousness of this change are defining elements of this process. Globalisation is distinct from internationalisation, liberalisation, homogenisation, transnationalisation, and interdependence. However, each of these processes has influenced as well as been influenced by the globalisation process.

3. Causes: How Did Globalisation Happen?

The question of what produced the process of globalisation is one of the main questions preoccupying students of this process. The causal link between globalisation and capitalism is fairly well established.54 Rationalism, as the core structure of our

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49 Reinicke, W., Global Public Policy: Governing Without Government? (1998), 11. He makes the same point albeit in a narrower context. He distinguishes between globalisation and interdependence by describing the former as microeconomic process while the latter is a macroeconomic one.
50 Robertson, R., supra note 4, at 9.
51 Scholte, J., supra note 3, at 85.
52 Robertson, supra note 5, at 13 (distinguishing between globalisation theory and world system theory on the basis that the former’s focus on the reflexivity of globalisation and the latter focuses on the systemic character of the world as a whole).
53 Kogut, B., and Gittelman, M., supra note 27, at 1650.
54 Waters, M., supra note 6, at 19-26; Scholte, supra note 2, at 95-99.
knowledge, is also contended as another force behind the process. The most cited cause of globalisation, however, is technology. Clearly technology is a main direct cause of globalisation. Technology is an instrument, an answer to how globalisation happened rather than why it happened. However, closely interconnected with the technological advance is regulation.

3.1. The Obvious: Technology

As previously indicated, globalisation has a subjective element consisting of the growing consciousness of the geographical change of our social relations, and a material or objective element. The material element finds its core in the actual geographical change of social relations. In addition to this geographic core, globalisation in its material aspect is a much broader and dialectic process. One part of this process, which is discussed later and is paramount and specifically relevant to the present thesis, is the rearrangement of State power and the emergence of powerful non-state actors. Each of the elements of globalisation is to a significant degree a technological achievement. There is a consensus amongst writers on globalisation that technology is the sine qua non cause of this process.

Satellite pictures of the planet in 1966 showing earth as a single place were probably responsible for formulating our consciousness of earth as one place. Satellite broadcast, the telephone, and the Internet continue to confirm this consciousness by bringing images of one distant locality to another, allowing us to follow events happening thousands of miles away as they take place and to communicate on real time basis across such distances. This instantaneous communication across the planet through computer mediated telecommunication compresses space and obliterates distance, thus changing the geography of social relations.

Technological innovations that freed individual exchanges from the geographic

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55 Scholte, supra note 2, at 93-95.
56 For a pioneer and insightful account, albeit lacking in academic quality, of how technology brought about globalisation, see McLuhan, M., supra note 10, at 3. "After three thousand years of explosion, by means of fragmentary and mechanical technologies, the Western world is imploding. During the mechanical ages we extended our bodies in space. Today after more than a century of electric technology, we have extended our central nervous system itself in a global embrace, abolishing both space and time as far as our planet is concerned."
57 Scholte, J., supra note 2, at 85.
confinement of State boundaries have dealt a blow to State power and have forced the State to reconsider its mechanisms of governance. Digital technologies that enhance exponentially the storage and processing of data further accentuate the need for change in State power or governance. Such technologies have ended the State monopoly over information and have made previously inconceivable amounts of information available to the individual and to private entities, thus reconfiguring the power relationship between the State and the citizenry.

The foregoing paragraphs stated how technology helped bring about the three core aspects of globalisation. Certain areas of technological innovation were specifically instrumental in bringing about this change in our social life. Information technologies are the primary catalyst of this transformation. Information technology is a broad term that includes both information processing and communication, i.e., computing and telecommunication technologies.

Telecommunication means communication at a distance. Attempts at communicating at a distance date back to the beginnings of history where people used drums, fire and smoke signals. The starting point, however, of what one commentator described as “distanceless” communication is the advent of the telegraph in the 1840s. With this invention, messages could cross distance at unprecedented speed by using of electricity. The invention of telephony soon after has made instantaneous voice communication across borders possible.

Now, at the beginning of the twenty-first century and after 150 years of inventions and discoveries, the world is covered by a web of global information flows linking its remotest localities. By 1990, cross-border direct dial telephones were available in over 200 countries. In the mid 1990s, the Cable News Network (CNN) claimed that “its transmission from seventeen satellites reached some 123 million reception points in

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58 There is large body of scholarship that studies the current process of social change as an information revolution in which globalisation is only an outcome and a single aspect of a much larger process. See Bell, D., The Coming of Post-Industrial Society: A Venture in Social Forecasting (1973); Castells, M., The Rise of the Network Society (1996); Hepworth, M., Geography of the Information Economy, in Studies in the Information Economy: Urban and Regional Development (1989).


60 Scholte, supra note 2, at 66.
around 140 countries.²⁶¹ By mid-1998, the Internet, which started in 1969 by the U.S. Department of Defence as a communication network to be used in the case of a nuclear attack, has secured 140 million users worldwide.²⁶² The Internet is the global technology par excellence. It can transfer massive amounts of information around the world instantaneously and cheaply. Through developments in computers, this information tool has become available to the individual, sometimes even at the comfort of his own office or home.

Telecommunication technology has thus compressed space, obliterated distance and removed the geographic constraints on social interaction. Information processing technologies have in their turn made massive amounts of information available very cheaply. The history of modern computers dates back to the Second World War where computing machines were developed to carry out military functions, such as designing missiles or breaking secret codes.³ For a brief history of computing, see Jones International, Computers: History and Development in Jones Telecommunications & Multimedia Encyclopedia (1999), available at www.digitalcentury.com/encyclo/update/comp_hd.html (last visited Dec. 18, 2000).

According to ‘Moore’s Law’, the pace of technological innovation is such that microchip capacity doubles every eighteen months. Although this rule was first proposed in 1965, it has only been confirmed in the past three decades. This simply means an exponential increase in our information processing speed and capacity. It also means smaller and cheaper computers. In 1960, the average cost of processing information was

²⁶¹ Id. at 75-76.
$75 per million operations. By 1990, this cost fell to less than one-hundredth of a cent.\textsuperscript{64} This decline in cost meant decline in the price of computers making them affordable to the average individual of medium to high income. In 1977, an executive in the computer industry said: “there is no reason why anyone would want a computer in their home.” Two decades later, around 100 million households in the United States and Europe have at least one computer at home.\textsuperscript{65}

Transport technologies are another area of technological innovation relevant to the process of globalisation. Commercial aviation was introduced in the late 1950s. In 1997, the number of passengers using domestic and international commercial flights was 1.5 billion per annum.\textsuperscript{66} Equally revolutionary developments in the transportation of goods in the 1950s have been directly connected to the increase in international trade in the second half of the twentieth century.\textsuperscript{67} The introduction of standardised metal containers that could be separated from lorry's chassis loaded onto ships and later on unloaded onto lorries at the country of destination has cut the costs of transportation precipitously. Such developments in the transportation of goods have made the export of many goods economically viable when it would not have been with older methods of transportation.

In summary, each aspect of the process of globalisation can be traced back to some technological development. Even our capacity to affect the global environment is technological in nature. This environmentally damaging impact can be traced back to the industrial revolution, the discovery of fossil energy and its use in large-scale mechanisation.

3.2. The Role of Law and Regulation

3.2.1. In General

Technology is an indispensable instrument of globalisation. Its globalising potential, however, is influenced and shaped by laws and regulations. Globalisation, as we understand it today, is a conscious process. People perceive the world as a single or

\textsuperscript{64} Castells, M., \textit{supra} note 58, at 45.
\textsuperscript{66} Scholte, J., \textit{supra} note 2, at 76.
compressed space laws and regulations enable the technology to achieve its globalising potential and allow human activity to stretch across borders. Laws and regulations also help create powerful non-state actors, such as international organisations and corporations, by permitting such actors to come into being and to acquire their sources of power.

Although one should not exaggerate the autonomy of regulation from technological pressures, history provides many examples of the restrictive impact of regulation on the globalising potential of technology. In the early years of the radio, Marconi Company prohibited its operators from communicating with other radio operators, thus putting a cap on the potential of radio as an instrument of instant communication across distance. This prohibition manifest in the Titanic disaster where the absence of standardised radio-operating procedures deprived the ship from rescue it could have otherwise secured. Another example can be found in the area of air transport. In 1944, U.S. president Franklin Roosevelt convened the International Civil Aviation Conference in Chicago with the aim of engendering a freedom of the skies. The Soviet Union decided to withdraw from the conference at the last moment and denied other countries the right to fly over its territory. It then created a distinct regulatory system for the Eastern Bloc. This action significantly limited the global reach of aviation and created barriers between nations that belonged to separate regulatory arrangements.

Intellectual property laws provide a more relevant example. By legally creating property rights to inventions and other intellectual productions, such as computer software, the price of technology rises to a degree that might be, absent other safeguards, prohibitive to poorer countries. Globalisation is in essence a technological achievement. Therefore, preventing the larger part of the world from accessing the technologies that underlie global telecommunication through fierce application of intellectual property rights will inevitably result in limiting the reach of telecommunication technologies to a much smaller segment of the globe.

But what have laws and regulations actually contributed to bringing about our

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67 For an interesting brief account of developments in 'containerisation' and its link to trade, see Delivering the Goods, (Economist, Schools Brief, Nov. 15 -21, 1997).
69 Id. at 455.

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contemporary condition of globalisation? In 1995, the U.S. Department of Commerce issued its policy paper ‘Global Information Infrastructure: Agenda for Cooperation’ in which it outlined the regulatory framework necessary to “create a global information network that transmits messages and images with the speed of light from the largest city to the smallest village. Through the interconnection of disparate but interoperable networks, these information highways will allow us to communicate as a global community. .”\textsuperscript{71} The regulatory framework envisioned for the creation of this ‘global community’ is based on global market access measures including: Standardisation or harmonisation, privatisation, liberalisation, and deregulation. These four categories provide a reasonable statement of the regulatory policies that have enabled globalisation in the past three decades.

3.2.2. Standardisation and Harmonisation

Legal harmonisation is the convergence between the rules set by different governments. While standardisation is often used interchangeably with harmonisation, the term actually has somewhat different meaning in certain contexts. Specifically relevant to this discussion is the meaning of ‘standardisation’ as a technical form of harmonisation pertaining to the product specifications. Such specifications may be relevant to the method of production, to the product’s function or to its interoperability with other products.\textsuperscript{72}

Harmonisation, in a general sense, plays an important role in the context of intense global or even merely transnational relations. Governments often resort to harmonisation as a response to globalisation or transnationalisation and as a way of dealing with the problems that such cross border relations may impose. Harmonisation of money laundering laws and regulations is an example of the use of harmonisation to counter the problems of globalisation. Harmonisation has, however, been instrumental in bringing about globalisation. Telecommunication as the primary instrument of

globalisation would not be possible without standardisation. Any form of communication, for example language, assumes agreement on the symbols and the codes of this communication. In the early years of the telegraph, each State unilaterally set its own standards. This resulted in significant impediments to cross-border communication. In some instances, it was necessary for the telegraph operator to physically cross the border in order to hand a message to his counterpart on the other side. Exasperation with this type of problem and the international community's desire for a more efficient cross-border communication led to convening the International Telecommunication Conference in 1865. This conference carried out the first standardisation effort by designating Morse code as the preferred code for the telegram. The Conference also established the International Telegraph Union (ITU) in 1865 as one of the first two international organisations for the purpose of providing a forum within which countries can develop and co-ordinate the telegraph standards and procedures in order to achieve interoperability.

During its 135 years of history, ITU has expanded its jurisdiction to new technologies. It brought long distance telephony under its auspices in 1925 and radiotelegraphy in 1927. In 1934, ITU evolved into the International Telecommunication Union, with the French providing telecommunication as an alternative and more generic term that encompasses the widening scope of technologies that the Union co-ordinates and regulates. In the 1970s, this scope further expanded to include satellite communication.

The ITU performs its standardisation functions through a complex web of international telecommunication standardisation conferences, study and expert groups, committees, and scientific organisations. The increasing complexity of the

73 The U.S. Government in its policy document on the implementation of the GII stated: "An essential technical element . . . is interoperability, i.e., the ability to connect applications, services, and/or network components so that they can be used together to accomplish tasks. As the GII will be based on many different existing and emerging components at local, national and global levels, it is imperative that these components be interoperable. The key to interoperability is the development of global standards."
U.S. Department of Commerce, supra note 71, at 12.
74 Braithwaite, J., and Drahos, P., supra note 68, at 332.
76 The other one is The Universal Postal Union.
77 For a brief history of ITU, see Codding, supra note 78, at 502.
telecommunication regulations drafted by the technical committees forced States in 1973 to delegate their sovereignty. The States granted the Telegraph and Telephone regulations direct enforceability by national administrations or private operating agencies without further requiring the official endorsement of governments in an international conference. The standardisation operations by ITU filled thousands of pages and covered an extensive array of topics bearing both on the product specifications of telecommunication technology and on its performance with interoperability as the paramount objective.

Standardisation helps globalisation in yet another way. By standardising product specifications, performance and method of production, goods could be traded more liberally between different countries and production processes could be integrated across national borders; thus, facilitating the globalisation of two important economic activities, namely trade and production. Removing technical barriers to trade through standardisation was the rationale behind establishing the International Organisation for Standardisation (ISO) in 1947. ISO is a non-governmental organisation that has as its mission the promotion of “the development of standardization and related activities in the world with a view to facilitating the international exchange of goods and services...” The ISO standardisation activities cover a very broad range of products from telephone and bank cards to paper sizes and wire ropes.

The ISO’s achievement in the standardisation of freight containers serves as a good example of the significance of standardisation in facilitating cross border trade. By standardising the sizes of containers and the lorry’s chassis that carried them goods could be containerised, loaded on the compatible lorries, transported to harbours, then unloaded onto ships in an efficient manner and transported across long distances by sea. Upon arriving to their destination, lorries of the same standardised chassis’ size would carry them to their ultimate warehouses and finally to their retailers. Standardisation of

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78 Braithwaite, J., and Drahos, P., supra note 68, at 329-332.
79 Id., at 327.

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containers and its associated technologies has had enormous consequences for the efficiency and cost effectiveness of international trade, increasing significantly its volume, and thus enabling its globalisation.82

Following the significant reduction of tariff barriers to trade through the operation of the General Agreement on Tariff and Trade since 1947, the "technical barriers to trade became more evident." In 1994, the Agreement on Technical Barriers to Trade (TBT)83 was passed as one of the twenty-nine legal texts of the WTO Agreement. The TBT Agreement’s purpose is to ensure that WTO Members who ratify it are committed to using international standards where such standards exist or are imminent. Parties also must commit to reducing the hindering effect that technical regulations and conformity assessment procedures might have on international trade. Growing consciousness of the effect that disparities in technical regulations might have on the flow of international trade underlie incorporating TBT as a standardisation mechanism within the WTO system.84

So far, this discussion focused on standardisation in the narrow technical sense that introduced it. Legal harmonisation, in the broader sense, including the harmonisation of substantive legal principles, such as contract and property principles, is however part and parcel of the globalisation process. Every geographic expansion of social relations carries with it geographic spread of legal ideas and principles. The early military expansion of the Roman Empire between 27 B.C. and 284 A.D. carried with it the parallel expansion of Private Roman law.85 The rise of trade in medieval Europe across its various cities and communities led to the emergence of Lex Mercatoria as a harmonised set of legal principles governing merchants in their trade.86 Globalisation since the 1960s has resulted in extensive harmonisation efforts, on aspects of which this study will elaborate. Harmonisation of substantive legal principles underlying business transactions undoubtedly facilitates the cross border operation of such transactions. It is not, however, readily accepted that this type of harmonisation is a necessary

85 Braithwaite, J., and Drahos, P., supra note 68, at 40-41.
infrastructure or instrument of globalisation. This debate remains beyond the scope of this Chapter.

In conclusion, harmonisation in general, and standardisation in a more specific technical sense, are regulatory mechanisms necessary for globalisation, as we understand it today to take place. Without technical interoperability, telecommunication systems would not be able to perform their function in bringing a distant locality to the instantaneous proximity that we presently experience. Technical standardisation also facilitates integrating markets and production and increases the volume of world trade. While substantive legal harmonisation is not necessarily a globalising instrument, enthusiastic efforts, aided by the rapid technological circulation of information, are expended around the world towards this cause.

3.2.3. Privatisation

As explained in the definition of globalisation adopted above, it is a process of change that is both geographic and political. While standardisation is primarily an instrument for the geographic aspect of globalisation, privatisation is an instrument for its two facets; i.e., geographic compression and political power shifts.

Privatisation is a broad and diverse concept. Discussions of privatisation often represent it as the transfer of ownership from the government to the private sector. An example of this approach is found in a World Bank publication that defines privatisation as “the transfer of ownership of SOEs [State Owned Enterprises] to the private sector by the sale—full or partial—of ongoing concerns or by the sale of assets following liquidation.” Other commentators, however, perceive privatisation more in terms of its impact on the governance structure in the society. In this sense, privatisation is discussed as redistribution of governance roles in favour of the private sector. It is thus defined broadly as “the shifting of a function, either in whole or in part, from the public sector to

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86 Id. at 45-47.
88 For a discussion of the difficulties inherent in the definition and the various approaches see Feigenbaum, H., et al., Shrinking the State: The Political Underpinnings of Privatization (1999), 5-12.

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the private sector. " Without undermining the significance of the transfer of ownership in privatisation, privatisation remains essentially a transfer of roles and functions from the State to the private sector. This often involves transfer of property rights from the public to the private sector or creation of new private rights.

The current privatisation movement started in the United Kingdom, which pioneered it in the early 1980s, shortly after the ascent of the Conservative Party to power in 1979. This trend has followed more than three decades of nationalisation policies, and continuous expansion of the public sector, which has witnessed a pervasive direct intervention of the State as a producer and a service provider in various economic sectors. In sectors such as public utilities, including gas, electricity, telecommunication, water, and sometimes transportation, this intervention was justified on the basis of the goal of universal service. Public utilities were perceived as essential and a belief developed that every citizen was entitled to these basic services. Government’s direct intervention in providing health services and education was founded on similar perceptions of entitlement and that it was the government’s responsibility to guarantee universal access. In other areas such as mining and shipbuilding, government intervention was justified on the basis of the strategic significance of such industries for national security.

In November 1984, the Conservative Government in the United Kingdom under the leadership of Prime Minister Margaret Thatcher, privatised the British Telecom. Commentators marked this privatisation as the watershed in the privatisation policy, which established it as a programme and as a resilient trend. The trend soon spread to other countries at various stages of development. In 1985, U.S. Secretary of Treasury James Baker brought privatisation to the international sphere in his address to the Bank/Fund Annual Meetings in Seoul. Ever since, privatisation has become a policy item on the agendas of the U.S. Agency for International Development (USAID), the

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90 Feigenbaum, H., supra note 88, at 1.
92 Veljanovski, C., id., at 54-57.
93 Letwin, supra note 91, at 12.
International Bank for Reconstruction and Development (World Bank) and the International Monetary Fund (IMF). It is under the influence, and sometimes the pressure, of such institutions that the phenomenon of privatisation is constantly spreading into growing numbers of developing countries.

The trend towards privatisation acquired more significance when it began to infiltrate the thinking of governments with command economies in Eastern Europe, the Soviet Union, and China. Henceforth, those governments have directly commanded up to ninety percent of all productive economic activities mostly through 'state owned enterprises.' With the collapse of the Soviet Union in 1991 and the disintegration of the Socialist Bloc, a massive programme of wholesale privatisation started. To gain a sense of the size of this process, it is enough to note that in the early 1990s, the former German Democratic Republic privatised more enterprises over a period of eighteen months than the rest of the world did over a period of fifteen years. It is also important to note that in the former socialist countries, privatisation did not only mean transfer of roles and ownership from the public to the private sector, it effectively meant creating the notion of private property from scratch. This fact makes privatisation in the ex-command economies not only quantitatively more significant, but rather qualitatively so.

Although privatisation is initially a political decision, turning the policy into practice cannot take place without extensive lawmaking. The intervention of the legislature varies amongst countries depending on their basic laws and constitutional principles. In the extreme case of the former planned economies, implementing privatisation policies required overhauling the legal system, introducing new constitutions and civil codes that implement afresh the concepts of private property and regulate it. In other countries, such as Germany, less extensive constitutional changes were required in order to allow the privatisation of certain sectors. The majority of academic opinion perceived telecommunications and postal services to be exclusively a federal function under Article 87(1) of the Basic Law before its amendment. Therefore, preparing these services for privatisation has required amending the Basic Law to allow

95 Kikeri, S., et al., supra note 89, at 73.
96 Id. at 74.
private providers to provide these services.\textsuperscript{97}

Brazil is also a case in point. It needed radical constitutional change in order to terminate the dominance of the public sector in the economy. Under the twenty years of military rule (1964-1984) the public sector represented approximately seventy percent of the country's gross national product. The Latin-American liquidity crisis in the early 1980s limited Brazil's access to capital and rendered such interventionist economic policies not viable. This economic condition triggered a policy shift towards privatisation. In order to put this and other policy shifts into effect, Brazil introduced a new constitution in 1988. Article 173 limited the State's direct participation in the economy to cases of national security, significant public interest and a number of other constitutionally prescribed exceptions. The list of exceptions was however too large, including telecommunications, electricity, gas, transportation, mining, the post, and the telegraph. As a result, further legal intervention continued to be necessary in order to implement more rigorous privatisation.\textsuperscript{98}

Because of the absence of a written constitution and the principle of parliamentary sovereignty, which grants the Parliament under the English constitution the right "to make or unmake any law whatever,"\textsuperscript{99} the privatisation programme in the United Kingdom faced much less legal constraints than in other countries. Nevertheless, in each case of privatisation, legal intervention remained necessary to repeal the earlier nationalisation acts and to pave the way for the privatisation of the service or the industry. However, France applied a different legal solution. In July 1986, a general enabling law was introduced delegating the power to the government to privatise a list of enterprises without further recourse to the Parliament for legislation.\textsuperscript{100}

The role of law in the privatisation process is very extensive. It is not merely confined to establishing the principle of privatisation in the constitution or the basic law. Very complex legal issues arise in any privatisation process; for example: the transfer of rights and liabilities from the national body to the new entity, the rights of third parties,

\textsuperscript{97} Reckwerth, S., "Constitutional Imitations on Privatisation in Germany", in McEldowney, F. (ed.), supra note 91, 131.


the transfer of employees, their rights and legal status, to whom is the ownership to be transferred, and the extent of foreign capital control of the privatised entity.\textsuperscript{101} Several policy issues arise in this context and the law is invariably used to reflect the government's policy stances whether liberal, interventionist, welfare-oriented, or market-oriented. The potency of privatisation as a globalisation instrument depends largely on such policy options and the laws implementing them.

The U.S. Department of Commerce\textsuperscript{102} 1995 prescription on the requirements necessary for a 'global information network' lists privatisation as a measure necessary for global market access.\textsuperscript{103} This categorisation summarises the ways in which privatisation acts as an instrument for globalisation in the geographic sense. Direct government involvement in the production of goods or supply of services often results in State monopoly and protectionist measures that exclude foreign investment in the concerned sector. Privatisation, on the other hand, is often a first and necessary step towards the market liberalisation and opening it for foreign investment. Considering the scope of the present privatisation movement, sectors that were originally considered too strategic and too sensitive in terms of public interest value, such as telecommunications and other utilities, are now frequently taken over by foreign investors. The sensitivity of the sectors that are now open to foreign investment and sometimes control, render global interdependence and inter-entanglement more acute.

\textit{Ownership is power.} Privatisation, as has once been indicated, represents "the largest transfer of property since the dissolution of the monasteries under Henry VIII."\textsuperscript{104} It, therefore, represents a massive transfer of power. Power shifts that are inherent in privatisation are central to the definition of globalisation presented above and to the argument of this work. Privatisation reorganises governance structures and institutions in the society. It removes the utility or the strategic sector from the direct control of government and places it under private control. From this point onward, the government would not be able to implement any public policy relating to the sector privatised without

\begin{thebibliography}{9}
\bibitem{100} Letwin, supra note 94, at 15.
\bibitem{102} See U.S. Department of Commerce, supra note 71.
\end{thebibliography}
entering into negotiations with the newly created private power.ι⁰⁴

Privatisation also creates new classes of interests.ι⁰⁵ When British Telecom was
privatised in 1984, 2.3 million individuals bought shares.ι⁰⁶ Privatisation through public
offering typically broadens the base of ownership and popularises the equity market.
This results in creating a new class of interests that is capable of developing and
exercising its own bargaining power. After an extensive programme of privatisation,
such classes form another interest group with whom the government must negotiate in the
development and implementation of public policy. The separation between the
government and the supply of goods and services through privatisation has also rendered
transparent economic sectors that were previously shrouded in secrecy. This access to
information was a by-product of privatisation that empowered the new classes of interest
and enhanced their leverage in negotiations over public policy issues. It also empowered
old interest groups such as the consumers, which were almost helpless under the opaque
system of supply of goods and services in the era of nationalisation.ι⁰⁷

The potency of privatisation as a globalisation instrument is contingent on the
employed mechanisms of privatisation and on post-privatisation regulation. Government
can use the law to restrict foreign investment, for example by requiring a controlling
share of local capital in the privatised utility in order to prevent foreign control. This
clearly undercuts the possibilities of geographic globalisation inherent in the process.
Furthermore, the capacity of privatisation to shift the power arrangements in the society
is contingent on the mechanisms of privatisation and how far it removes government
control over the economy.ι⁰⁸

If government adopts a highly interventionist regulatory policy vis-à-vis the
privatised industry or utility, regulation can act as a substitute for direct ownership in
securing government control over the sector. This capacity, however, should not be
exaggerated. Government intervention through regulation remains checked by the private

ι⁰⁴ On the political significance of privatisation see, eg., Feigenbaum, H., et al., supra note 88.
ι⁰⁵ Id. at 56.
ι⁰⁶ Letwin, O., supra note 91, at 12.
ι⁰⁷ McEldowney, J., "Law and Regulation: Current Issues and Future Directions", in Bishop, M. et al. (eds.),
The Regulatory Challenge 408 (1995), at 413.
ι⁰⁸ This point is made repeatedly and poignantly in Feigenbaum, H., supra note 88. The authors clearly
distinguish between privatisation and ‘shrinking the State’, which they define as “reducing the overall level
of State intervention in the society rather than simply reducing the size of the public sector.”
sector control over the sources of financing. This power becomes even more commanding in the current context of globalised capital markets, where capital can move freely and choose the forum that is most suitable to its interests. No matter how reserved the privatisation is, changes in the governance structure and the place of government within it invariably takes place. Post-privatisation governance is always more diffused and decentralised.

3.2.4. Deregulation and Liberalisation

As the previous section explains, the capacity of privatisation as an instrument of globalisation is contingent on the degree and type of regulation imposed on the privatised sector. Regulation is a substitute for government direct supply of goods and services. It means control exercised by the State, through legislation and other government instruments, over the activities of legitimate private economic entities. Albeit simplistic, one can distinguish between two types of regulation: economic regulation and social regulation. Economic regulation includes government regulatory control over economic decisions such as pricing and profit structure, output, market entry and exit. Social regulation, on the other hand, refers to government intervention, which aims at advancing special interests such as consumer protection, environmental protection and health and safety considerations.

A regulatory reform movement started in the middle of the 1970s, guided by the same goal that triggered and directed the privatisation movement of the same period, namely the desire to roll back the State and reduce public sector intervention in the economy. This movement, unlike privatisation, started in the United States. The reason for this is very simple. The United States has always had a dominant private sector and a minimal State involvement in the direct supply of goods and services. When virtually the rest of the world engaged in massive nationalisation programmes after the Second World War, the United States remained the exception. Instead, the United States relied on strict and interventionist regulatory policies implemented through independent technocratic

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regulatory agencies in order to implement the State's social and economic plans. When
the tide of public sector expansion ebbed, other countries lead by the United Kingdom
launched extensive privatisation programmes as previously described. The United States,
on the other hand, had little to privatise and a lot of regulatory structures to dismantle.
This regulatory reform movement has thus been termed 'deregulation'.

Deregulation, inasmuch as it implies the end of all regulations, is misleading. During the past three decades one can easily detect a proliferation of State regulatory intervention in areas such as health and safety, environmental protection and consumer protection. In other words, during the same period of deregulatory reform, one can easily see proliferation of social regulation. Deregulatory pressures are, however, to be witnessed in the area of economic regulation. These pressures and the broader movement towards reducing the size and role of the State are the product of a growing belief in the market as a superior mechanism of resource allocation and disillusionment with the State as a disinterested technocrat capable of allocating resources objectively and rationally. Accordingly, this has led economists and policy makers to leave more decisions to the market and to reduce the number of justifications for State intervention to correct market failures. In the area of social regulation where the State is increasingly active, the voices for the supremacy or even the capacity of the market to serve the social interest remain less convincing.

A survey of deregulation in various sectors of the U.S. economy serves to illustrate the trend's direction. In 1978, deregulation of air transport was finally effectuated through legislation. This involved totally dismantling the economic regulatory structure; i.e., price-and-entry regulation, while leaving safety regulations in place. During the same period, deregulation of the truck industry took place, relaxing the rules on new entry and allowing individual truckers to set their own prices. Similar reforms were implemented in the railway sector, where in 1980 railway companies were allowed to abandon unprofitable lines more easily and to set their prices more freely.

Deregulation as "substituting market mechanisms for administrative

coordination” is clearly a globalisation instrument as it is understood in this Chapter. The more decisions left to the market, the more decentralised the structure of governance i.e., the more acute globalisation is as a process of political reorganisation. The record of deregulation, however, remains ambivalent. With deregulatory pressures dismantling State economic intervention in certain areas, contradictory regulatory pressures are inviting State control over the economic decisions of private entities in others. Taking the concern for energy supply, which was triggered by the Californian energy crisis in 2000 as an example, one can clearly see a relapse towards more government intervention in the power generation market. Shortly after the re-election of the Labour Party to government in the United Kingdom in June 2001, a report of the Better Regulation Task Force was published. The Report concluded that the U.K. market was in many respects over regulated and recommended a series of deregulatory measures. At the same time, concern over energy supplies has resulted in declaring a policy of more regulation of the electricity generation market. On these bases, one can only conclude that while the trend towards price-and-entry deregulation is definitely a globalising trend in the political sense, its depth and linearity are not conclusive. Reversals in its progress contribute to the ambivalence and dialectic nature of political arrangements during the current process of globalisation.

Liberalisation is a type of deregulation that has particular bearing on the process of globalisation. In reversing the protectionist trends of the 1930s, liberalisation formed the starting point for all international economic policy discussion since the Second World War. Liberalisation means allowing the unrestricted flow of goods and services across borders. In implementation, this meant removing or reducing nationalistic economic

112 Breyer, S., "Regulation and Deregulation in the United States: Airlines, Telecommunications and Antitrust", in Majone, G. (ed.), supra note 109, 8, at 5-16
115 For a discussion of different definitions of liberalisation see Driesen, D., "What is Free Trade?: The Real Issue Lurking Behind the Trade and Environment Debate", 41 Va. J. Int'l L. 279 (2001). In this article the author argues that there is ambiguity in the definition of "free trade." He organises his discussion around the question of "what precisely must trade be free of in order to be free . . . ?" Id. at 280. He then proposes that free trade in policy discussions and in the law of the WTO and the jurisprudence of the Dispute Settlement Body is used in three different meanings: free trade as (1) trade free of discrimination between foreign and domestically produced goods; (2) trade free of attempts to coerce non-complying countries to
regulations aimed at restricting the access of foreign goods and services to national markets. Import tariffs and quotas are the obvious example of such restrictive measures. Early liberalisation efforts have thus focused on reducing the amount of tariffs imposed on imports. This was done through a complex process of bilateral and multilateral negotiations of tariff concessions resulting in the General Agreement on Tariffs and Trade (GATT) in 1948 as a multilateral agreement for the mutual reduction of tariffs. This initial round of multilateral negotiations was followed by seven other rounds. The most successful was the Uruguay Round, which concluded in 1994 and resulted in the establishment of the World Trade Organisation (WTO) and the reduction of tariffs on non-primary products to 3.9 percent in industrialised countries and to 12.3 percent in developing countries.

Barriers to trade are not always so straightforward. Following the impressive success of trade negotiation rounds in reducing tariffs on non-primary products to near negligible levels, attention has shifted to non-tariff barriers to trade (NTB). The first five rounds of trade negotiations were almost entirely dedicated to negotiating tariff concessions. Negotiating NTBs first appeared on the agenda as a primary goal of negotiations in the sixth round: the Kennedy Round (1962-1967). This focus on NTBs persisted in the last two rounds of trade negotiations, the Tokyo Round (1973-1979) and the Uruguay Round (1986-1994). Non-tariff protectionist measures are only restricted by the imagination of governments. All attempts at cataloguing these various measures have resulted in voluminous but incomprehensive records. Examples of NTBs include imposing a requirement to place imported cattle in quarantine without providing quarantine facilities, or an importing nation requiring a product inspection to be conducted by its own authorities and does not send an inspector to implement the

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117 Jackson, J., supra note 114, at 74.
119 Jackson, J., supra note 114, at 73-74.
120 In 1973, the GATT produced a catalogue of NTBs of all participating countries that included over 800 such barriers. In 1986, UNCTAD in a similar project had on her country-by-country lists many more than the GATT’s 800 non-tariff barriers. See id. at 154.
Determining what constitutes non-tariff barrier to trade could be very problematic. While the protectionist character of these amusing examples is very evident, other cases could be much more complex. In a highly integrated world, any national regulation could constitute a burden on cross-border trade. Regulations that aim at advancing other social interests, such as the protection of the environment or the health and safety of consumers, could be perceived as creating a barrier to trade, especially where the obligations imposed are more onerous on foreign producers. Determining whether the measure constitutes a trade barrier or not hinges on questions, such as whether the measure is necessary for advancing the perceived interest. In this context, liberalisation policies could create deregulatory pressures in a wider sense.

The Uruguay Round expanded the liberalisation agenda to a wider range of areas such as services, textiles and agriculture. While the progress achieved by the Uruguay Round in liberalising services was impressive, liberalisation in agriculture and textiles remains limited. This again confirms the dialectic nature of globalisation. Liberalisation, like deregulation, is not linear or conclusive. Protectionist and restrictive measures persist despite the economic assumption in favour of liberalisation.

As it becomes apparent, while information and communication technologies are determining factors in the process of globalisation, globalisation remains to a certain degree a legal or regulatory product. Globalisation involved major technological leaps, as well as drastic regulatory activities including harmonisation and standardisation of laws, privatisation of government property and functions and deregulation especially in its liberalising aspect.

4. Globalisation: some particularly relevant aspects

In this Chapter it has been argued that globalisation is a process of social change, that this change is both geographic and political and that the term is used both for its spatial connotations as well as for its omission of any reference to the nation State. There, it has

122 Jackson, J., *supra* note 114, at 155.
123 For a critical discussion of the role of the WTO's Dispute Settlement Body in making such determination see Driesen, D., *supra* note 115.
also been argued that globalisation is a product of both technology and regulation. Information and telecommunication technologies compressed the world physically and altered its structure of power, while regulation enabled the use of such technologies and confirmed the new structures of power through standardisation, harmonisation, deregulation and privatisation.

Since money laundering is both about money and about crime, a brief description of globalisation in relation to both these aspects becomes a necessary pre-requisite to any discussion of money laundering. This section will address each of these two aspects in turn.

4.1. Money and Finance

Money is information. The physical appearance of money, as one can now readily testify, is not intrinsic to its function. Very early in its history, transfer of data in a record has been used as a substitute for the physical transfer of money from hand to hand. Further, the determination of the medium of exchange, its production and its value are based on rules accepted in the society where such medium is exchanged. These rules can be based on custom or stipulated in a statute book. It is thus apparent that any changes in the technologies of information processing and transmission in a society is bound to have great influence on the function and use of money in that society. It is also apparent that changes in the financial and monetary regulatory structures in the society are likely to have equally potent effects.

As explained above, globalisation is the product of both types of changes: technological and regulatory. In that sense, globalisation is most discernible in the area of money and finance. The globalising forces of technology and regulation have produced their most substantial alterations in this area of human activity and the changes that resulted have been a driving force for globalisation in every other aspect of the society. The following few paragraphs will attempt to sketch the progress of globalisation in money and finance. This account is a factual one that does not engage in the numerous debates that surround this aspect of globalisation. This account will also briefly show governance problematic as it manifests in this sphere.
When one talks about globalisation in the area of money and finance what one is referring to is both the removal or recession of geographic restraints on the movement of capital as well as the retreat of the government role in this area in favour of the market. In view of the information nature of money, information and communication technologies have played a crucial role in this regard. Now, money can move around the globe in huge sums at the click of a button and stock traders no longer need to meet at the trading floors of the exchanges. Stock market dealings instead are now conducted on computer screens and through telecommunication networks.124 At the regulatory front, there is a number of watershed events that are accepted amongst commentators as forming the globalisation path of money and finance. These events include: the emergence of the Eurodollar market in the late 1960s, the collapse of the Bretton Woods system in 1971, the dismantling of the exchange controls in the 1970s-1980s and the broader deregulation and liberalisation movement of the same period. Each of these events will now be dealt with in brief.

The Euromarket refers to an offshore regulation-free market where financial assets are denominated in foreign currency.125 Euromarket is commonly traced back to the early post Second World War years when Russia and other countries of the eastern bloc held their dollar deposits in European banks to avoid potential US seizure that might be performed for political reasons.126 Such deposits were then used for lending to other European banks and institutions. It was not, however, until late 1950s and early 1960s that the Euromarket has acquired real momentum. In this regard it is worth noting that the first Eurobond issue took place in London raising $15 million for the Italian motorway authority Autostrade.127 This development of the market was triggered by an increase in foreign holdings of the American dollars resulting from the Marshall plan as well as the activities of American multinationals abroad. Also, restrictive US domestic regulatory measures, such as interest rate control called "regulation Q" that sets upper level on interest rates offered to depositors, encouraged American banks to lend their dollars in the offshore Euromarket. In this regard, the Euromarket offered the market players an

125 Helleiner, E., States and the Reemergence of Global Finance: From Bretton Woods to the 1990s (1994) at 8.
126 Valdez, S., An Introduction to Global Financial Markets (1997), at 120.
127 Id., at 120.

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adventurous arena free from restrictive national regulations. This feature has proved very attractive that market dealings have grown from $1 billion in 1959 to $6 in 1992. It is partly due to the Euromarket operations that the second decisive event in the history of financial globalisation; namely the collapse of the Bretton Woods system, took place.

Determined to avoid the devastation of another world war and convinced that the beggar-thy-neighbour policies of the inter-war period were primarily to blame for the Second World War, finance ministers and renowned economists from 44 countries gathered in the Bretton Woods (New Hampshire, U.S.) in 1944 to design post-war monetary and financial arrangements. The international monetary system that emerged from this conference has been termed the Bretton Woods system. This system was based on fixed exchange rates with limited and restrictive mechanisms to be implemented in cases of fundamental disequilibrium. The dollar was to remain convertible to gold on demand at $35 per ounce. Other countries were required to adopt par value for their currencies in terms of dollar or gold. Exchange rates during the operation of the Bretton Woods system were stable. Their stability required employing a myriad of capital control measures and financial regulatory restrictions. It also required periodic intervention by central banks in the foreign exchange markets in order to keep the exchange rates within a certain very limited band.

Due to a variety of reasons, including the Euromarket operations and the cost of the Vietnam War, the U.S. was forced to abandon the dollar-gold convertibility in August 1972. With such measure, the Bretton Woods system collapsed and a system of floating exchange rates; i.e., exchange rates determined by supply and demand on the foreign exchange currency, replaced the Bretton Woods system of par value or fixed exchange rate arrangements.

The implications of this transition for globalisation in money and finance are manifold. With the collapse of the system, the various capital controls that were put in place mainly to secure its stability lost their rationale. The United States led the

128 For a detailed explanation of the emergence of the Euromarket see Helleiner, E., supra note 125, 81-91; O’Brien, R., supra note 124, at 33-37.
129 Id., at 121.
movement towards dismantling capital controls by removing its various controls in 1974. Britain followed suit in 1979. The 1980s have seen the spread of the liberalisation movement across the developed world. By the end of the decade, the OECD countries had achieved almost total financial liberalisation. This liberalisation movements have created several markets that possess genuine global characteristics in terms of their delocalisation and their openness to entry by market operators from all over the world. The foreign exchange market is one a very significant example.

The implications of the collapse of the Bretton Woods system were not only geographic. The shift towards floating exchange rates has also and very significantly meant that the role of government in governing the system has receded in favour of the market. One commentator describes this stating that: "As a result of these changes we now have an international financial system which is often seen as being run by the global investor, where global portfolio preferences determine the fate of currencies [...] The World's money managers are seen to exercise great global power, with the capital account determining the current account, rather than the other way round."\footnote{Edwards, R., \textit{International Monetary Collaboration} (1985), at 491 et seq.}

The same point was expressed numerically by another commentator. Referring to the increased volume of international financial transactions, he says: "All of this activity has resulted in a ballooning of the foreign exchange markets, which by 1995 were estimated to be handling nearly $1.2 trillion each day. By comparison, the total foreign exchange reserves of all governments (which represent their ability to intervene in the foreign exchange markets) stood at a little over $670 billion."\footnote{O'Brien, R., \textit{supra} note 124, at 34.}

The challenge of these developments to national governments was not confined to the issue of monetary sovereignty. All financial and legal regulatory structures that has thus far been based on territorial allocation of jurisdiction had to be reconsidered to adjust for de-territorialisation. Governments also had to devise new means to redress the shifts in the balance of power in favour of private players some of them are even criminal. The remainder of this Chapter and actually this work as a whole is dedicated to understanding some of these challenges and the governmental response in the form of money laundering laws.
4.2. Crime Beyond Borders

It is a truth accepted amongst analysts of the phenomenon of crime in the context of globalisation that the instruments of globalisation, i.e.; technology and regulation have acted indiscriminately globalising crime along with the other legitimate aspects of economic and social activities. Information and telecommunication technology has been accessible to criminals as much as others and they utilised them to advance their activities in scope and sophistication. Deregulation, especially that of financial markets, have given criminals the opportunities they needed to place their assets beyond the reach of their pursuers. The relaxation of border controls in cases such as the European integration has also contributed to the possibilities of globalisation of crime. Considering that, crime is a challenge to governance to begin with, equipping criminals with instruments that allows them to further evade governance takes this challenge to a different level.

Globalisation in the context of crime has the same two components: geographic and political. The geographic element is often referred to in the studies of this subject by the term "transnational crime." And it includes very generally crime involving the territory of more than one State. Studies of the phenomenon are also conscious of the political element of globalisation reflected in the growing economic power of criminal organisations and criminals more generally. In one of the earliest official studies of the phenomenon, both aspects were stipulated. In April 16 1985, the UN Secretariat published a Working Paper called "New Dimensions of Criminality and Crime Prevention in the Context of Development: Challenges for the Future." Listing the "new dimensions" of criminality the Working Paper included: "(a) [...] the very substantial increase in the financial volume of certain conventional economic crimes, such as tax evasion, illegal capital transfers or fraud in the massive transfer of vital commodities, where the overall impact may be great enough to threaten the economic stability of entire

133 Reinicke, W., supra note 49, at 30.
135 Id., at 466.
countries;"\textsuperscript{136} (Political element) and "the high degree of international coordination and extension characterizing certain criminal operations\textsuperscript{[.] }"\textsuperscript{137} (Geographic element)

Transnational crime is a crime that involves the territory of more than one country. This could mean that the \textit{actus reus} of the crime took place in more than one country such as the classic example of the killer who fires the shot across the border from France, hitting his victim in Italy who later succumbs to his wounds in Switzerland. The crime could be also transnational even if the \textit{actus reus} has been totally completed within the territory of one country provided that certain preparatory works have taken place in another territory, such as the purchase of the gun or the hiring of a gunman. It could also be deemed transnational if the crime that was committed domestically has substantial effects on the territory of another country or involved a criminal group that typically operates across different countries.\textsuperscript{138}

With the advances in technology, the capacity to commit transnational crime has become available to many criminals not necessarily the most sophisticated ones. Some transnational crimes, such as computer hacking, are even committed by youngsters who possess very advanced computer skills and have access to the latest of information technology. Evidently, with the liberalisation of markets, many criminal regulatory breaches and criminal market manipulations are committed transnationally. Examples of such transnationalisation are very obvious in the area of insider dealing and, as will be discussed later on in this work, in the area of money laundering.\textsuperscript{139} It is natural that the globalisation of multinational corporations should extend to their legal as well as illegal activities. Considering the volume of cross-border activities conducted by multinational


\textsuperscript{137} \textit{Id.}

\textsuperscript{138} This analysis of the transnational character of organised crime is based on the definition of the United Nations Convention against Transnational Organized Crime (2000), art. 3(2). "For the purpose of paragraph 1 of this article, an offence is transnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves and organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State.

\textsuperscript{139} For a relatively early discussion of the transnationalisation of insider dealing see Thomas, J., "Icarus and his Waxed Wings: Congress Attempts to Address the Challenges of Insider Trading in a Globalized Securities Market", 23 \textit{Vanderbilt Journal of Transnational Law} (1990), 99-133.
corporations and considering that the liberalisation movement is particularly geared towards facilitating such activities, it is normal that corporate criminality constitutes one major concern for governments across the world.

It is however, the transnational activity of organised criminal groups that has ranked high on the official national and international agendas. According to the United Nations Convention against Transnational Organized Crime (2000), an "Organized Criminal Group" means "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences [...], in order to obtain, directly or indirectly, a financial or other material benefit." There are five major organised criminal organisations: The Russian Mafiya, the Italian Mafia, the Colombian Cartels, the Chinese Triads, and the Japanese Yakusa. These major groups are divided into clans and subgroups and the estimates put their total membership well above three millions. In addition to these key players there are many other smaller groups including Nigerian fraudsters and traffickers, Pakistani drug traders and Afghani poppy farmers. Concern for the transnational operations of organised criminal groups dates back to the mid-1970s. This concern did not receive its due serious attention until after the Cold War. This is simply because of the preoccupation with the security problems of the Cold War era in a manner that relegated such concerns for crime to a lesser degree.

The transnationalisation by organised criminal groups can be explained on many accounts. As indicated above, technological innovation and regulatory change were primary instrumental factors in this process of de-localisation. Further, economic considerations cannot be neglected. Organised criminal groups operating for profit are essentially economic or business organisations. They are motivated by the same business

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140 The United Nations Convention against Transnational Organized Crime was adopted by the General Assembly at its Millennium meeting in November 2000. It was opened for signature at a high-level conference in Palermo, Italy, in December 2000 (during the week of 12-15 December 2000).
141 Id., art. 2 (a).
considerations as legitimate business and their development reflects similar trends. Organised criminal groups like legitimate business transnationalised to take advantage of market opportunities in other countries and to benefit of cheap labour and production opportunities.\(^\text{145}\) In certain respects, especially with respect to their money laundering activities, transnationalisation was primarily motivated by reducing the risk of apprehension through exploiting legislative discrepancies and the territorial limitations on the enforcement powers of policing and investigative agencies.

The evidence of the transnational character of organised criminal groups, as evidence generally in this area, is often anecdotal. The best evidence is to be found in cases of cross-border activities that has been uncovered and prosecuted. One such case was uncovered in Romania where a network of criminals spanning Africa, Eastern Europe, Israel, Latin America and Pakistan was uncovered. The operation involved drugs originating in Pakistan, shipped to Kenya, from there to Haifa via South Africa and ultimately to Romania where it was seized. The network was led by a German national of Ugandan origin and the company that was supposed to handle the cargo in Romania was an Israeli-Romanian company. The shipment was ultimately intended for the Italian market and was to make a further stop in Slovakia on its way had it not been detected.\(^\text{146}\)

Transnationalisation is not restricted to the drug trade. Many traditional organized crime activities such as fraud or contract killing are acquiring transnational dimensions. For example, organized groups may now resort to hiring gunmen from one country to commit a killing in another country in order to avoid apprehension. Also, traditional criminal acts are now becoming increasingly transnational or even global. One very common example now is the Nigerian fraud schemes that, according to law enforcement data total hundreds of millions. According to the same sources, American retail investors are the primary victims of such schemes representing a significant portion of that


\(^{145}\) *Id.*, at 466. The fact that organised criminal groups are business essentially business entities is captured in Shelley's reference to such groups as "illicit multinationals", *id.* at 470.

\(^{146}\) *Id.*, 472-473.
Another increasingly global market is the market for stolen cars. Stolen cars are not only disposed of locally. They are also often exported for resale abroad.\textsuperscript{148}

Another more staggering aspect the transnationalisation of organised crime is the development of on-going strategic alliances and co-ordination amongst criminal groups. According to intelligence sources, organised criminal groups hold summits of their own to strategize, establish their alliances, agree their market shares and fix prices. In 1990, a summit was held in East Berlin between the leaders of Italian Mafia and the Russian Mafiya leading to co-operative agreements. It is also believed that, a secret agreement exists between the Russian Mafiya and the Sicilian since 1992 aiming at securing illicit trade through Central Europe and creating a global market in drugs and nuclear material. According to French intelligence reports, a meeting was held in 1994 in Burgundy gathering representatives of the five major criminal organisations in an effort to discuss sharing western European market in drugs and prostitution among other things. A co-operative agreement between the Sicilian Mafia and the Colombian cartels whereby the Sicilians traded a share of the heroin market in New York for a share of the Cocaine market in Europe.\textsuperscript{149}

The transnational character of crime and criminal groups does not tell the whole story. The extent of the challenge cannot be appreciated without some sense of the criminal power. One way of assessing this power is by assessing the size of their revenues and capital. Estimates in this regard vary and they are not necessarily reliable. They do however have some indicative value. One estimate puts the annual retail sales of illegal drugs at $500 billion, which makes it larger than the global trade in oil.\textsuperscript{150} A stronger evidence of the staggering size of this trade can be found in the size of a single cocaine seizure made in 1989. In Los Angeles 21.4 metric tons of cocaine of six billion dollars of street value were seized. Commenting on this finding one author indicated that this amount is "more than the gross national product of 100 sovereign States."\textsuperscript{151}

\textsuperscript{148} On this theme of traditionally local crimes turning transnational see id., at 82-84.
\textsuperscript{149} On these arrangements and others see Guymon, C., supra note 142, at 66-69.
\textsuperscript{151} Id., at 5.
This comparison between the income of criminal groups and the country resources is particularly relevant to the political aspect of globalisation. A clear gap between criminal income and national income in favour of the criminals is a clear indication of the shift in the balance of power away from the State. According to a one estimate, the volume of drug-related earnings in the Colombian money supply in 1979 was US$600-700 millions or 16.4-19.7% of money supply. The impact of such economic power has been felt in countries like Italy and Colombia where criminal organisations have deeply infiltrated the government effectively removing any State capacity to combat it. Similar degrees of penetration could be detected in Russia. Russian Interior Ministry officials have estimated that in 1993 most of Russia's 2000 banks were under criminal control. Criminal groups also infiltrated most of its 40000 State and private enterprises effectively undermining its privatisation programme.

The blatant exercise of power by criminal groups has led one commentator to state accurately that "International organized crime is an assault on the three pillars of State sovereignty: the control of borders, the monopoly on the use of violence for enforcement, and the power to tax economic activities within State borders." The brutal exercise of power by criminal organisations have been likened to the practices of dictatorships and authoritarian governments. One commentator went as far as to describe this as the "new authoritarianism" and another described the power of the Cosa Nostra as "a state within a state."

Economic analysis further shows that financial activities by criminals using their enormous accumulation of capital undermine state economic and monetary policies. According to such analysis, this is true with respect to leading world economies such as the US. A great proportion of the wealth created by the drug cartels is held in US dollars abroad. This has the potential of distorting the basis on which to assess the demand and

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153 Shelley, L., supra note 134, at 469-470. One important aspect of the penetration of the State is the strong link between organised crime and corruption. On this relationship see Bassiouni, S., and Vetere, E. (eds.), supra note 136, at xxxiv-xl.
154 Rotman, E., supra note 150 at 11-12.
155 Guymon, C., supra note 149, at 61.
157 Id., at 10.
supply for local currency as an important factor in making interest rate policy decisions. Also, aggregate increase in the foreign holdings of US dollars is a source of monetary expansion that can undermine any national attempt at controlling the money supply. Similar distortions can occur when criminal money is used to provide informal credit.158

This brief exposé provides the reader an overview of one of the more obvious negative aspects of globalisation. With criminal power now rivalling and exceeding the power of many States and the scope of criminal operations exceeding the strict territoriality of State jurisdiction, the challenges are real. Further, liberal financial markets, as discussed in some detail above, and the natural fungibility of money leaves this power more securely in the hands of this illicitly self enriching 'elite'. The challenges are, therefore, real and money-laundering control as one legal solution is highly imaginative. In the remaining parts of this work, this legal solution will be elaborately and critically discussed.

5. The Timeframe: When Did Globalisation Begin?

This is one of the main questions in the globalisation debate. The varying views on this question offer three possibilities:159 (1) that globalisation is as old as history, dating back at least to the beginnings of Christianity as a world religion; (2) globalisation is a contemporary phenomenon that started with the beginnings of modernity and capitalism;160 or (3) that globalisation is much more recent and is a product or a symptom of the post-modern and post-industrial information society.161

Despite the seemingly stark difference between these views, they all agree that recently there has been a sudden acceleration in the process. In other words, the question is not whether we are undergoing change at this particular stage of history. It is rather how deep and how novel is this change. The debate can thus be reduced to a question of degree.

Exploring the parameters of this debate and engaging in it is beyond the scope of this Chapter. The Chapter simply relies on this element of agreement on globalisation

158 For this analysis see Keh, supra note 152, Table 1, at 3-5.
159 Waters, supra note 6, at 4; Scholte, supra note 2, at 62.
160 One of the main proponents of this view is Giddens supra note 6, at 21.

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acceleration witnessed in the past three decades; globalisation is a recent phenomenon that started in the beginnings of the 1970s. The bases of this position is found by analysing how globalisation came about.

Globalisation is a product of technological and regulatory change. Its history is thus indistinguishable from their history. While telecommunication dates back to late nineteenth century, the intensity, ‘instantaneousness’\textsuperscript{162}, and spread of present modes of communication, as well as their cheap costs is incomparable to the developments of that ‘remote’ past. The present telecommunication revolution could not have been possible without the invention of the Integrated Circuit in 1958 and the Microprocessor in 1971. These technological developments made our present reality of intense, instantaneous, global communication possible.

The history of globalising legal change is equally recent. While standardisation is as old as cross-border technologies, such as the telephone and the train, its momentum has picked up with the shifting emphasis on non-tariff barriers to trade since the Tokyo Round (1973-79). Further, the privatisation of British Telecom in 1984 marks the beginning of the privatisation movement in the pioneering United Kingdom as well as worldwide. The parallel movement towards deregulation dates back to the mid-1970s in the United States.

This rough calendar of globalising legal and technological development shows that globalisation as a process of social change could be situated temporally in the last three decades of the twentieth century to the present. While the process does have some roots and genesis since the late nineteenth century, its legal and technological forces did not gather their collective momentum until the beginning of the 1970s. This process has also reached a new height with the collapse of the Berlin Wall in 1989 and the subsequent disintegration of the Soviet Bloc. This conclusion, therefore, delineates the historical scope of this work and forms part of the basis for its core theme.

\textsuperscript{161} For attempts at organising the history of globalisation into periods see Scholte, supra note 2, at 62-88; Robertson, supra note 4, at 57-60.

\textsuperscript{162} The present author attaches great importance to this instantaneous character of current modes of communication. In her view, this is the \textit{sine qua non} condition for the emergence of de-territorial social life.
6. Globalisation as a legal problematic

The debate about globalisation and the law falls within a broader debate in globalisation studies concerning the problem of governance. In fact, this concern forms one of the core aspects of problematising globalisation.\textsuperscript{163} Posed as a question, globalisation theorists have repeatedly asked what are the implications of globalisation of economic activities and organisations for the Westphalian structure of governance? How can we control, regulate or organise these emergent "deterritorial" aspects of social life? Such questions echoed in the writings of political economists, social scientists and inevitably lawyers. This part of the discussion focuses on the latter's approach and sets the structure and analytical framework for the remainder of this work.

The complexity of the concept of globalisation did not escape lawyers. One author indicated that globalisation is a "multifaceted concept encompassing a wide range of seemingly disparate processes, activities and conditions- some nebulous, others concrete- that often re-enforce as well as clash with each other."\textsuperscript{164} Lawyers, however, while acknowledging this complexity did not engage intensely in the debate about definition. They did not strain themselves to distinguish globalisation from other similar phenomenon such as transnationalisation, or internationalisation. They often used this term interchangeably with some of the others.\textsuperscript{165} In analysing legal writing on globalisation one can encounter three approaches to the question of defining the concept: some authors omit totally any attempt at definition and use the concept instead as self-explanatory,\textsuperscript{166} others list a set of examples of what is perceived as symptoms of globalisation and label it as such,\textsuperscript{167} others actually tackle the question of definition and adopt one definition or another. In all these cases, the student can clearly see the lawyer's disinterest in this definitional problem and the eagerness to move on to the more practical issues involved.

\textsuperscript{163} Scholte, J., \textit{supra} note 2, at 132-158.
\textsuperscript{166} See e.g., Engel, D., "Transformation of Law and Place: Introduction to the Articles by Buchanan, Dariah-Smith, Maurer, and Aman", 2 Indiana Journal of Global Legal Studies 363 (1995).
Nevertheless, in studying the lawyers' definitions of globalisation, one can discern the similarities with other social scientific analysis as well as certain disciplinary characteristics. Lawyers like others perceive globalisation as change in the social surrounding that merits their attention. The geographic nature of this change is repeatedly expressed in their writing. According to one author, the disparate processes of globalisation are connected by a single theme and that is "What is geographically meaningful now transcends national boundaries and is expanding to cover the entire planet." \(^{168}\)

There are also various characteristic features about the lawyers' understanding of globalisation. These characteristics can all be traced to the particular understanding of territory in the discipline of law. For lawyers, geographic spheres and territories are descriptions of legal spheres of competence or dominion. \(^{169}\) In that sense, when lawyers talk about globalisation as change of geography, they are also implicitly referring to globalisation as a political shift in power and authority. In a legal sense, territory is a "sphere of legal competence" \(^{170}\) and deterritorialisation is a loss of such competence. This explains why lawyers are more explicitly conscious of globalisation as an omission of the State. The word "denationalisation" is used frequently by lawyers to define what globalisation is about. This is often combined with the incorporation of the problem of governance in their definition. For example, one author discussing the status of non-governmental organisations under international law defines globalisation as: "denationalization of clusters of political, economic, and social activities that undermine the ability of the sovereign State to control activities on its territory[.]" \(^{171}\)

Legal writing about globalisation is organised around this problem of loss of State power and the mismatch between the legal competence of the State and the geographic scope of certain activities and/or problems. Lawyers tend to either advocate solutions to this problem or critique emerging solutions. The latter spurs a whole set of new problems that are essentially side effects of the attempts at solving the problem of legal governance. The discussion in the remainder of this section will follow this structure. It

\[^{168}\] Seita, A., supra note 164, at 429.
\[^{170}\] Id.
\[^{171}\] Id.
will start by elaborating on the core problem of territorial governance versus social and economic deterritoriality, this will be followed by a discussion of the various emerging solutions of this core problem. The section will be concluded with a discussion of the problematic implications of such solutions for democracy, legitimacy and State sovereignty.

6.1. Territoriality v. De-territoriality

As indicated in the previous paragraph, the problem of the mismatch between the scope of State governance and the scope of social activities is the core legal problem posed by globalisation. This problem is captured in the titles of writings that address the issues such as: "International Business and National Jurisdiction"\textsuperscript{172}, "On governing a Permeable Society"\textsuperscript{173} and "Global Economics and International Economic Law."\textsuperscript{174} Authors repeatedly pose questions such as: "Just where is the market when it exists in the computer system? Who regulates a market when its geographical coordinates can no longer be pinned down easily?" "Which jurisdiction or jurisdictions are supposed to regulate a given conduct in connection with a cross-border securities transaction? And gravely formulate the problem in statements as: "There is a serious disconnect between the scope of economic processes and the reach of rules to govern those processes,"\textsuperscript{175} "Individuals had become global actors, yet the frameworks establishing rules, rights, and duties remained tied to a territory"\textsuperscript{176}

This section will describe this primary problematic of globalisation in more detail. The first part will explain the prevalent territoruality of the Westphalian legal order. This will be followed by a description of the current deterritorialisation of economic and social activities. The last part will be dedicated to a schematic analysis of the problems that this contrast poses for legal governance.


\textsuperscript{173} Wiener, J., \textit{Globalization and the Harmonization of Law} (1999), at 3. The title referred to in the text is the heading of chapter one of the book.

\textsuperscript{174} Jackson, J., \textit{supra} note 167.


6.1.1. Territoriality and the Law

The organisation of the world into geographic entities called "States" dates back to the Peace of Westphalia in 1648. These Peace Treaties have divided Europe into independent territorial units thus creating the notion of "State" as we understand it today. According to the criteria of statehood as formulated in article 1 of the 1933 Montevideo Convention on the Rights and duties of States, a State can be defined as a political community that possesses a defined territory and a permanent population and is subject to an organised form of government.

This definition makes it apparent that territoriality is a constitutive element of the State. The significance of this element has been repeatedly pronounced by scholars of international law. According to Oppenheim, "a State without a territory is not possible." Similarly, Shaw states that "statehood is inconceivable in the absence of a reasonably defined geographical base." On these bases, the world order created by the Westphalian Peace Treaties is a geographically segmented one. The State, which constitutes its geographic unit, was conceived by the treaties to be a highly monopolistic and exclusive political arrangement. Each State possesses the faculty of sovereignty, which grants it the exclusive right to organise its internal affairs in any manner it perceives to be fit (internal sovereignty). It further grants it full independence vis-à-vis other States in the international order (external sovereignty).

In relation to the law, State internal sovereignty was translated into an understanding of legal systems as an absolute monopoly of the State. Law, thus, has become synonymous with State-law to the exclusion of any other possible sources of rules of conduct. Consequently, the territoriality of the State and its sovereignty was reflected in

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178 Brownlie, I., supra note 169, at 70-72; Shaw, M., International Law (1997), at 139-144.
180 Shaw, M., supra note 177 at 61.
182 This State-centred understanding of legal systems has not passed unchallenged, see for example Cotterrell, The Sociology of Law: An Introduction (1984) pp. 29-31. For more recent challenges of this monopoly based on analysis of globalisation see Teubner, G. (ed.), Global Law Without a State, (1997); De
the legal order, which became predominantly territorial in its turn. The concept of State jurisdiction emerged to delineate the scope within which each State exercises its "judicial, legislative and administrative competence." This is the concept the territoriality of which is most pertinent to our present analysis.

As part of public international law traditional mission of delimiting the scope of exercise of State powers, it has developed, doctrinally and sometimes judicially, certain principles relating to the legal jurisdiction of the State. According to Brownlie, "[t]he starting-point in this part of the law is the proposition that, at least as a presumption, jurisdiction is territorial." [Emphasis added] One should, however, distinguish between three types of State legal jurisdiction: (1) prescriptive or legislative jurisdiction, which refers to the power of the State to prescribe rules of law; (2) adjudicative jurisdiction, which refers to its power to rule judicially over legal questions; and (3) enforcement jurisdiction, meaning State power to take action to enforce its laws or its judicial decisions. While prescriptive and judicial jurisdiction may be exercised on non-territorial basis, enforcement jurisdiction is strictly territorial except in rare and very exceptional cases. Considering that the effectiveness of legal rules and judicial decisions is highly dependent on their enforcement, this strict territoriality of the enforcement jurisdiction strengthens legal territoriality more generally.

Another distinction is made between jurisdiction over civil matters (civil jurisdiction) and jurisdiction over criminal matters (criminal jurisdiction). It is to be noted that stretching the territorial jurisdiction of the State has been more tolerated in civil rather than criminal matters. This could be explained on basis of the particular nature of criminal law, its more severely coercive character and the close link between crimes and the moral structure and values of the society. All these features of criminal law make foreign criminal jurisdiction more of a threat to the notions of State sovereignty and its

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183 Brownlie, I., supra note 169, at 70-72; and Shaw, M., supra note 178, at 301.
184 Shaw, M., supra note 177, at 73.
186 Brownlie, I., supra note 169, at 301.
188 Shaw, M., supra note 178, at 452.
189 Id. at 457.
exclusive authority within its territory.

While State sovereignty gives the State the right to exercise certain exclusive legal competencies within a specific territory, such exclusivity should be enforced against other persons of international law. This is captured by the external aspect of sovereignty and the corollary duty of other States to refrain from intervention in any matter concerning another State. One application of the principle of non-intervention in the legal sphere is the concept of the reserved domain of domestic jurisdiction. According to this concept certain matters are reserved for the domestic jurisdiction of the State and free from any binding international law. The classic example of such matters is issues of nationality and immigration. The importance of the concept of reserved domain should not be exaggerated. It is generally accepted that the scope of the reserved domain is historically contingent. This means that "no subject is irrevocably fixed within the reserved domain[...]" Recent developments in international law and the current expansion of its subject-matter supports this general view and proves the limitations of the reserved domain as a principle.

The analysis presented in the previous paragraphs leads one to conclude that the world order that prevailed since the 17th century is a geographically fragmented one. The State monopoly of legal ordering has resulted in a legal system that is based on a presumption of territoriality. While this is not to suggest that territoriality remained pure and exclusive of other criteria, territoriality continues to dominate the principles of legal jurisdiction.

6.1.2. Social and Economic De-territoriality
Against this backdrop of legal territoriality, lawyers and lawmakers have been increasingly confronted by forms of social and economic activities that break, to varying degrees, with such territorial boundaries. Before one goes on to elaborate on this observation, it is important to indicate that the reference to economic and social de-territoriality remains a reference to a partial phenomenon. De-territorialisation does not touch our social life in any uniform degree. Simply, in analysing the question of

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190 See generally Brownlie, I., supra note 169, at 293-297; Shaw, M., supra note 178, at 454-455; and Verzijl, J., supra note 181, at 272-283.
globalisation one should always remember that substantial aspects of our social life remain in essence territorial.

De-territorialisation of social life takes various forms. In one sense, de-territorialisation can pertain to the fact that actions that are taking place strictly within the boundaries of one country are having acute impact across various territories. The typical case of this form of de-territorialisation is environmental pollution. A local industry that is emitting excessive levels of carbon dioxide, is realistically affecting the life of all the inhabitants of the planet by contributing to the threatening problem of global warming. Another example is the now typical global repercussions of initially national financial crisis such as the Latin American debt crisis in the mid-1980s and the Asian Financial Crisis in 1997.¹⁹²

Largely due to technological changes in the area of telecommunication, social actions or activities are increasingly de-territorial in themselves rather than merely in terms of their effect. One primary example is the geographic fragmentation of the processes of production, which sets the present era apart from earlier forms internationalisation that were based on cross-border commerce rather than production. Reich's example of an aeroplane that is "designed in the State of Washington and in Japan, assembled in Seattle, with tail cones from Canada, special tail sections from China and Italy, and engines from Britain"¹⁹³ is worth repeating here for its illustrative value.

This geographic dispersal of production is caused and paralleled by another equally significant process of de-territorialisation; that is of the corporation. This phenomenon takes place at various levels. Because of the liberalisation of capital markets, the ownership of companies is now increasingly dispersed amongst shareholders of various countries. The freedom of incorporation, has also resulted in companies repeatedly shifting their place of incorporation. The place of a company's operation is also frequently different from the location of its decision-making machinery and its country of incorporation. The case of the Bank for Credit and Commerce International can serve to illustrate this point.

¹⁹¹ Brownlie, I., id., at 293.
¹⁹² The Latin American crisis was triggered by the default of Mexico on its sovereign debt in 1984. The Asian Crisis, on the other hand, was triggered by the devaluation of the Thai Pah. On this issue see.
¹⁹³ Reich, R., supra note 8 at 112 (1991)
What mention of the BCCI brings to mind is the fact that de-territorialisation is not confined to the legal aspects of our social life. Undergoing a very similar process of geographic expansion is the groups of organised criminals that up until recently constituted a local problem for certain countries such as the United States and Italy. According to studies of organised criminal activities, criminal organisations are forging major transnational alliances with similar organisations in other countries and entering into informal agreements organised around common interests. Such alliances are said to exist between groups as geographically disparate as the Chinese Triads and the Colombian drug cartels. This, it is argued, has spawned a globalisation of illegal markets in drugs, arms or illegal immigrants.

The Internet takes this de-territorialisation of economic life to a different level. The act of advertising goods and services on the Internet, is an act the geographic scope of which is expanding with every access to the site from a different country. This reality makes it happening anywhere at any point of time. This makes tying such act down to a single territory mere arbitrariness. The spatial transformation brought by the internet has been strongly captured by one author stating that: "space is no longer in geography- it's in electronics...there is a movement from geo- to chrono-politics: the distribution of territory becomes the distribution of time."  

The Problem

The problematic implications of this mismatch for governance are now common place. They are contemplated incessantly by lawyers. Simply stated, while national interests and values are expressed in national laws territorially applicable, infringement of such interests and values has a non-territorial character.

For example, the national interest in a sound and safe financial system is traditionally expressed in national regulation of banking operations and capital adequacy standards. The threat to a country's citizens and its national financial system can, however, result from bank failures and financial crisis occurring in another probably even remote country. This has been illustrated by the BCCI case and the Barings, case as well as by

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195 *Id.*
196 *Id.*
the lessons of the Asian Financial Crisis in 1997.

In situations of de-territorial impingement on national interests and values, the State concerned might lack any form of jurisdiction over the offensive acts absent an aggressive application of a "nationality principle" or "effect doctrine" to assert jurisdiction. In other cases, the country concerned might have a prescriptive jurisdiction, in that its laws apply to the offensive act, but lacks enforcement jurisdiction because of the presence of the offender, the assets or even the documentary evidence outside its territory.

The mismatch dilemma is sometimes more subtle. This occurs particularly in relation to the mobility of large capital and the geographic fluidity of multinational corporations. In such cases, this mobility might create pressures on the domestic jurisdiction to abandon the pursuit of certain national interests where this pursuit proves unfavourable or costly to business. This phenomenon is commonly known as "regulatory competition" or "regulatory arbitrage". Over the past few decades, labour rights and environmental protection have repeatedly suffered such deregulatory pressures.

Globalisation, therefore, creates a situation where national interests either cannot be pursued or cannot be protected because of the pressures of de-territoriality. This challenge to governance has created demands for imaginative readjustment of our contemporary structures and mechanisms of governing. A State-centred structure of governance is no longer sufficient.

6.2. Solving the Governance Problematic: A Framework for Understanding Money Laundering Law

Money laundering law is a response to globalisation. The link between globalisation and money laundering law is well established in the legislative history of the core national and international instruments discussed in Chapter Two of this study as well as in the writing on the subject. Restating some of this history here is useful to confirm this obvious fact.

The U.S. Bank Secrecy Act 1970,198 as the first legal instrument dealing with the problem of money laundering, emerged in response to the increasing use of offshore

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financial centres for the purpose of evading U.S. law enforcement. The House Report on the Bill has provided in justification of the "foreign transaction reporting requirements" that: "Secret foreign bank accounts and secret foreign financial institutions have permitted proliferation of 'white collar' crime; have served as the financial undepinning of organized criminal operations in the United States; have been utilized by Americans to evade income taxes, conceal assets illegally and purchase gold; have allowed Americans and others to avoid the law and regulations governing securities and exchanges; [...] etc. It then went on to explain the problem that foreign secret accounts create, which justifies legislative intervention: "When law enforcement personnel are confronted with the secret foreign bank account or the secret financial institution they are placed in an impossible position."

In upholding the constitutionality of the BSA (1970), the U.S. Supreme Court expressed awareness of the changes in the context, which in its opinion merited the measures adopted in the Act. The threatening developments that merited the BSA's unusual regulatory requirements involved both the use of foreign secret accounts to circumvent national laws and the rise of criminal organisations possessing substantial wealth. The words of the Court are worth restating here: "While an Act conferring such broad authority over transactions such as these might well surprise or even shock those who lived in an earlier era, the latter did not live to see the time when bank accounts would join chocolate, cheese, and watches as a symbol of the Swiss economy. Nor did they live to see the heavy utilization of our domestic banking system by minions of organized crime as by millions of legitimate businessmen."

The U.S. MLCA (1986) developed also out of similar considerations. The President's Commission on Organised Crime, whose work inspired the legislation, found that "in recent years...criminals have mastered the details of modern technology, international finance, and foreign secrecy laws to create select fraternity of money

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200 Id.
laundering professionals. As a result, organized crime today uses banks and other financial institutions as routinely, if not as frequently, as legitimate businesses.⁴⁰² This has led the U.S. Congress to accept the argument of law enforcement officials that "only a substantive prohibition of the act of laundering will deter and significantly decrease money laundering"⁴⁰³ and pass the MLCA rendering it an offence to launder the proceeds of a criminal activity.

Similarly, the Swiss Banks' Agreement on the Observance of Care (1977) was a response to billions of Swiss Francs deposited in the Swiss financial sector in violation of the Italian capital controls.⁴⁰⁴ The U.K. law incriminated money laundering as a response to the failure of existing laws to deprive drug traffickers of their enormous but ill-gotten wealth, which they could place in assets abroad.⁴⁰⁵ Considerations of the same sort operated at the international level to induce agreement on the main anti-money laundering instruments. For example, the Council of Europe Recommendation on money laundering, as the first international instrument on money laundering, proceeded from the assumption that: "modern forms of criminality in the majority of the European countries shown an impressive increase in organised violent criminality supported by large financial resources and aimed at raising more and more gain." It was also geared towards addressing the concern that "the transfer of funds of criminal origin from one country to another and the process by which they are laundered through insertion in the economic system give rise to serious problems."

The gist of this brief summary of the concerns and assumptions that underlie the main legal instruments on money laundering in the past two decades is that money laundering law emerged as a response to transnational criminal activity, i.e., the geographic aspect of globalisation, and to powerful criminal enterprises, i.e., the political aspect of globalisation. Understanding money laundering law should be based on an understanding on how it purports to address these current problematic aspects of global legal governance.

⁴⁰⁴ See above Chapter Two, Section 2.2.
The legal response to the challenges that globalisation poses to legal order can be organised into six modalities or mechanisms. These modalities can be observed in the different fields of public law. It will be argued in the subsequent part of this volume that money laundering law utilises each of these modalities in an attempt to control and prevent transnational organised criminal activity. The first reaction to extraterritorial threats is likely to be an attempt to reverse the process through regulatory measures that close the national borders to capital flows, information flows, or other cross-border activities. These protective measures could be labelled de-globalisation by reference to their affect on the process that triggered them.\footnote{R. v. Cuthbertson, [1980] 2 All ER 401. This case constitutes the trigger of the legislative intervention to amend laws of forfeiture and the corollary introduction of an offence of money laundering. \textit{See} above Chapter Two, Section 3.3.} Another response could be to attempt to stretch national jurisdiction across border in order to govern extraterritorial activities that the State perceives as detrimental to its interests.\footnote{\textit{See} above Chapter Four, Section 2.} Such measure is problematic in that, in its unilateral forms, it tends to offend against the sovereignty of other countries and as a result to undermine the potential for international co-operation. This extraterritorialisation of national jurisdiction is also available only to powerful States that possess the resources and the clout to extend national jurisdiction and to enforce this extension against other countries.

Other mechanisms could be less nationally oriented and more co-operative. For example, over the past three decades one could discern a strong trend towards harmonisation of national laws as well as an equally strong trend towards co-operation amongst enforcement authorities across borders.\footnote{\textit{See} above Chapter Four, Sections 4 & 5.} Such mechanisms are, by far, the least upsetting of the State-based system of international governance.

The legal responses mentioned so far centre to a great extent around the State as the primary agency of governance. Other forms of less traditional governance tend to rely on private or supranational to functions that were originally performed by the State. Privatisation and supranationalisation of the functions of the State in law and order represent the clearest departure from the structures of legal governance as we know it
since the birth of the nation State. In that sense they represent the lawyer with some of the most vexing challenges to the prevailing notions of legitimacy.

Analysing money laundering law in terms of these six legal responses to globalisation provides a vehicle for systematising this hybrid legal system and placing it in the wider context of current legal order. It is the task of the following three chapters of this volume to conduct this analysis.

7. Conclusion

Understanding money laundering law as a legal phenomenon is not possible without an understanding of the context in which it emerged. Over roughly the same period of time that money laundering law has been developing, social scientists have observed a process of social transformation that they have labelled globalisation. In this Chapter, the author has tried to trace the origin, the contours and the causes of this process. In this regard, globalisation has been defined as a process of social change that possesses two core dimensions. The first dimension, and from which the term globalisation is derived, is a geographic one and it simply implies a compression of the space within which social relations are conducted. The second dimension is political and can only be defined by reference to the State. This refers to the emergence of non-state actors that are not only transnational but also possess substantial powers.

Globalisation is not a process that is simply happening to the society. In many ways it is a process that is brought about by the society itself. The discussion so far has illustrated that conscious regulatory arrangements have played an equally significant role in bringing about the process of globalisation. This analysis is particularly pertinent to the lawyer. As explained above, globalisation creates a geographic mismatch between the government and the governed. This mismatch is compounded by the increasing powers of the governed in disproportion to the State. Both aspects of globalisation pose vexing problems for the legal order. The fact that law was instrumental in bringing globalisation about suggests that it is unlikely to be impotent in helping to manage it.

Understanding globalisation, its causes and its challenge to the legal order in those terms is essential for the understanding of the legal policy that underlies money

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209 See below Chapters, Five and Six.
laundering law. Building on the analysis in this Chapter and on the particularly relevant examination of globalisation in the area of crime and financial markets, the following chapters of this work are dedicated to analysing systematically money laundering law as a response to globalisation. This systematisation aims at placing money laundering law in context and understanding the consequences of certain policy choices in this area in the overall structure of contemporary legal order. This framework further permits comparisons across different areas of the law.
1. Introduction

As elaborated upon in the previous Chapter, globalisation from a governance perspective creates a problem of "mismatch." In one respect, government is essentially territorial while the governed activities are increasingly extraterritorial. In another respect, non-state actors are gaining substantial economic and informational power in disproportion to the State, i.e., the government. Both aspects of the problem clearly manifest themselves in the area of criminal law enforcement. The troubles faced by the State in enforcing its authority in general, including such fundamental sovereign authority as that expressed in criminal law, has led some to argue the decline of the State and the retreat of the State. Such conclusions, however, are premature. In its attempt to reassert its authority and establish order, the State has adopted a number of techniques. Each of these techniques has become part of the "toolkit" of money laundering law.

A possible reactive solution to the dis-empowering effect of globalisation is to reverse its tide. The idea is that if law has been instrumental in bringing globalisation about then it should be capable of terminating its process. Some attempts have been made in this regard, and this is the modality that this Chapter terms as de-globalisation. Money laundering law relies substantially on the operation of such modality to an extent that this creates conflict with other economic policies. Trends in this direction are discernible in the regulation of the Internet in a number of countries.
and especially in more totalitarian ones, such as China. It is also discernible in mechanisms of capital controls that are sometimes used to contain a financial crisis. The question with respect to such attempts is one of effectiveness. Proponents of globalisation and others who are inclined towards determinacy believe that globalisation is irreversible. Considering the key role of technology in causing globalisation, there is an element of truth to this argument. The role of law, however, should not be underestimated, and hence law's capacity to regulate. Further, technological developments are now being put to the task of creating de-globalising technologies.

A possible second solution is one that attempts "to bridge" the geographic mismatch. It is the traditional mechanism of extraterritoriality. The history of criminal jurisdiction is one of developing principles that attempt at expanding the territorial jurisdiction of the State beyond its territory. While some forms of extraterritoriality are the product of amicable agreements between States, others were simply the exercise of an aggressive defensive by some powerful jurisdictions. The most obvious example of the latter exercise of extraterritoriality is the United States. Aggressive extraterritoriality creates antagonism amongst States to the extent of defeating its purposes in the long run. Amicable extraterritoriality, unless practised with sufficient safeguards, can result in jeopardising the rights of the individual.

In order to secure their authority, States are increasingly resorting to what might be described as pooling of sovereignties. This best describes the final two modalities of State-based governance in the era of globalisation. Harmonisation, as one such solution, is based on achieving substantive conversion between the laws in different countries in a manner that deprives offenders from the benefits of safe havens. This was a primary objective of the stage of supranationalisation of money laundering law. This trend in money laundering law was discussed in Chapter Two and will be further discussed in the Chapter Six below. The last modality is international co-operation. This form of handling the governance problematic will remain relevant for as long as the organisation of international society into sovereign States persists. Under such structure, enforcement jurisdiction remains squarely national. The increasingly transnational character of social and economic activities renders local enforcement ineffective. The only sustainable solution to such problem is necessarily co-operative.
Before delving into the detailed discussion of each of these modalities, it is important to note that (1) the distinction between the tools of governance described in this Chapter and the tools described in the following two chapter is somewhat arbitrary. The use of supranationalisation to achieve harmonisation is one example of this arbitrariness. (2) While some of the modalities described in this Chapter are seemingly traditional, they have acquired new features in this era of globalisation that merit treating them as distinct from their earlier forms.

2. De-globalisation through Regulation

2.1. An Overview

As argued in Chapter Three, laws and regulations have played an instrumental role in bringing globalisation about, it, thus, is arguable that the law can interfere once more to reverse the tide of globalisation or to limit its flow. This can be achieved through laws and regulations that impose restrictions on the free movement of goods, capital and people, or the free access to and use of telecommunication and information technologies. This de-globalisation through law is one obvious and ready solution to the problems that globalisation might raise.

The Internet is one of the primary technological instruments of globalisation. Legal restrictions on Internet use and access represent a good example of de-globalisation through law. While such attempts exist to one degree or another in all jurisdictions, China's case is a discrete and illustrative one. China has perceived the clear financial and economic benefits of globalisation. It has also become aware of the threats that this process can bring about. The primary national interests that China perceived to be threatened by wide Internet access were the national interests in political control, State security, social cohesion, social stability, public order, ideals of socialism and the basic principles of the Constitution. In order to protect these values and interests while gleaning the benefits that the Internet could bring, China is

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1 See supra Chapter Three, Section 3.2.
3 In specifying their purpose, Chapter 1, s.1 of the Computer Information Network and Internet Security Protection and Management Regulations (December 30, 1997) stipulate that they seek to "preserve the social order and social stability." Cited in McGeary, A., supra note 2, at 226.
continuously attempting to regulate and control the use of the Internet.

China's regulatory system is based on limiting access to information on the Internet. To achieve this objective, the Chinese government casts a wide regulatory net that catches Internet Service Providers (ISPs), Internet information providers and all users of this medium. The regulations prohibit access to certain Internet sites and retrieval and distribution of categories of information that the Government perceives to be prejudicial to the national interests and values referred to above. To enforce such regulations, the Government uses filtering and blocking technologies. It also imposes a cumbersome set of licensing and registration requirements upon Internet users, service providers and information providers. The regulations governing the Internet further impose wide policing requirements on ISPs and information providers.4

The efficacy of China's regulation of the Internet has been questioned.5 It is however generally accepted that such tight control does deter the ordinary user of the Internet in China even if it fails to deter the tenacious and highly skilled one.6

The threat of globalisation to the State's capacity to govern has not been more obvious as it has been in the economic sphere. Financial liberalisation7 and the consequent flood of capital flows across borders have significantly undermined governments' monetary and economic autonomy. The government's instruments of monetary policy are becoming increasingly ineffective under the conditions of open economy and financial liberalisation. For example, the use of open market operations to reduce liquidity in the economy is a traditional and effective instrument to achieve stabilisation and control inflation under the conditions of a closed economy. In an open economy with liberalised capital account, these mechanisms could prove counter productive if it results in increasing interest rates and attracting more foreign investment.8

Such governance problems, especially as manifested in the Mexican debt crisis in

4 For an overview of these regulatory arrangements see D. McGeary, A., id., at 224-229. For a review of the Chinese government agencies involved in Internet regulations see Feir, S., supra note 2, at 368-371.
5 McGeary, A., supra note 2, at 229-230; Feir, S., supra note 2, at 377-382; Taylor, J., supra note 2, at 637-639.
6 A senior Chinese government official noted that "the regulations were intended to deter those who might casually visit blocked or banned sites and added [...] a person intent on accessing prohibited information will find a way to access that information." Cited in McGeary, A., supra note 2, at 227.
1994 and the Asian financial crisis in 1997, have resulted in re-examination of the value of financial liberalisation and repeated resort to capital controls across the developing world. Capital controls are another example of de-globalisation through regulation. They encompass a wide range of regulatory measures imposed by a country for the purpose of controlling capital flows crossing its borders. Examples of such measures include imposing a tax on capital inflows, imposing a non-remunerated reserve requirement on banks and private companies for foreign currency obligations and imposing restrictions on foreign ownership.

Traditionally, capital controls were used to protect nationalist values by preventing the control of foreign capital of domestic industries or of certain categories of industries that are perceived to be strategic. Current capital controls are often employed to restore a degree of monetary autonomy that allows the government to use monetary policy instruments effectively and to achieve economic stabilisation. Capital controls are therefore often used to insulate the economy temporarily until government monetary policy interventions succeed. They are also used to influence the composition of capital inflows mostly to discourage short-term capital flows and favour long-term foreign investment. It is now commonly acknowledged that short-term capital flows, through the volatility they cause, were key factors in the repeated financial crises in the 1990s.

De-globalisation through law is therefore a common remedy to the problems of governance that globalisation creates. De-globalisation measures are incorporated in the key international treaties that were concluded explicitly to promote the values of liberalisation. Art. VI §3 of the International Monetary Fund Articles of Agreement provides that "Members may exercise such controls as are necessary to regulate international capital movements". Further, safeguard or escape clause measures have always been incorporated in international trade agreements allowing parties to

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9 In 1994, Brazil imposed a 1% tax on foreign investment in the stock market. Id., at 885.
10 For a detailed analysis of the Chilean experience with non-remunerated reserve requirement see Laurens, B., "Chile's Experience with Controls on Capital Inflows in the 1990s", in Ariyoshi, A. et al. (eds.), Capital Controls: Country Experiences with Their Use and Liberalization, IMF Occasional Paper No. 190, Appendix I (May 2000).
11 Id., at 70; Ötker-Robe, I., "Malaysia's Experience with the Use of Capital Controls", in Ariyoshi, A. et al. (eds.), Capital Controls: Country Experiences with Their Use and Liberalization, IMF Occasional Paper No. 190, Appendix III (May 2000), at 96. Both studies confirm that gaining monetary policy autonomy was one of the primary objectives of imposing capital controls.
12 For a discussion of the rationales of capital controls see McKnight, N., supra note 8, at 879-883.
impose trade restrictions as an exception to their trade liberalisation obligations under certain circumstances.\textsuperscript{13} Art. XIX of the General Agreement on Tariffs and Trade gives the Contracting Parties a broad escape clause that permits them, in circumstances that poses a threat to their domestic industries, "to suspend the obligation in whole or in part or to withdraw or modify the concession."\textsuperscript{14} The effectiveness of such remedies is, in turn, problematic and their impact on economic growth is often argued to be negative; but they nevertheless remain some of the most readily used responses to the governance challenge of globalisation.

2.2. De-globalistaion Trends in Money Laundering Law

There is an inherent tension between money laundering prevention and control on the one hand and liberalisation on the other. In many ways and consistently with the argument presented in this volume, money laundering is an externality of the liberalisation movement, especially capital account and financial services' liberalisation. This tension is reflected in the legal instruments on money laundering. For example, the recent USA PATIOT Act addresses the problem of money laundering and terrorist financing. It empowers the Secretary of the Treasury to impose special measures to deal with situations of "primary money laundering concern."\textsuperscript{15} In exercising his power, the Secretary of the Treasury is required to take into consideration "the extent to which the action or the timing of the action would have a significant adverse systemic impact on the international payment, clearance, and settlement system, or on legitimate business activities involving the particular jurisdiction, institution or class of transaction"\textsuperscript{16} that raise the concern. This provision reveals the awareness of the Congress of the potential conflict between the desire to control terrorist financing and the goal of keeping the channels of commerce open. It


\textsuperscript{14} The General Agreement on Tariffs and Trade (GATT, 1994)), Art. XIX Para. 1(a), reprinted in World Trade Organization, \textit{The Legal Text: The Results of the Uruguay Round of Multilateral Trade Negotiations} 17 (1999).

\textsuperscript{15} This is a designation that the Secretary of the Treasury is empowered, on basis of reasonable grounds, to attach to certain financial institutions, financial transactions or jurisdictions outside the United States. Once the Secretary reaches the conclusion that a certain financial institution, a certain jurisdiction or a certain type of financial transaction is a "primary money laundering concern," he will have the power to impose special measures upon domestic financial institutions in their dealing with the designated financial institution or jurisdiction or in their carrying out of the designated transaction. See USA PATRIOT ACT, PL 107-56 (October 26, 2001), s. 311.

\textsuperscript{16} \textit{Id.}
grants the Secretary of the Treasury the discretion and delegates to it the task of striking the balance.

The conflict between money laundering control and prevention measures on the one hand and liberalisation measures on the other is likely to arise under the General Agreement on Trade in Services (GATS). GATS constitute the first multilateral step towards the progressive liberalisation of trade in services. As such, it imposes "Most-Favoured-Nation" (MFN) treatment, national treatment and transparency obligations on its State Members. By way of exception to the liberalisation measures of GATS, article 2 of GATS Annex on Financial Services provides that: "a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system." Money laundering prevention measures fall within the scope of this exception. It is likely that such prudential measures will come under the scrutiny of the new WTO Dispute Settlement Body as they are challenged by countries whose industries are affected by their implementation.

The restrictive effect of money laundering laws on the freedom of movement of capital has been scrutinised by the European Court of Justice (ECJ) in several joined cases. These cases concerned a Spanish law that imposed a prior authorisation as a requirement for any export of coins, banknotes or bearer cheques. The ECJ was asked to confirm the compatibility of this law with the European Community law, which prohibits restrictions on movement of capital. The Spanish Government argued that this measure was imposed in order to prevent illegal money laundering activities, which are normally associated with this type of conduct. The Court ruled that the measure was incompatible with the Community law on the movement of capital. In reaching this conclusion the Court reasoned that the effective enforcement of national laws including criminal law on money laundering could be achieved.

17 General Agreement on Trade in Services (GATS, 1994), in World Trade Organization, supra note 14, 284.
through less restrictive measures. The Court held as valid a measure that requires prior declaration of the sums transported as opposed to prior authorisation and argued that such a measure could be a suitable substitute for prior authorisation.

In order to prevent money laundering, the FATF and its members adopt and encourage policies of geographic targeting. According to these policies, financial transactions emerging from certain countries or jurisdictions maybe subject to stricter scrutiny. The FATF's Recommendation 21 provides that: "Financial institutions should give special attention to business relations and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply these recommendations. Whenever these transactions have no apparent economic or visible lawful purpose, their background and purpose should, as far as possible, be examined, the findings established in writing, and be available to help supervisory authorities and law enforcement agencies."21 While the language of the Recommendation seems mild, its impact on a certain jurisdiction's access to the global financial system could be substantial. This is particularly the case in view of the severe criminal sanctions attached to money laundering offences in the FATF countries and the natural aversion of financial institutions to liability. These issues will be dealt with in more detail in the Chapter Six below.

The USA PATRIOT Act 2001 takes these measures a step further.22 It gives the Secretary of the Treasury the power and discretion to prohibit any domestic financial institution from keeping a correspondent account or a payable-through account on behalf of a foreign banking institution operating in a jurisdiction that the Secretary finds of "primary money laundering concern."23 Imposing such a prohibition could be of serious de-globalisation effect if one takes into consideration the importance of the United States as a financial jurisdiction and the importance of correspondence account services for capital mobility and the conduct of international business transactions. It remains to be seen whether such measures will be subject to challenge under the provisions of the GATS.

It, therefore, becomes clear that money laundering law utilises restrictive regulatory measures to control and prevent the problems of transnational crime. The resort to such measures has been extended following the tragic events of September

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22 Supra note 15.
23 Id., s. 311.
11. The problem with such approach is that excessive use might undermine the
benefits of a liberal economic system. To the knowledge of the author, there has not
been, so far, any systematic analysis of the impact of these ad hoc restrictive measures
on liberalisation. The unilateral nature of these measures also makes them
questionable in terms of the equity of the global economic order.

3. Stretching National Jurisdiction

3.1. An Overview

As explained in the discussion of the legal problematic of globalisation, the
jurisdictional territoriality of the law unmatched by de-territoriality in the social and
economic spheres has produced the governance vacuum that troubles lawyers.25 Throughout its history, the principle of territoriality has been increasingly challenged
by changes in the geography of social and economic relations brought about by
developments in transportation and communication technologies. In response, lawyers
have been innovative in developing other jurisdictional principles that stretch the
reach of the State beyond its defined territory or in other words localise acts that could
otherwise fall outside the ambit of its jurisdiction.26 According to the Harvard
Research on Jurisdiction of Crime (1935), "Indeed with the increasing facility of
communication and transportation the opportunities for committing crimes whose
constituent elements take place in more than one State have grown apace. To meet
these conditions, the jurisdiction of crime founded upon the territorial principle has
been expanded in several ways."27

The pressure of a mobile social and economic reality is evident in the now classic
definition of the territorial principle in criminal law. According to Art. 3 of the
Harvard Draft Convention on Jurisdiction with Respect to Crime, "A State has
jurisdiction with respect to any crime committed in whole or in part within its
territory."28 [Emphasis Added] A crime is committed in whole within a State's

24 Note that the discussion in this section focuses on the criminal and regulatory jurisdiction of the state
rather than the civil jurisdiction. It is in the area of public law that the governance vacuum has been
more felt.
25 See supra Chapter Three, Section 6.
26 For an early discussion of the problem of extraterritorial harms and comparative State responses see
27 "Harvard Research on Jurisdiction of Crime: Draft Convention on Jurisdiction with Respect to
Convention]
28 The Harvard Draft Convention, id., at 439; and commentary at 480-483.
territory when all its constituent parts (the conduct and the criminal result) have taken place within that territory. Some crimes, however, start within the territory of a State but are consummated outside that territory. Alternatively, a crime could start outside the territory of a State but produce its criminal result within the territory of the State. The latter two cases fall within the jurisdiction of the State on basis of the territorial principle as crime committed in part within its territory.

This development in the territorial principle constitutes one of the first attempts to expand the doctrine in response to economic and social mobility. The principle has thus differentiated into subjective territoriality, where part of the criminal conduct takes place in the territory of the State while its result or its effect takes place abroad, and objective territoriality, where the result of a criminal conduct carried out abroad takes effect within the territory of the State.

While traditionally accepted as a basis for criminal jurisdiction, the nationality principle expands the scope of State jurisdiction beyond its territory and therefore forms a helpful tool in dealing with the governance vacuum created by social and economic mobility. According to this principle, a State's laws and regulations apply to its citizens wherever they are. The universal acceptance of this principle stems from its grounding in the basic concept of State sovereignty. This principle brings within State jurisdiction violations of its laws committed by any of its citizens regardless of the place where such violations have been committed.

Extraterritorial jurisdiction has also been achieved through another jurisdictional principle referred to as the protective principle. According to this principle, jurisdiction over a crime is assumed even if it doesn't 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 State currency. The rationale for extending the jurisdiction in such cases lies in the fact that the State, where the act took place, might

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31 Id., at 50-54.
33 Blakesly, C., supra note 30, at 307.
not be interested in prosecuting an offence directed against the interests of another State. The *protective principle* is now generally recognised as a principle of jurisdiction and historically has been used to deal with extraterritorial threats of political nature.

Where coherent international public policy has emerged, a *principle of universality* has been adopted to secure prosecution of acts that violate such globally recognised interests. With regard to violations of this sort, international law goes beyond merely granting any country, within whose jurisdiction the accused might be present, the right to prosecute. It further imposes upon such country the duty to carry out this prosecution or alternatively extradite the accused to another country that is willing to perform this duty. The crimes for which a principle of universality applies include war crimes, genocide, apartheid, hijacking and sabotage of civil aircraft.

More recently, there have been further attempts by mainly the United States to further expand the reach of its national jurisdiction for purposes of economic regulations. Such expansion was attempted as a solution to the overreaching effects that economic behaviour carried out and completed outside the territory of one country might have within its territory. In response, what is termed the "effects doctrine" has emerged. According to this doctrine a State has jurisdiction over conduct carried out outside its territory if that conduct has or intended to have substantial effect within its territory. It could be argued that this doctrine is consistent with and based on the principle of territoriality in its objective formulation. The reality is that the effects doctrine relaxes the nexus between the conduct and its consequences in a manner that permits the application of the State's law to a conduct that has been performed and completed outside its territory but that might have repercussions within its territory. Such repercussions need not be part of the criminal conduct or a constituent element of the offence.

The facts of the *Alcoa* case that established the "effects doctrine" will serve to illustrate the distinction between the "effects" in the context of *objective territoriality*

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34 For a detailed analysis of this principle and its status in international law see Bassiouni, C., and Wise, E., *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (1995).
and the "effects" as encompassed in the "effects doctrine." In the Alcoa case, US law was applied to a foreign company "Aluminium Limited" penalising under US law its act of organising a cartel operating through a Swiss corporation with a number of other foreign companies. The jurisdiction of the US law was based on the fact that the operations of the cartel have resulted in restricting imports of aluminium into the US and consequently pushing up the prices. On settling the jurisdictional question, the court stipulated that "it is settled law [...] that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." The facts of this case and the effects accepted as basis for jurisdiction are clearly distinct from the effects envisioned in the objective territoriality principle. The classic illustrative case of the objective territoriality principle is that of a murderer who fires a shot across the border from Italy wounding the victim in France who then subsequently succumbs to his death in Switzerland. While the death is a constituent element of the offence in this hypothetical case, the subsequent impact of the cartel on the US aluminium market is not an element of the penalised restraint of trade. It is merely a subsequent and remote repercussion.

The US expansionary jurisdictional inclinations that have been increasingly manifested over the past few decades are not confined to prescriptive jurisdiction. As indicated in earlier discussion in this Chapter, despite developments in jurisdiction theory over the decades, enforcement jurisdiction continues to be strictly territorial. This however did not hold against US recent expansionary trends. Extraterritorial enforcement actions are increasingly resorted to by US courts. This takes various forms including: (1) demanding the disclosure of evidence that is held abroad sometimes in breach of foreign statutory requirements; (2) imposing remedies on foreign companies in civil anti-trust cases such as requiring foreign firms to make know-how available to competitors on reasonable basis; and (3) imposing American

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39 Id., at 443.
40 "The type of 'effect' which the Alcoa ruling has in mind has nothing in common with the effect which by virtue of established principles of international jurisdiction confers the right of regulation. The 'effect' within the meaning of Alcoa ruling does not amount to an essential element or constituent part of the restraint of trade, but is an indirect or remote repercussion of a restraint carried out, completed and in the legally relevant sense, exhausted in the foreign country." Mann, F., "The Doctrine of Jurisdiction in International Law", Recueil des Cours 9 (1964), at 104.
export regulations on foreign companies who have any link with the US such as being foreign subsidiaries to an American parent company or merely using American technology.42

In conclusion, stretching the national jurisdiction through various legal and doctrinal vehicles is increasingly resorted to in order to bridge the governance gap. Such development is not without problems. Over assertiveness of jurisdiction by one country often results in antagonising other countries and invoking conflict and retaliatory actions.43 This, in turn, undermines other productive forms of co-operation that are most needed as a solution to the "governance vacuum."


3.2.1 Extending the Territorial Reach of Criminal Law

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 common practice of States is to confine the crime of money laundering to laundering the proceeds of a crime that is committed within the territory of the State. There is however a more recent trend towards criminalising money laundering of the proceeds of crimes committed abroad subject to conditions such as dual criminality. Prosecuting money laundering in the latter case could arguably be considered an extension of the State's jurisdiction to the predicate offence. A conviction for money laundering in some jurisdictions, such as the United States, could result in the confiscation of the laundered funds and, thus, in effect imposing penalty on a person for an act that originally lied outside the jurisdiction of the State.

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

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42 For a detailed analysis and evaluation of such cases and bibliographic reference see Neale, A., Stephens, M., supra note 32, Chapters 9 & 11.
43 See Zagaris, B., and Rosenthal, J., supra note 41, at 328-331. Providing an account of a number of incidents of U.S. extraterritorial enforcement that caused friction with other countries. See also Lowe,
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. However, the Convention 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." It is not, however, clear whether the funds laundered shall be confiscated in this case as "proceeds" or "instrumentalities" of money laundering offence.

According to the UK 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 UK. The law does not require that the act should constitute a criminal offence in the country where it was committed.

Money laundering law extends the territorial jurisdiction of criminal law in another way. As explained in Chapter Two of this volume, money laundering offences are defined typically broad. This broad definition of the actus reus results in extending the national jurisdiction on basis of the territorial principle. Merely drawing a cheque on a U.S. bank as part of scheme of money laundering is likely to bring the case within the U.S. jurisdiction as an offence committed in whole or in part within the U.S. territory.

3.2.2. 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

45 The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, European Treaty Series No. 141 (November 1990), Art.6(2)(a).
46 Criminal Justice Act 1988 as amended by Criminal Justice Act 1993, s. 93A.
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 the Forty Recommendations (1996).\textsuperscript{47} Recommendation 22 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, which do not apply the Recommendations. In view of the interdependence of financial markets, strict application of this Recommendation results in placing pressures on States to implement the Recommendations in order to maintain their access to the global financial market.\textsuperscript{48}

The United States serves as an illustrative example of the extraterritorial reach of anti-money laundering regulations. The US Bank Secrecy Act applies equally to US banks and to foreign banks operating within the jurisdiction. US regulators, unless denied access by the host country, will examine branches of US banks that are operating abroad.\textsuperscript{49} US 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.\textsuperscript{50}

The criminal law of money laundering extends the regulatory framework further to cover financial institutions that are neither branches of US banks nor operating within the US. The US criminal jurisdiction extends to offences that are committed in whole or in part within its borders. Because of the very fluid nature of the \textit{actus reus} in money laundering, this territorial link to the US jurisdiction can be stretched very far. For example, if illicit money was wired through a US bank as part of a cross-border process of laundering, this transit will be sufficient to give the US

\textsuperscript{47}This mechanism was also envisioned in the 1990 version of the Forty Recommendations. FATF, \textit{Report 1990} (February 17, 1990).
\textsuperscript{48}See infra Chapter Six, Section 4.4.2.
criminal jurisdiction over the whole process of laundering. Any foreign bank involved in this process will 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 US criminal law and how it leads to the extension of its regulatory system extraterritorially. Banque Leu was a Luxembourg bank that had no offices in the US. In 1993 it entered a guilty plea to money laundering in the US and agreed to forfeit $2.3 million to the US and $1 million to Luxembourg. The bank was charged with money laundering under US law because it accepted deposits of $2.3 million in the form of cashier checks drawn on banks operating in there, which formed part of money laundering operation initiated in the US. The bank sent the checks to the US 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 puts 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."

What is of more interest in the current context is the fact that, in addition to entering into a forfeiture agreement with the U.S. Government, the Luxembourg bank agreed to submit to a three-year US audit specifically for money laundering. It also agreed to produce an anti-money laundering monograph that should be updated annually for two years. 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 US regulatory jurisdiction extraterritorially.

The extension of the regulatory jurisdiction in the case discussed above was temporary and specific. However, the extraterritoriality of the criminal law of money laundering has a more durable effect on the scope of anti-money laundering regulations. Foreign institutions and countries wishing to avoid prosecution for

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50 Id.
52 Id.
53 Id.
54 Id.
55 Id.
56 Id.
criminal money laundering and its devastating effects must show good institutional record of fighting against money laundering. The history of a country's handling of the money laundering problem, and the internal controls of a foreign financial institution are relevant factors in determining the occurrence and the outcome of a prosecution under US money laundering law.58

In the case of the Banco de Occidente the reputation of the bank's owners and management resulted in a lenient outcome on an indictment for money laundering offences under US law.59 Initially, the prosecution sought a total of $824 million in forfeiture and civil penalties.60 This amounted 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.61 This much more lenient settlement that allowed the bank to survive was largely due to the reputation of its management and owners.

3.2.3. Extraterritoriality as a Problem

Criminal and regulatory extraterritoriality imposes serious problems for financial institutions. The regulatory extraterritoriality creates conflict between the laws and regulations of the countries 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

57 Within 10 days of the indictment of Banco de Occidente (Panama), the US managed to freeze $80 million of the bank's assets world-wide. 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. Id.
58 Id. (arguing that the best way for a small Caribbean country to protect its banks against devastating US prosecution is by implementing a vigorous compliance program within the financial institutions that would convince the US that the bank concerned is a "a good corporate citizen".)
59 Id.
60 Id.
61 Id.
possible under the local laws and regulations. The solution contemplated by the FATF has not always been applied. Some US 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. Failure to comply with such court order places the institution in contempt of court, while compliance invoke 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 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

63 Morgan, M., supra note 49, at 43.
65 Basel Committee, Customer Due Diligence for Banks (October, 2001).
66 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.
68 Id., ¶104.5.
69 Id., ¶105.1.
70 Id.
"internationally recognised warranty certificate." According to this procedure, any bank transferring funds that belong to a public sector official must certify that "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."\textsuperscript{72}

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 be 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 non-governmental organisation such as 'Transparency International'\textsuperscript{73} to assist the banks in carrying out their obligations.

In addition to the problems that extraterritoriality poses for financial institutions attempting to comply with conflicting requirements, extraterritoriality in the context of money laundering law is fraught with the same problems that beset extraterritoriality more generally. Aggressive extraterritorial application of anti-money laundering regulations is bound to undermine the potential for international cooperation and to trigger retaliatory measures. This is particularly true in view of the conflict of values and national that is inherent in anti-money laundering measures. Privacy rights are accorded different levels of protection in different countries and the interests of countries in maintaining financial confidentiality vary according to the structure of their financial markets and their competitive position.

4. **Harmonisation**

4.1. **Harmonising as a Solution: An Overview**

Harmonisation is a process of approximating national laws that regulate a particular subject matter. Harmonisation efforts might aspire to the unification of the law but,

\textsuperscript{71} Id., ¶105.1.

\textsuperscript{72} Id.

\textsuperscript{73} Id.
absent supranational lawmaking with direct applicability, they hardly achieve this ultimate aspiration. This is due to cultural, historical and doctrinal differences that shape the different legal systems. Further, the uniformity of legal texts does not guarantee uniformity of application. Different courts apply similar laws differently, especially when these courts belong to different legal jurisdictions.

In Chapter Three, harmonisation was discussed as an instrument of globalisation. It has been argued that technical standardisation of communication technologies have facilitated global communication and hence brought about globalisation. It has also been argued that harmonisation of laws has been carried out to facilitate and encourage international trade. In the present context, it is argued that harmonisation is sometimes offered as a solution to globalisation as a legal problematic. To counter a transnational threat to national public interest, countries stand shoulder to shoulder creating a continuous wall of similar laws. Prudential regulations offer a good example. It is the national interest of country A to create a sound financial system. In order to achieve this result, country A imposes on its financial intermediaries capital adequacy standards. In globalised financial markets, Banks from country A are very likely to lend to banks from country B. If country B’s prudential regulations are less rigorous, a banking crisis in country B might destabilise the banking system in country A. Harmonisation of prudential regulations between Country A and Country B could be one solution to the governance problematic. Similar problems and similar solutions occur in other areas of the law.

Harmonisation amongst national legal systems occurs through a variety of methods. Although placing this section within a chapter on State-based solutions

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73 Transparency International is a civil society organisation dedicated to the curbing of both international and national corruption. See www.transparency.de. (last visited on 2 May 2002).
74 On different degrees of harmonisation see Baum, H., "Globalizing Capital Markets and Possible Regulatory Responses" in Basedow, J., and Kono, T. (eds.), Legal Aspects of Globalization: Conflict of Laws, Internet, Capital Markets and Insolvency in a Global Economy 77 (2000), at 99-100. In terms of legislative harmonisation the author distinguishes between two types of harmonisation in terms of depth. The first he describes as minimum harmonisation, which is limited to basic principles and core elements. The second is comprehensive harmonisation, which results in uniform law.
76 See above Chapter Three, Section 3.2.2.
77 Id.
suggests that harmonisation is a State policy implemented autonomously by each State, this conclusion is inaccurate. As it will be described in the discussion of supranationalism in Chapter Six below, harmonisation is sometimes imposed by supranational agencies. This method of harmonisation is typically employed in cases of either treaty-based integration, such as the European Union or the North American Free Trade Agreement, or in cases of de facto integration, such as the case with respect to the regulation of technologically integrated capital markets.

Treating harmonisation as a State-based solution remains, however, logical for two reasons. First, harmonisation, as a policy, seeks to approximate national laws that remain territorially enforceable by each State and in that sense the solution by its definition is embedded within national legal systems. Second, supra-nationally imposed legal harmonisation remains the exception not the rule. The majority of legal harmonisation that is taking place is done autonomously at State level or through traditional international law mechanisms. Sometimes it takes place through the spontaneous spread of legal norms across borders and their adoption within various jurisdictions. In other instances, harmonisation takes place as a result of a deliberate decision by a national lawmaker to copy the rules of another jurisdiction either as a form of importing foreign expertise, where national expertise is lacking, or as part of regulatory competition. When a certain problem is perceived as a transnational problem, countries often get together and enact an international treaty regulating or controlling the problem. Such treaties are often geared towards harmonising the laws of the State Parties in their approach to the perceived problem.

There is yet another method of harmonisation and one that is increasingly in use in numerous areas of the law. This method involves generating soft law norms that are then incorporated by the national legislature into national law. "Soft law"

80 The state-based nature of this solution is captured in the argument of some commentators on harmonisation that "harmonization is intended to, and has the effect of, reasserting state sovereignty" and that harmonisation has the core advantage of not impinging on national sovereignty. Wiener, J., supra note 78, at 37.

81 Legal norms sometimes spread through transnational commercial transactions and their accompanying trade usages and commercial customs. These norms constitute what is called lex mercatoria. Since the present discussion concerns harmonisation of national laws, lex mercatoria and its instruments are not dealt with by the author as means of legal harmonisation. Instead, they are tackled in the next Chapter as forms of private lawmaking. It is important however to note that harmonisation of national laws sometimes occurs as a result of the adoption of such cross-border commercial practices by national legislatures.

instruments include model laws, statements of principles, recommendations, guidelines, codes of conduct and other forms of non-binding instruments. Such soft rules are generated by a wide number of agencies referred to generically as "standard setters" or "formulating agencies."\textsuperscript{83} The nature of the standard-setters varies. This function could be exercised by inter-governmental organisations. Some inter-governmental organisations, such as the United Nations Commission on International Trade Law (UNCITRAL)\textsuperscript{84} and the International Institute for the Unification of Private Law (UNIDROIT)\textsuperscript{85}, are established specifically for the purpose of harmonising a specialised area of the law. Other inter-governmental organisations, such the International Monetary Fund (IMF) and the World Bank, exercise this function as part of a much broader mandate. A number of non-governmental transnational organisations and professional associations have started playing an important role in standard-setting. These include the International Chamber of Commerce (ICC) and the International Bar Association (IBA).\textsuperscript{86}

The multiplicity of formulating agencies is proving to be an obstacle to the efforts towards harmonisation. It is to circumvent this obstacle in the area of trade law that the UNCITRAL was created.\textsuperscript{87} Its primary purpose was to co-ordinate the conflicting activities of various standard-setters in this field. The efforts of the UNCITRAL in this regard include keeping abreast with and documenting the efforts of other agencies, participating in their meetings and encouraging mutual consultation. These efforts are however often defeated by competitive spirit, turf protection and self-justification.\textsuperscript{88} Despite its drawbacks, harmonisation through soft law remains the more favoured method. This is due to the flexible and expeditious nature of the process of creating soft law instruments and also due to the fact that the adoption of these instruments does not circumvent the national democratic processes.\textsuperscript{89} The latter argument does not hold though in cases where such standards are imposed on the States through techniques such as conditional lending, as will be discussed in the context of supranationalism in Chapter Six below.

\textsuperscript{83} This term was coined by Clive Schmitthoff in his book Commercial Law in Changing Economic Climate (1981) at 24. Cited in Mistelis, L., \textit{id.}, at 3-36 and footnote 70.
\textsuperscript{84} For a review of the role of the UNCITRAL, see Hermann, G., "The Role of the UNCITRAL", in Fletcher, I., \textit{et al.}, supra note 75, 28-36.
\textsuperscript{85} On the role of UNIDROIT see Krone, H., \textit{supra} note 82, 59-72.
\textsuperscript{86} Mistelis, L., \textit{supra} note 79, at 18-19.
\textsuperscript{87} Hermann, G., \textit{supra} note 84.
\textsuperscript{88} \textit{Id}.
\textsuperscript{89} Froomkin, M., \textit{supra} note 79, at 624.
The global integration of financial markets has made regulatory harmonisation more pressing in this sphere. Harmonisation efforts in this area are clearly coincident with the beginnings of globalisation in the early 1970s. The leading institution in this field is the Basel Committee on Banking Supervision. The Committee issued its "Basel Concordat" in 1975, which could arguably be described as the first harmonisation document in this field. The document provided recommendations on the supervision of banks that operate internationally. Over the past three decades, other institutions joined in the efforts to harmonise and set standards for financial regulation and supervision. These include the International Organization of Securities Commissions (IOSCO), the International Association of Insurance Supervisors (IAIS) and the Financial Action Task Force (FATF). Signs of the problem of conflict mentioned above started to emerge and the Financial Stability Forum came into being for the purpose of introducing a degree of co-ordination.

The route of financial regulatory harmonisation is an interesting one. Standards are set by the various standard-setters in the form of non-binding statements of principles, recommendations and committee reports. These soft-law rules are then transmitted to national jurisdictions through various processes. For example, through the common membership between the Basel Committee and the European Union, the Basel recommendations were closely followed in the Council Directives on capital standards. This process has resulted in hardening the soft recommendations of the Committee into European Community law. The recommendations spread further to Central and Eastern Europe, especially to the countries seeking accession to the European Union. Conditional lending by the International Monetary Fund and the World Bank served as another method of transmitting the financial regulatory principles to less developed countries. These mechanisms, in addition to the voluntary

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90 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 of representatives of the central banks and other financial supervisory authorities of the eleven member countries of the G10 and Luxembourg. For a detailed account on the work of this Committee and its history see Norton, J., Divising International Bank Supervisory Standards (1995), Chapter Four; Walker, G., International Banking Regulation: Law Policy and Practice (2001), Part 1.


93 For a brief discussion see Follak, K., "International Harmonization of Regulatory and Supervisory Frameworks" in Giovanoli, M. (ed.), supra note 91, at 306-313. For more detailed discussion, see also references. supra note 90.

94 Follak, K., id., at 306.
adoption of the regulatory principles, have produced significant regulatory harmonisation worldwide.\textsuperscript{95}

An urge for harmonisation is also manifest in criminal law. As the strictest form of legal coercion and as a statement of moral condemnation, criminal law is the ultimate expression of State sovereignty and is closely tied to national systems of values. Differences in the systems of values have resulted in differences in legal arrangements at all levels of criminal law. National laws differ in their criminal investigative procedures, in the rules of evidence they apply, in the penalties they impose, in their decision to criminalise, in the definition of offences and the determination of their gravity. The rift between countries that still impose capital punishment and countries that abolished it is only one example. Other examples include offences that are known in some jurisdictions and not known in others, such as insider dealing.

In a porous world these differences have a great impact on the effectiveness of national penal systems. One example may illustrate the point. If pornography is a criminal offence in country A and not so in country B, pornographic images posted on the Internet at a server in Country B are as likely to violate the anti-pornography criminal statutes in Country B as any local distribution of pornographic images is likely to do. This is due to the \textit{borderless} nature of the medium. The effectiveness of Country A’s criminal laws that regulate pornography is most served by a cross-border harmonisation of criminal law prohibiting pornography. It is also evident from this example that consensus on such issues is not attainable considering the cultural and philosophical underpinnings of different legal systems.

The sovereign character of penal law has meant that technically it stayed outside the scope of competence of "Community Law" in the European context. In 1974, the European Commission noted in its "Eighth Report of Activities" that penal law "is a subject which does not as such enter the Community's sphere of competence, but remains within the province of each Member State."\textsuperscript{96} Despite this formal exclusion of criminal law from the scope of Community competence, Community influence has infiltrated criminal law through various mechanisms triggering an

\textsuperscript{95} This is not to suggest that harmonisation in this context amounts to actual unification. Differences persist due to structural differences between the various markets.

imperfect process of harmonisation. The dynamics of this process can be helpful in illustrating the issues pertaining to harmonisation of criminal law in general. The reason for this infiltration is twofold: at one level it is the natural outcome of the existence of important Community interests, i.e.; supranational interests that require protection. At another level, it is the result of the threat of transnational crime to the national interests of Member States and the facilitative effect of the "Internal Market" on this form of criminality.

The most obvious European Community interest requiring the protection of criminal sanction is the financial interests EU. Assaults on this interest have been found to possess certain characteristics. The assaults normally reflect a high degree of organisation, rely on sophisticated techniques of concealment involving the use of fictitious entities and commercial concerns, and finally they are normally of transnational character spreading over a number of countries. A direct link has been observed between this transnational character and the growth of the internal market.

In order to provide penal protection to this supranational interest, Member States opted for granting the financial interests of the Community treatment equal to that of their national interests. This meant extending national criminal laws to acts of assault on the financial interest of the Community. This assimilation between national interest and Community interest was initially granted voluntarily by Member States. Subsequently, the European Court of Justice (ECJ) interpreted the EC Treaty obligation to "take all appropriate measures, [...] to ensure fulfilment of the obligations arising out of this Treaty[...]" as imposing an obligation to assimilate. Article 280 of the Treaty establishing the European Union as amended by the Amsterdam Treaty affirmed this ECJ rule.

This method of harmonisation was not, however, sufficient. Mere extension of national penal law to Community interests, while introducing new criminal offences in the different Member States, left in tact the variations between the national laws of different countries. This undermined the effectiveness of the system of protection and

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97 On the various mechanisms and the legal basis for this Community-based penal law see id.
98 Id., at 102
99 Id.
100 Article 10 (ex Article 5) of the EC Treaty, supra note 20.
102 Article 280 (2) (ex Article 209) "The Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter affecting their own financial interest."
permitted the offenders a chance to exploit these variations to defeat the protection. In response, two other mechanisms of harmonisation were attempted. The first mechanism involved enacting a Convention for the Protection of the Financial Interests of the Communities (PFI Convention). The main purpose of the Convention was to unify the definitions of the acts constituting an offence against the financial interests of the Communities. The Convention also attempts to achieve a degree of harmonisation with respect to the penalties involved and the allocation of responsibility. The Convention was criticised as providing insufficient unification and harmonisation. It was also feared that failure to address questions of harmonisation of rules of procedure and evidence is likely to "paralyse penal co-operation."\(^{103}\)

The second method of harmonisation was envisioned by a group of experts, commissioned by the European Commission, who proposed the creation of a Corpus Juris for protecting the financial interests of the EU as a supranational penal code.\(^{104}\) As a supranational code it would have the advantage of direct applicability. The Corpus addresses both substantive and procedural rules. In terms of the substantive rules, it introduces not only unification of definition of offences but also unification of penalties, thus going beyond the PFI Convention. In terms of the procedural aspect it proposes a supranational system including European public prosecutor office and hybrid system of so called "confrontational proceedings" aiming at solving the perennial conflict between the adversarial and inquisitorial systems of criminal procedure.\(^{105}\) The latter rules would represent deep harmonisation between the European procedural laws confined to a specific area of criminal justice, namely fraud against the financial interests of the Community.

This harmonisation project is advocated as necessary for the protection of the supranational interest of the Community. In the words of the lead expert of the project "the only way to combine the three virtues -justice, simplicity and efficacy -is via the unification path."\(^{106}\)

In addition to the attempts to protect the Community interest through harmonisation, this technique was also attempted in order to protect the separate but

\(^{103}\) Delmas-Marty, M., supra note 96, at 109.
\(^{105}\) Delmas-Marty, M., supra note 96.
\(^{106}\) Id., at 110.
common interests of the Member States against transnational criminal threats. The Council Directive on Prevention of the Use of Financial System for the Purpose of Money Laundering offers one example of this type of harmonisation.\footnote{\textcopyright 107 Council Directive 91/308/EEC, Doc. 391L0308 (10 June 1991).} Because of the lack of competence to enact penal law, the directive imposes on the Member States an obligation to prohibit money laundering.\footnote{\textcopyright 108 Id., art. 2} It does not indicate the nature of this prohibition. The Preamble to the Directive, however, states that "money laundering must be combated mainly by penal means." Article (1) of the Directive adopts the Vienna Convention definition of money laundering while extending it beyond drug money laundering to "any other criminal activity designated as such for the purpose of the Directive by each Member State." The degree of harmonisation achieved by this Directive is limited. By deferring to Member States to designate the predicate offences, it left ample scope for differences between Member States. The Directive also does not address any other aspects of harmonisation. In justifying its intervention in this area, the Preamble emphasised particularly the transnational character of money laundering and the facilitative effect of the liberalisation of capital movement and financial services.

The interests that triggered harmonisation of criminal law in the European context are equally applicable at the international level. The global nature of certain threats creates global interests that require the protection of penal law. Creating parallel crimes across jurisdictions provides one solution. Further, the transnational character of crime, as illustrated in the example of Internet pornography, creates another situation where harmonised criminal law can offer a solution. It is in order to address such concerns that international criminal law has emerged.\footnote{\textcopyright 109 For a general discussion of the development and ambit of international criminal law see Schwarzenberger, G., "The Problem of an International Criminal Law" \textit{3 Current Legal Problems} 263} It is a treaty-based branch of international law that typically imposes a duty on State Parties to criminalise certain types of conduct. The development of international criminal law has been incremental. The decision to elevate a certain conduct to the status of international crime has stemmed from different concerns.

In certain instances, the decision to criminalise on international basis stemmed from a desire to protect a collective interest. The safety of the high seas represents an example of such interest. In order to protect it, a customary international rule has
emerged imposing upon all States a duty to criminalise and to assume jurisdiction over pirates' conduct. Piracy is normally conducted in high seas. It offends against the common interest of all States in safe trade routes and yet it does not fall within the jurisdiction of any State to prosecute. This provides an incident of harmonisation as a solution to the governance vacuum that emerges once a conduct takes place beyond the jurisdiction of any particular State.

In other instances, the decision to harmonise the criminalisation of certain conducts stemmed from the desire to enhance the effectiveness of national jurisdictions in their pursuit of a conduct that offends against their national laws. A prime example of this rationale is the international efforts to control illicit traffic in drugs. Controlling drug trafficking is a national interest common to many if not all States. The transnational character of drug trafficking activities has resulted in repeated attempts at harmonising national approaches to this problem through international treaties. These efforts have culminated in the Vienna Convention 1988.\footnote{United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), 28 ILM 493 (1989). \textit{See supra} Chapter Two, Section 3.4.}

The sovereign character of criminal law and its close link to local values and concepts of justice have resulted in the incorporation of the principle of \textit{dual criminality} in the operation of international co-operation in penal matters.\footnote{Wyngaert, C., "Double Criminality as a Requirement to Jurisdiction", in Jareborg, N. (ed.), \textit{Double Criminality: Studies in International Criminal Law} 43 (1989).} The principle of dual criminality is both a condition for extraterritorial jurisdiction and a requirement for international co-operation. In the former case it means that the conduct should be punishable both in the country assuming extraterritorial jurisdiction and in the country where the conduct has actually taken place. In the latter case, it means that the conduct should be punishable in the country requesting the cooperation and the country recipient of the request.

The requirement of dual criminality renders harmonisation of criminal law a requisite for effective co-operation in penal matters.\footnote{For a discussion of dual criminality as a requirement for international co-operation \textit{see} Stessens, G., \textit{Money Laundering: A New International Law Enforcement Model} (2000), at 287et seq.; Nadelman, E., \textit{supra} note 41, at 411-414.} This requirement has provided an incentive for various harmonisation efforts at the international level, as the case is with respect to international efforts to criminalise money laundering. The persistence of national differences in the definition of offences and the rules of criminal liability

has induced both scholars and policy makers to argue for and endeavour to dilute the principle of dual criminality. This is most evident in the context of mutual legal assistance where there is a growing shift towards abandoning the requirement of dual criminality for the sake of more effective co-operation.\footnote{Stessens, G., \textit{id.}, at 287 \textit{et seq.} The author argues for the removal of the dual criminality requirement in the context of mutual legal assistance.}

Harmonisation provides a favoured solution for the problem of governance in a global context. This is due to the fact that it is in essence a co-operative method that respects the national sovereignty of each State. As such, it does not offend against the existing principles of the Westphalian system. It has however been criticised on account of its lack of effectiveness at occasions, where a deeper degree of harmonisation is needed and the deeply ingrained differences between national systems does not permit it. Methods of harmonisation through treaty-making or technocratic standard-setting that seek to regulate private conduct has also been a source of concern with regard to its democratic deficit. The problems become more acute when harmonisation takes a more aggressive form through supranational structures, as will be discussed in Chapter Six of this volume, or through unilateral actions of a more powerful jurisdiction.

Harmonisation has been advocated as a method of improving national legal systems through the importation or exportation of better quality norms. This argument is particularly asserted with respect to harmonisation that is based on the adoption of international standards. This method however encounters the well-known shortcomings inherent in any process of legal transplant. As one author argues, laws are embedded in the context in which they apply. Merely transplanting international standards within a certain context would not guarantee their effective application. Their failure could stem from inherent contradictions between the newly adopted standards and the general legal system or from lack of understanding of the transplanted rules because of their alien character. Such process could thus result in undermining the development of an effective legal system that is responsive to local needs and local culture.\footnote{Pistor, K., \textit{The Standardization of Law and its Effect on Developing Economies}, G-24 Discussion Paper Series (2000).} Other commentators have also argued in favour of regulatory competition as opposed to regulatory harmonisation.\footnote{On this argument see Sykes, A., "The (Limited ) Role of Regulatory Harmonization in International Goods and Services Markets" \textit{2 Journal of International Economic Law} 49 (1999); Baum, H., \textit{supra} note 74, at 101 \textit{et seq.}}
The trend towards growing harmonisation confirms the need and the viability of such mechanism. The success however is contingent on selecting the contexts in which harmonisation is necessary and also selecting the methods of achieving harmonisation. "Top-down" harmonisation that is sometimes exercised by more dominant jurisdictions ignores the validity of the argument advanced in the previous paragraph and that when all is said and done the enforcement of the law remains a national institution. The success of this institution is contingent on the consistency of the legal norm with the national system and the acceptance of the norm within this system.

4.2. Convergence in Money Laundering Law

Chapter Two of this volume provided a chronology of money laundering law. It has been demonstrated how money laundering law moved from the domestic context of the United States into the international context through instruments such as the Vienna Convention (1988) and the Basel Principles of the same year. In the 1990s the spread of money laundering law took a more aggressive supranational direction. The mechanisms of that regime as it formed in the 1990s will be subject to more extensive analysis in Chapter Six. The internationalisation and supranationalisation of money laundering have been driven by the 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. This belief is consistent with the rationales of harmonisation as a response to globalisation as discussed above.

This Section is dedicated to outlining the paradigmatic elements of the present system of money laundering control and prevention. It is however important to note that variations in money laundering laws still exist and differences in implementation often accentuate them or even create new ones. Nevertheless, one can still speak of a money laundering control model or paradigm. Such differences are indicated in the discussion below.

Money laundering control strategy has four prongs: (1) criminalising 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

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116 See supra Chapter Two, Sections 3.4. and 3.5.
co-operation. The following few paragraphs elaborate on these four aspects of money laundering control strategies with reference to national differences.

4.2.1. Criminalising Money Laundering:
As it has been indicated above money laundering was not considered a criminal offence until 1986 when it was criminalised in both the US and the UK. 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 prevailing definition of the elements of the offence remains that of the Vienna Convention 1988. The offence of money laundering established by the Convention is very narrow in that it applies only to property derived from drug-related offences. However, it is very broad 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 also defined very broadly to include any possible kind of asset. 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 and 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. It is now common to extend the offence of money laundering beyond the scope of drug-related offences. In doing so, countries adopt

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117 See supra Chapter Two, Section 3.
118 The Vienna Convention 1988, supra note 110, art. 3(1)(b).
119 Id., art. 1(p).
120 Id., art. 3(1)(b).
121 Id., art. 1(q)
different approaches. Some extend it beyond this scope to all serious offences while others extend it to a specific 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{122}

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, 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 he 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 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{123}

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 raises the issue of corporate criminal liability. If financial institutions are to be discouraged from getting involved in money laundering their criminal liability needs to be addressed. Countries differ greatly on the question of criminal liability of corporations. While some accept it and design sanctions that are consistent with the non-corporeal nature of legal persons, others reject this liability on basis of the general principles of their 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


\textsuperscript{123} Vienna Convention 1988, supra note 110, art. 3(3).
legal system of the country concerned. This makes corporate criminal liability a third issue that the legislature of a country should address in a criminal law of money laundering.

4.2.2. Tracing, Freezing and Confiscation

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. 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 specially in an era of instantaneous global money transfers.

However, where confiscation rules are drawn too narrowly so 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, is an enforcement instrument of economic criminal law. One central rationale for this prohibition is to prevent circumvention of forfeiture laws. 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 Vienna Convention 1988, "confiscation" means "the permanent deprivation of property by order of a court or other competent authority." 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. The Convention also imposes on the parties the

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125 Vienna Convention 1988, supra note 110, art. 1(f).
126 Id., Art.5 (1)(a) & (b)
duty to take necessary measures to enable the identification, tracing, freezing or seizure of such proceeds or instrumentalities.\textsuperscript{127}

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.\textsuperscript{128}

4.2.3. Regulatory Convergence

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 US Banking Secrecy Act of 1970, which imposed a number of regulatory reporting requirements and its legislative history.\textsuperscript{129}

The Basel Committee on Banking Supervision confirmed this concern in its Statement of Principles discussed above.\textsuperscript{130} The third prong of money laundering law includes regulatory policies that are often classified by analysts of money laundering control regimes as preventive, as opposed to control policies of criminalisation and confiscation, which were discussed above. As indicated by the Basel Principles 1988, financial regulatory measures are crucial for the enforcement of criminal and confiscatory measures. The regulatory model comprises of the following aspects:

(a) Authorisation Requirements

The FATF provided in Recommendation 29 that "the 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

\textsuperscript{127} Id., art.5 (2)  
\textsuperscript{128} See generally Stessen, G., supra note 112, at 29-82.  
\textsuperscript{129} Supra Chapýer Two, Section 2.1.
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.¹³¹

(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."¹³² The Recommendations also provide that reporting based on the unusual character of the transaction is also sufficient, provided that it captures or instances of suspicious transactions.

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 US and Australia, and was rejected by the UK as likely to result in excessive reporting that overburdens the law enforcement agencies.

¹³⁰ See Supra Chapter Two, Section 3.5.
¹³² Id., Recommendation 15.
(d) Record-Keeping

The primary purpose of 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 record of the identity 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.

4.2.4. International co-operation:

International co-operation is crucial for money laundering. Transnationalising the laundering process offers the launderer substantial benefits. It allows the offender 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.

The FATF, aware of the transnational character of money laundering, dedicated Recommendations 30 to 40 to the question of strengthening international co-operation. The elements of international co-operation in the prevention and control of money laundering are discussed in more detail in the next section. In the present context it is important to note that a degree of harmonisation was required in order to facilitate international co-operation. In this regard, the FATF recommended that States should establish money laundering offences as basis for mutual legal assistance. Members were also encouraged to establish a network of multilateral and bilateral agreements in this regard. It was also proposed in Recommendation 40 that countries should establish money laundering as an extraditable offence under their laws and any extradition agreements to which the country is a party.

Harmonisation attempts were not confined to the substantive aspects of criminal law. At the investigative level, FATF recommended that countries should establish "controlled delivery" relating to criminal assets as an investigative

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133 Id., Recommendation 14.
135 Id., Recommendation 33.
technique. FATF perceived this technique as valuable for investigating certain offences as well as further understanding money laundering techniques more generally.

In conclusion, controlling and preventing money laundering has provided an impetus for harmonisation in various areas of the law: criminal law, financial regulation and international co-operation arrangements. Harmonisation in all these areas was perceived as instrumental for enhancing the effectiveness of money laundering laws and hence the enforcement of economic criminal laws in general. Unless a supranational legislative and regulatory body exists, e.g., in the context of the European Union, harmonisation is never complete. It is for this reason that money laundering laws remain to a certain degree divergent and a number of policy options remain available for the domestic regulatory and legislative bodies. The extent of harmonisation achieved remains substantial, especially in view of the short life of this body of the law. This was not achieved without some cost to principles of international law and democracy. Forceful methods to impose harmonisation upon weaker jurisdictions are discussed in Chapter Six of this volume.

5. Enforcement Co-operation: A Traditional Solution with New Features

International co-operation is a very broad concept. It can encompass all efforts at policy co-ordination, harmonisation, international institutional arrangements, and treaty-based extension of national jurisdiction, such as the creation of universal jurisdiction for crimes against humanity. This is only a non-inclusive list of possibilities for international co-operation as a mechanism for solving the governance problematic in a global context. It is therefore necessary to delimit the scope of this mechanism for solving global governance vis-à-vis the other mechanisms suggested in this volume.

This solution is strictly concerned with the mutual co-operation between States in the enforcement of their respective laws and regulations. It is not concerned with making these national laws similar, consensually extending their reach or jointly creating supranational institutions to manage the tasks of governance. As it has been repeatedly indicated, enforcement jurisdiction remains strictly territorial and upon it depends the effectiveness of both prescriptive and judicial powers of any State.

136 Id., Recommendation 36.
Absent a form of a World State, a supranational enforcement system is not a likely option. States, thus, are left with the only option of co-operating and the efficacy of their legal orders is increasingly contingent on the success of such arrangements.

5.1. International Enforcement Co-operation: The Broad Context

The ultimate goal of criminal justice is to control crime. Under current criminal justice systems, there are two approaches to achieving this ultimate goal. The first is based on removing the capacity of criminals to commit crime by imprisoning them and forfeiting the instrumentalities of the crime. The second approach is specific to economically motivated crimes and is based on removing the incentives to commit crime by stripping the offender of the benefits of criminal activity through the confiscation of the criminal proceeds. In order to achieve the goal of criminal justice through either of those approaches, laws now are in place criminalising activities, attaching prison sentences and other sentences and empowering the courts to order the confiscation of assets.

Enforcing such criminal laws requires detecting a violation, identifying the offenders, establishing their whereabouts, arresting them, gathering evidence sufficient to indict them, prosecuting them and finally imprisoning them. Where there are forfeitable assets other enforcement actions are required including identifying the assets, locating them, tracing them to the offence, seizing and finally forfeiting the assets. In many cases these steps are all conducted within the boundaries of a single State. In the present context, a growing number of offences are taking transnational or even global dimensions with the implication that evidence, offenders and assets are often located beyond the territory of the State. The need for effective methods for gathering evidence abroad, arresting offenders located outside the jurisdiction and seizing assets in foreign countries has become increasingly compelling.

Powerful jurisdictions such as the United States have sometimes resorted to extraterritorial application of their local enforcement processes, such as issuing subpoenas to the local branches and employees of multinational corporations requiring them to produce documents held by their foreign branches. Unilateral measures however are of limited effectiveness because of the resistance they induce in foreign jurisdictions. Hence, co-operative mechanisms become a necessity. Several

mechanisms were devised to meet each of the law enforcement needs. They have been identified by a leading expert in the field of international criminal law as including: extradition, mutual legal assistance in penal matters, transfer of prisoners, seizure and forfeiture of illicit proceeds, recognition of foreign penal judgements, and transfer of penal proceedings. Collectively they may be referred to as modalities of international co-operation in penal matters.

International co-operation in penal matters has gathered significant momentum in the past three decades. These developments naturally coincided with globalisation trends especially in capital markets. The first evidence of this coincidence is to be found in the fact that, apart from extradition, all the other forms of co-operation have emerged in the post-war period and particularly since the 1970s. The history of regional multilateral co-operation in penal matters in Europe dates back to 1957. One author reviewing these developments in Europe characterised the period from 1961 to 1971 as one of innovation and the period from 1972 to 1990 as one of expansion of co-operation and improvement. The United States has been particularly aggressive in pursuing its law enforcement goals internationally. Developments in the United States provide an evidence of the degree and history of the increased momentum in this area. For example, it was in the mid-1980s that the Securities and Exchange Commission established its special office for handling enforcement matters. Also, between 1979 and 1990, the United States national central bureau of Interpol increased its personnel from 60 to 110 and its budget from $125,000 to 6,000,000. Between 1976 and 1986, the bureau's caseload increased from 4,000 to 43,863.

International co-operation in penal matters finds its legal basis in bilateral and multilateral treaties and in national laws. Because of the intrusive nature of criminal enforcement, both on individual rights and on State sovereignty, co-operation

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139 This history starts with the European Convention on Extradition, Europ. T.S. No. 24 (1957).


141 See generally on the U.S. law enforcement efforts abroad, Nadelmann, E., supra note 41.

142 Id., at 3.

143 Id.

144 Id., at 4.

145 For a critique of this fragmented nature of international criminal enforcement law and an argument for integration see Bassiouni, C., Supra note 138.
arrangements have always been circumscribed by various limitations and exceptions as well as strict procedural requirements. The principle of double criminality is one traditional condition to international co-operation. The gist of this principle is that co-operation could be denied if the act for which the co-operation is sought does not constitute an offence under the law of the requested State.\textsuperscript{146} Other conditions of co-operation pertaining to the offence include the exclusion from the scope of co-operation: political, military and fiscal offences. Most co-operation agreements grant the States the right to decline to co-operate if it would prejudice the security or other essential interests of the requested States. Further, the speciality principle restricts the requesting State in its use of the help provided by the requested State. According to this principle, the requesting State may only use the information provided for the specific purpose defined in its formal request and not any other. The same applies to the case of extradition, which means that the extradited person may only be prosecuted for the offence specified in the extradition request.

These rules and principles as well as the procedures for the execution of requests for co-operation constitute restrictions on the flow of co-operation between States in penal matters.\textsuperscript{147} The pressing needs of international co-operation in the present context and the speed with which assets, information and individuals can move between jurisdictions have brought these obstacles under closer scrutiny by scholars, policy makers and law enforcement officials. Despite the scrutiny and criticism, the restrictive principles and procedures still persist mainly because of the importance of the interests and values they actually or seemingly protect. Two trends can, however, be discerned. First, there is a growing tendency towards relaxing some of the restrictions in certain contexts of international co-operation. Second, there is a trend towards informal direct co-operation between law enforcement agencies.

The first trend is manifest in the evolution of the "political offence" principle. Once a universally accepted exemption from co-operation, it has been gradually diluted since the 1970s as a result of growing concern over transnational terrorism. The trend took the form of excluding from the scope of political offence a growing


number of offences. In the European context, for example, the European Convention on the Suppression of Terrorism excludes from the scope of political offence for the purpose of extradition a number of acts including: unlawful seizure of aircraft, unlawful acts against the safety of civil aviation and the broad category of any endangerment of persons involving the use bombs and firearms. For the purposes of mutual legal assistance, the Convention goes one step further by excluding the political offence exemption for all the acts included in its articles 1 and 2. This excludes all categories of violent offences that involve the endangerment of persons. A similar approach has been adopted in the United States since the U.S.-U.K. Supplementary Extradition Treaty was signed in June 1985. Since then the U.S. has sought to extend the limitations to other extradition treaties of which it is a party.

In the same vein, many countries now exclude international crimes, such as war crimes, genocide, piracy and crimes against humanity, from the scope of the "political offence" exemption. Also, the United Nations Convention for the Suppression of Terrorist Bombing (1998) provides that State Parties should ensure that criminal acts within the scope of the convention are not justifiable by political, ideological, religious or other considerations. The trend towards restricting the scope of the political offence exemption does not mean that the exemption has been totally abandoned. "Purely political offences" such as offences of opinion and public expression remain squarely covered by the exemption. Further, the restriction of the exemption remains more or less confined to countries with developed democratic systems. This is evidenced in the fact that the Council of Europe Convention on the Suppression of Terrorism is only open for signature by member countries of the

149 Europ. T.S. No. 90.
150 Id., art. 1. Article 2 of the Treaty grants the State Parties the discretion to remove from the scope of the exemption any offence violence apart from those specifically covered by Art. 1.
151 Id., Art. 8.
156 Id., art. (5).
This is unlike other Council of Europe conventions, which are open for signature by non-member countries. Also, the United States Senate has specifically advised the President not to negotiate a restriction of the scope of the political offence distinction with totalitarian and non-democratic regimes.

The trend in favour of relaxation of traditional exceptions to international co-operation is not confined to the "political offence" doctrine. Similar trends could be observed with regard to other key exceptions and restrictions on co-operation such as the principle of dual criminality and the principle of speciality. The pressure to abandon or to restrict traditional limitations and exemptions continues to stir strong debate within the field of International Criminal Law. The resistance to total abandonment of the traditional doctrines in the developed democracies is predominantly grounded in concern for human rights. The fear is that abolishing these principles might result in undermining the fundamental rights of the subject to the proceedings. Unlike other solutions to the governance problematic, this concern is less threatening. This is primarily due to a parallel trend in the law on international co-operation in criminal matters, which links human rights norms to international co-operation in penal matters and gives these norms direct applicability to the processes of co-operation. In the European context, this means that the individual subject to the process can rely directly on human rights norms even when they are not explicitly incorporated in the law and treaties governing the co-operation.

The second trend in international co-operation in penal enforcement is a tendency towards informal channels of co-operation. The informality in this context

157 Europ. T.S. No. 90, art. (11).
159 See contributions in Eser, A., and Lagodny, O., (eds.), supra note 147.
160 Blakesley, C., supra note 153. In arguing against the dilution of the political offence exemption, the author relied on the need for judicial determination of matters pertaining to fundamental rights and freedoms.
163 This principle has been established in the Soering case, European Court of Human Rights, 7 July (1989) 161 E.C.H.R., A Series.
describes either the fact that co-operation is not based on any specific statutory or treaty-based authority, or the fact that even where such authority exists the procedural requirements are minimal. Informal co-operation can take many forms including posting law enforcement officers abroad with the mandate of liaising with local counterparts.\textsuperscript{164} It also includes establishing joint task forces to investigate transnational cases.\textsuperscript{165} Scholars and law enforcement experts have often lamented the absence of a modality for international co-operation in the gathering of intelligence necessary for the detection of crime.\textsuperscript{166} Existing modalities for co-operation focus on the advanced stages of evidence gathering that are associated with the prosecution for an offence and ignore the necessary stage of intelligence gathering. Recent instruments however aim at addressing this vacuum and encourage flexible forms of information sharing. Article (9) of the Vienna Convention 1988 provides for such co-operation by encouraging Parties to "Establish and maintain channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information[.]" In view of their novelty, the exact scope and impact of such arrangements is yet to be assessed.

Regulatory enforcement shows similar trends towards cross-border co-operation. Both the Basel Committee on Banking Supervision and the International Organization of Securities Commissions have published general principles for co-operation between regulatory and supervisory agencies in different countries.\textsuperscript{167} This need for supervisory co-operation stems from the increase in financial institutions that conduct their business across-national borders and within the jurisdiction of different supervisory authorities. In terms of formality, different countries prefer different approaches. While some countries opt for more legalistic bilateral and multilateral frameworks for co-operation others opt for more flexible instruments such as the Memorandum of Understanding (MOU).\textsuperscript{168} The latter seems to be the more preferred approach in the area of securities regulatory enforcement. It is however important to note that regulatory authorities may remain bound by restrictions on information

\textsuperscript{164} Nadelmann, E., supra note 112, at 107-111. Discussing models of transnational policing.
\textsuperscript{165} Article 9(1)(c) of the Vienna Convention 1988 provides specifically for this form of co-operation.
\textsuperscript{166} Bassiouni, C., supra note 30, at 8.
\textsuperscript{168} Basel Committee, \textit{id.}, at 1. According to the IOSCO Principles, Memoranda of Understanding "are statements of intent which do not impose legally binding obligations on signatories." IOSCO, \textit{id.}
sharing that are proscribed in their national laws. In the context of their co-operation they are required by international standards to advise the counterpart of any such limitations.

In sum, mutual co-operation in the enforcement of national laws is an obvious and commendable method for bridging the governance gap created by globalisation. This wisdom did not escape policy makers and enforcement agents who have engaged in an incessant effort to establish nets of inter-state co-operation. The speed with which economic activity crosses borders has created pressure to speed up the processes of co-operation. The result was trends towards dismantling traditional doctrines and procedures that limit or slow down the process. The exceptions and procedures while somewhat weakened remain resilient. This is mainly because of the pressures of human rights concerns rather than sovereign interests. Similar trends towards co-operation are also evident in the area of financial regulatory enforcement.

5.2. Money Laundering Law Enforcement Co-operation

Money laundering law as an enforcement tool is particularly concerned with crime as a transnational phenomenon. It is argued in this volume that this law aims at addressing the enforcement failures that stem partially from the territoriality of State enforcement jurisdiction vis-à-vis extraterritorial criminality. One obvious tool in this regard is international co-operation in penal matters.

In the historical review of money laundering law, it was highlighted that the emergence of mutual legal assistance as a modality of interstate co-operation in penal matters and the development of bilateral MLATs was directly linked to money laundering concerns and instrumental in dealing with the problem. It was also illustrated that the Vienna Convention 1988 was the primary international instrument that placed this modality on multilateral basis. Other money laundering legal instruments such as the FATF Forty Recommendations and the Council of Europe

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169 Basel Committee, id., at 1.
170 Id.
171 In describing the general framework of the FATF provides that: "An effective money laundering enforcement program should include increased multilateral cooperation and mutual legal assistance in money laundering investigations and prosecutions and extradition in money laundering cases, where possible. FATF, The Forty Recommendations (1996), Recommendation 3.
172 See supra Chapter Two, Section 2.3.
173 See supra Chapter Two, Section 3.4.
Laundering Conventions also dedicated substantial attention to the question of mutual legal assistance and international co-operation more generally.\textsuperscript{174}

This section addresses international co-operation as one of the instruments utilised by money laundering law to solve the governance problem confronted by the State in its attempt to control and to prevent criminal activity. This section describes the objectives international co-operation in the context of money laundering law and the modalities of this co-operation. It then goes on to discuss critically the informal information sharing and transnational co-operative arrangements as non-traditional forms of co-operation intensively employed in the context of money laundering law.

5.2.1. Purposes and Modalities
Generally, international co-operation in the enforcement of money laundering laws as criminal statutes has the same objectives and modalities as such co-operation in any other context. Money laundering law however possesses certain characteristics that reflect on the objectives and the modalities of international co-operation in certain ways. First, money-laundering laws are proceeds-oriented as opposed to offender-oriented.\textsuperscript{175} In other words, they aim primarily at constructing the money trail and ultimately securing the enforcement of forfeiture and confiscation orders. Second, money laundering laws and regulations are essentially enforcement and investigative tools. As a result of these two features of money laundering laws, international co-operation in this regard often focuses on securing evidence abroad and enforcing confiscation and forfeiture order against assets held abroad.\textsuperscript{176}

This explains the proliferation of MLATs that coincided with money laundering control as an enforcement policy.\textsuperscript{177} MLATs create mechanisms that permit the State, where the investigation is taking place, to use the process of another State, where relevant evidence exists, in order to obtain this evidence. A particular feature of mutual legal assistance that emerged out of the concern for money laundering is the emphasis on removing banking secrecy as an obstacle to co-operation. Since investigating money laundering is often dependent on gaining access to bank records, strict bank secrecy could be detrimental to any such investigation. This emphasis first


\textsuperscript{175} Stessens, G., supra note 112, at 252.

\textsuperscript{176} Id., at 251-252.

\textsuperscript{177}
appeared in the form of prohibition to invoke bank secrecy as grounds for refusing assistance in the Vienna Convention 1988. Article 7(5) provides that: "A Party shall not decline to render mutual legal assistance under this article on the ground of bank secrecy." A similar formula appears in article 18(7) of the Council of Europe Laundering Convention. The FATF places this principle in the general framework of its recommendations by recommending that "Financial institution secrecy laws should be conceived so as not to inhibit implementation of these recommendations."

The second modality of co-operation involves tracing, immobilising and confiscating assets. This is the newest form of inter-state co-operation in penal matters and has emerged directly out of the profit-oriented approach to criminal justice and the globalisation of international finance. This form of co-operation is particularly designed to address the problem that arises when the criminal proceeds are placed outside the territorial jurisdiction of the State that is attempting forfeiture or confiscation. In this case the State, where the suspected proceeds are located, is required to take measures to prevent any transfer or disposal of the assets pending the judicial process relating to them in the requesting State. Considering the speed with which assets could be transferred or removed from the jurisdiction, the efficiency of co-operation in preventing dealings with the assets becomes crucial for the effective enforcement of money laundering law.

Addressing enforcement problems through the use of co-operative arrangements has replaced unilateral procedures such as extraterritorial disclosure orders, which were used by some countries, especially the United States. Unilateral measures were particularly detrimental to the privacy rights of bank’s customers and placed illegitimate burdens on corporations which were faced with the choice of either breaching the laws of their home country or the laws of the country issuing the order.¹⁷⁸

5.2.2. Non-traditional Forms of Co-operation: Informal and Transnational

Money laundering law is an enforcement tool. Its regulatory aspect is geared towards the gathering of information for the purpose of securing the enforcement and preventing the evasion of State laws and regulations. Its penal aspect is concerned

¹⁷⁷ For a discussion of these developments see Bassiouni, C., and Gualtieri, D., "International and National Responses to the Globalisation of Money Laundering", in Savona, E., supra note 134, 107.
¹⁷⁸ On the detriments of the unilateral approach see Stessens, G., supra note 112, at 318-329.
with controlling this evasion and inducing compliance with money laundering regulations. As a result, information gathering and processing becomes a very important dimension of money laundering law. Also, the cross-border character of money laundering activities creates a need for cross-border information gathering and sharing.

The intricacies of this information gathering or intelligence dimension of money laundering law are manifold. First, suspicious transaction reporting and other forms of reporting requirements that are imposed by money laundering regulations generate a voluminous amount of financial data. This data require processing and management. Second, money laundering law, as an enforcement tool, relates to the activities of a variety of enforcement agencies, which requires co-ordination and routing of information to and from these agencies. Third, the data generated and analysed is normally of confidential character and impinges on the privacy rights of individuals. As such, this data requires careful handling in order to safeguard the rights and liberties of individuals and the economic interests of corporations and sometimes even the State. Fourth, the role expected of financial institutions in curbing money laundering is inconsistent with their original function as service providers. It is a role that is not necessarily aligned with their business interests or with their commercial culture.\(^\text{179}\) Again, this conflicting nature of the role of financial institutions requires delicate balancing.

In order to address all these problematic practicalities, it has become a feature of money laundering laws to designate a central agency and vest it with the responsibility for receiving and analysing the financial data and routing it as necessary.\(^\text{180}\) Sometimes this function is given to an already existing government agency such as the ministry of finance, the public prosecutor's office or the police department. In other cases, a special agency is created to handle specifically this


\(^{180}\) On the FIUs and the rationales that led to their creation see Stessens, G., supra note 112, at 183-185; Egmont Group, Information Paper on Financial Intelligence Units and the Egmont Group, at 2-3., available at www.oecd.org/fatf. (last visited March 9, 2002).
function. These agencies are commonly referred to as Financial Intelligence Units (FIUs). The structure, nature and functions of these agencies vary considerably amongst jurisdictions.\textsuperscript{181}

In 1995, an \textit{ad hoc} group known as the Egmont Group came into being comprising of a number of domestic FIUs. Because of the diversity of domestic arrangements for handling financial information relating to money laundering control, the Group directed early attention to the definition of a FIU for the purpose of defining its membership. In 1996, the Group adopted a definition of a FIU as "A Central, national agency responsible for receiving (and, as permitted, requesting), analysing and disseminating to the competent authorities, disclosures of financial information: (i) concerning suspected proceeds of crime, or (ii) required by national legislation or regulation, in order to counter money laundering."\textsuperscript{182} The definition was specifically drafted to distinguish FIUs and to be broad enough so as to include FIUs in all their variations. It is for this reason that the definition focuses on the function of the FIU without reference to its judicial, administrative or police nature or structure.\textsuperscript{183}

The Egmont Group was created with a specific purpose in mind and that is to enhance co-operation amongst FIUs and to expand and systematise the exchange of financial information. It is with this particular aspect that this discussion is concerned. The Group's "Statement of Purpose" starts with recognition of the international nature of money laundering. Throughout its Preamble, the Statement repeatedly emphasises the importance and the need for co-operation and information sharing amongst FIUs across borders. The Preamble also recognises the obstacles that beset information exchange and co-operation amongst FIUs.\textsuperscript{184}

The Egmont Group provides a forum for exchange of information amongst its member FIUs. This multilateral form of co-operation only supplements and does not substitute for bilateral exchange of information amongst Members. This co-operation caters for the need for expeditious sharing of intelligence at an early stage of money laundering suspicion. In a cross-border operation a lag between the suspicion of laundering and the communication of this suspicion to competent authorities abroad might result in conclusively losing the "money trail."

\textsuperscript{181} Stessens, G., \textit{id.}, at 184-190; Egmont Group, \textit{id.}.
\textsuperscript{182} Egmont Group, \textit{Statement of Purpose of the Egmont Group of Financial Intelligence Units} (June 13, 2001). The definition was originally adopted by the Group in their plenary meeting in Rome in November 1996.
\textsuperscript{183} Egmont Group, \textit{id.}

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The exceptional nature of this form of co-operation stems from two facts. The first is that it is not treaty-based unlike traditional forms of judicial co-operation and mutual legal assistance. It is important however to note that article (9) of the Vienna Convention 1988 specifically refers to the desirability of creating channels of communication between competent authorities in State Parties and indicates that such channels should be based on bilateral or multilateral agreements or arrangements. Exchange of information amongst FIUs has been commonly based on Memorandum of Understanding (MOU). MOUs are typically not disclosed publicly, which limits the capacity to assess the practice of information sharing and to understand its contours.\(^{185}\)

The second exceptional feature of the exchange of information amongst FIUs is that it is specifically free of the procedural requirements that are normally attached to mutual legal assistance. This feature, while understandable in terms of need for speed, raises due process and individual rights concerns.\(^{186}\)

There are however certain sources of limitations on the exercise of FIUs of their functions. Like any other domestic agency, FIUs are subject to the restrictions incorporated in the domestic laws that established them. Two restrictions that are common in domestic laws are the principle of speciality and the requirement of confidentiality. The principle of speciality imposes limitations on the use of financial information by FIUs. These limitations are coterminous with the purpose and function of the FIU as envisioned by the law. For example, the Financial Intelligence Unit may be required to restrict its use of the information for the purpose of detecting money laundering and in that sense may be barred from using the information to aid the enforcement of tax laws. Confidentiality, on the other hand, requires FIUs to keep any information confidential and to disclose it only in accordance with the conditions and for the purposes specified in the law.

These restrictions of speciality and confidentiality also apply to the cross-border exchange of information. According to the Egmont Group's "Principles for Information Exchange," any information exchanged may only be used for the specific purpose for which the exchange was made. Further, any information exchanged must be subject to safeguards that ensure that it is used in a manner consistent with privacy and data protection laws. The Principles apply a national treatment principle requiring

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\(^{184}\) Egmont Group, supra note 182.

\(^{185}\) Stessens, G., supra note 112, at 269.

\(^{186}\) Id., at 258-278.
that the information received should be accorded the same standard of protection that
is afforded to similar information from domestic sources obtained by the receiving
FIU. The State providing the information may impose in its bilateral MOU higher
privacy standards than those available under the laws of the requesting State.

The standards governing the exchange of information under these informal
arrangements are lower than those imposed under MLAT. For example, there is no
dual criminality principle and the exchange does not necessarily pertain to a specific
criminal proceeding. These variations stem essentially from the different functions
that these arrangements serve. While MLATs are used for gathering evidence in the
context of particular criminal proceedings, FIUs' information sharing is of an
intelligence nature that precedes any charge or criminal proceeding. It, however,
remains a possibility that this informal information sharing could be used as an easier
alternative to mutual legal assistance mechanisms as a method of collecting evidence.
In order to safeguard against this possibility, it has been recommended that informal
assistance should be denied where the requesting State has already initiated criminal
proceedings or investigation. Such condition should be placed on statutory basis or
included in the MOU governing the co-operation.

In summary, international co-operation arrangements have been an integral
part of money laundering law since its inception. This is an immediate result as well
as an evidence of the cross-border nature of money laundering operations that loomed
large in the minds of money laundering lawmakers. Facing a situation of
extraterritoriality that challenges the enforcement jurisdiction of the State, co-
operation with similarly threatened States becomes an obvious solution.

The specific nature of money laundering law as an enforcement tool of laws
that are economic in nature has resulted in the rising importance of two modalities of
international co-operations. The first is mutual legal assistance and the second is
seizing and freezing assets and eventually the enforcement of confiscation or
forfeiture orders. In addition to these formal and treaty-based co-operation
arrangements, other forms of informal co-operation have emerged. A new specie of
government agencies vested with the powers to collect and analyse the financial data
under money laundering laws have created their own transnational community and
developed their own arrangements of cross-border exchange of information. Like

other informal arrangements that forego procedural safeguards, individual rights become vulnerable. However, in this case other restrictions and mechanisms were incorporated that introduced a number of safeguards without compromising the considerations of efficiency and effectiveness. In view of the novelty of these arrangements, the effectiveness of the specified safeguards remains to be assessed.

6. Conclusion
In order to reassert its authority and to establish order in an era of accelerated globalisation, the State has resorted to some seemingly traditional instruments of governance. Its instrumentalities in this regard included: (1) defensive instruments such as de-globalisation through restrictive regulation; (2) aggressive measures such as unilaterally adopted or multilaterally agreed extraterritoriality; and (3) collective measures such as harmonisation and co-operation. Money laundering law has utilised each one of these modalities to re-enforce the authority of the State in the area of crime control. These techniques of governance are however more widely used in various areas of law and regulation.

While, the modalities discussed in this Chapter are seemingly traditional, their method of implementation in this era of accelerated globalisation gives them new importance and new traits. In a previous era of less rigorous transnationalism, such mechanisms were merely incidental to an essentially localised form of governance. In the present context, these modalities are part of the structure of governance necessary for achieving a degree of order and predictability. In their implementation in this novel context they manifest new traits and raise a variety of problems.

The main problem of using regulation to reverse the process of globalisation, is that such measures in the context of this intense compression are not always effective. This limited effectiveness limits the reliability of this instrument. Further, this procedure stands in clear conflict with liberalisation as the organising economic principle of the present world order. The decentralisation of the global order renders policy co-ordination between various parts of the system problematic.

Similar symptoms of lack of co-ordination albeit more detrimental in terms of individual freedoms could be discerned in the use of extraterritoriality as an instrument of governance. Money laundering law, as well as other areas such as

\[\text{Id.}, \text{ at 274.}\]
competition law, relies on extraterritoriality as a mechanism for imposing order against transnational actors. Extraterritoriality is not a novel mechanism for dealing with extraterritorial threats. In the current context of intense globalisation, transnational actors are more repeatedly encountered with the threat of sanction for violating extraterritorial laws. The problem becomes more acute when the actor is faced by conflicting obligations under the national law and the law of the State that is seeking to exercise extraterritorial jurisdiction.

Harmonisation and co-operation are more co-ordinated methods of solving the governance problem of globalisation. There are various types of harmonisation according to the degree and depth of approximation and according to the instruments of such approximation. Harmonisation remains a benign method of governing a world of transnational relations unless it is imposed top-down by more powerful jurisdictions vis-à-vis less powerful ones. The problems of this form of harmonisation will be discussed in more detail in Chapter Six of this volume.

International enforcement co-operation is an area that has been growing rapidly in recent decades. Co-operation endeavours in the enforcement of criminal laws as well as social and economic regulations are proliferating. While international co-operation as a means of dealing with common problems is not new, in recent years it has demonstrated new traits. These included departure from traditional principles that used to inhibit international co-operation and resort to informal co-operation arrangements. The relaxation of principles in the area of international criminal law has been a very deliberate and careful process. Often the departure from one principle has been accompanied by establishing an alternative principle or safeguard. This was manifest in the case of the political offence exception.

Informality, however, remains to be assessed. This trend is clear in money laundering law, where FIUs enter into informal information sharing arrangements. While certain safeguards have been mounted, their efficacy needs further empirical assessment.
1. Introduction

So far it has been argued that Globalisation in its political and geographic aspects has undermined the power of the State and led some to the conclusion that the State is declining. The rationale suggest that the State has become too small to govern social and economic activities that expand beyond its borders and somewhat uninformed and under-resourced to regulate and control increasingly powerful private actors. Economic criminals and their organisations are only one example of this trend.

The previous Chapter has argued that the State has resorted to a number of modalities that re-enforce its powers vis-à-vis these new actors in order to keep her as the primary agency of governance that is global in its dimensions. These modalities included the defensive instruments of de-globalisation through regulation and the over-reaching instrument of extra-territorialisation. The community of States has also resorted to co-operative instruments that aim at pooling their sovereignties in efforts of harmonisation of their national laws and mutual co-operation in the enforcement of these laws. It has been argued that money laundering law has made use of each one of these modalities with a degree of success. Problems of effectiveness and some concerns of fairness and due process however remain to be addressed.

Without prejudice to the successes of these more conservative modalities, more remains to be done. At this stage, the State itself resorts to more innovative
methods that involve delegating part of its powers of governance to other agencies. By doing so the State foregoes part of its sovereignty in favour of achieving order and predictability. The two modalities employed to this end are *privatisation* and *supranationalisation*. This Chapter discusses privatisation as a form of non-state governance, while supranationalism will be discussed in the next Chapter.

Privatisation in some of its aspects, as argued in Chapter Three of this volume, is an instrument of globalisation. The process of mass transferral of State assets to private parties has resulted in a massive shift of power in the society. Further, the large-scale transfer of the State's production activities and service provision to private actors has resulted in proportional increase in the role of private power in governance. Privatisation of the State's functions in maintaining law and order has, on the other hand, been utilised as a method of tackling the governance problematic created by globalisation. Analysis of this trend reveals that privatisation pervades all aspects of State power in the area of law and order. Private actors now perform parts of the judicial, prescriptive and enforcement functions of the State. While the private role has always played part in these spheres, the past three decades have seen more delegation to private actors than ever before since the monopolisation of these functions by the State. Again, money laundering law has made utmost utilisation of this modality of governance. In fact, money laundering law is in certain respects a privatisation instrument.

Public law scholarship has always been suspicious of the private role in public governance. The suspicion is manifest in the perennial concern with administrative capture by private interests. This concern is based on the assumptions that public governance should be conducted and implemented in pursuit of the public interest and that private actors, inevitably, pursue private interests that are inherently in conflict with the public interest as a goal. Assumptions that are unfavourable to private power render burgeoning forms of private order particularly alarming to legal scholars. This alarm is compounded by the fact that accountability of judicial, lawmaking and enforcement agencies, as a pre-requisite for their legitimacy, has thus far been based on the State structures; parliamentary accountability and judicial and constitutional review being paramount forms of public accountability. Private adjudication, rulemaking and enforcement do not readily lend themselves to these forms of public

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1 *See* below Section 3.3.
accountability. This leaves public law scholarship in search of alternative mechanisms.

Money laundering law is based in essence on the idea of employing private agents, e.g., bankers, accountants, lawyers, brokers and dealers, to police the financial transactions of the public in search for signs of criminality and to document these transactions for police purposes. In this sense, it constitutes to varying degrees a deviation from criminal procedure rules of search and seizure that guard the individual against unwarranted intervention in one’s own private affairs. Two factors render this particular intervention problematic: (1) the tradition of financial confidentiality that has prevailed in many countries for several decades; and (2) the intrusive nature of criminal law as a threat to basic individual freedoms. While a degree of deviation could be necessary as a response to the change in the social context from that, which has prevailed during the formation years of the principles, this deviation should be measured and should not exceed what is justified by this change.

This Chapter deals with privatisation as a modality of global governance. It places the trend as it manifests in money laundering law within the broader context by examining forms of privatisation in different areas of the law. The discussion of the trend across different sectors serves to show the common concerns as well the direction of reform.

2. Private Dispute Resolution

What is described here as "private" dispute resolution is commonly referred to as "Alternative Dispute Resolution" (ADR). The choice of designation here is merely to highlight the specific feature of this trend most pertinent to the context of the discussion.2 Private dispute resolution is an alternative to public or State dispute resolution mechanisms that has evolved since the beginning of the last century. ADR is a broad term describing any method of dispute resolution that employs a private neutral in place of a State judge. The most important and most commonly used method of ADR internationally is arbitration. This method is also significant, in terms of the extent of privatisation of justice, in that it results in legally binding decisions

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that are enforceable through the standard coercive processes of the State. It is in this context that the private actor holds the biggest segment of State power in the administration of justice.

The evolution of ADR has been highly innovative and a variety of methods have been designed over the years. The classic form of non-binding ADR methods is mediation. In this form, the parties designate a neutral third party to help them in resolving their differences through negotiation. The results of mediation are typically non-binding. Their implementation depends on the good will and the co-operation of the disputants. Other techniques of non-binding ADR include mini-trial, fact-finding by a neutral and ombudsman.

Private dispute resolution is not a novel form of dispute resolution. In many ways it is the original form of settling disputes. In the transnational commercial context, private dispute resolution has always been favoured to State dispute resolution by the merchants. While historically State courts were reluctant to enforce arbitration agreements, a shift occurred in the 1980s according to which the courts began to look upon ADR more favourably. This judicial favour was expressed in expanding the enforceability of ADR agreements and restricting the application of contractual defences especially those based on consent. It is to this shift that ADR as a form of privatisation of the judicial function could be pinned.

From the perspective of the State, ADR developed as a solution to two types of problems: jurisdictional problem and capacity problem. The increase in the courts' caseload has far exceeded the courts' capacity to resolve disputes expeditiously. In the United States for example, filing cases before formal judicial institutions have increased by 14.3% between June 1981 and June 1982 alone. Filing appeals has rose

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3 Parties could agree to be bound by the results of mediation and other forms of non-binding ADR. Distinction however remains between these forms and arbitration in that the results are not handed down by an arbitrator but instead negotiated between the parties. Should they fail to agree on a solution, no resolution would result.

4 "a panel comprising of a neutral and a manager from each party proposes a solution or gives an opinion; or a neutral evaluation of a point of law or fact." ICC, *Introduction to ADR Dispute Resolution Services*, available at www.iccwbo.org. (Last visited February 16, 2002.)

5 This is a "settlement enhancement technique, in which the parties [...] agree to appoint a mutually acceptable fact-finder and to stipulate to the factual findings of such a neutral." Reuben, R., *supra* note 2, at footnote 3.

6 "a third part who intervenes to address concerns that individuals or dependent groups have with larger and more powerful organizations or bureaucracies." *Id.*

7 *Id.*, at 602-605.

from 2,800 in 1950 to 26,000 in 1981. This has led to the shift in judicial policy, vis-à-vis ADR agreements, that has been described above.

Historically, ADR was the favoured solution of the transnational merchant specifically because of its independence from State laws and procedures. From the business perspective, this desire to remain free from State constraints continued to determine the transnational business preference for this independent forum for dispute resolution. According to the International Chamber of Commerce, demand for its International Court of Arbitration services continues to rise annually in direct corollation to the expansion of world trade and the globalisation of the economy. From a State perspective, encouraging ADR constitutes a solution to the vexing conflict of law questions that beset certain aspects of economic activity such as the Internet and e-commerce.

The effectiveness of ADR as a solution to these jurisdictional and capacity problems stems from the main features of the process as informal, private and flexible. Informality means that ADR is less constrained by the procedural requirements that govern State judiciary. Flexibility means that the parties are free to choose the procedures that govern their dispute and, to a certain extent the substantive law, that binds them. ADR also grants the parties the chance to keep their disputes private and that has always been one of its most appealing features. These very virtues that commended ADR as a solution have been the source of substantial criticism on account of legitimacy. These concerns are particularly crucial in a context where ADR has spread to apply to disputes between parties of different power positions and substantial informational asymmetry (e.g., consumer/corporation disputes and employer/employee disputes.)

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9 Id.
11 President William Clinton and Vice President Albert Gore, Jr., A Framework for Global Electronic Commerce (July 11, 1997), Chapter II, Section 3. This policy document promotes generally a system of private rulemaking through contract to govern e-commerce and specifically "the development of adequate, efficient, and effective alternate dispute resolution mechanisms for global commercial transactions." In a similar policy initiative, the European Commission advocated that "Member States and the Commission should encourage online dispute settlement and alternative consumer redress procedures." E-Europe: An Information Society for All, Communication on a Commission Initiative for the Special European Council of Lisbon (23-24 March 2000).
Critics of the legitimacy of the informal procedures of ADR have asserted that this informality could be prejudicial to the weaker party. The argument in this regard could be based on social and psychological research as well as on political analysis of power relations. From a lawyer's standpoint, the fact that procedural law is often designed to redress imbalances of power to substitute for inequalities through form. Removing such procedures simply deprives the beneficial party of the protection they were designed to grant. To some this neglect of procedural protection amounts to a breach of the due process requirements in the resolution of disputes and hence constitutes a breach of the values of democracy. It has also been argued that ADR is antithetical to the principles of democracy in that it limits public participation by removing the determination of the meaning and application of the law in the context of dispute resolution from the public sphere to the secret arbitration forums.

When the same trait is both a virtue and a deficit, the balance becomes intricate. Irresolution is reflected in the writings of the critics discussed above. The solutions seem to advocate imposition of certain procedural constraints on ADR akin to those imposed on the judiciary. The requirements proposed range from publishing arbitral awards to imposing constitutional constraints on the private ADR forum. None of these proposals is conclusive. Striking the balance, as one of the critics suggests, requires "step-by-step consideration of ADR goals and practices and constitutional standards, constitutional right by constitutional right, ADR procedure by ADR procedure, and factual application by factual application. Surely broader principles will emerge."

3. Private Law-Making

3.1. An Overview

By arguing that privatisation of lawmaking is one solution to the governance problematic of globalisation the author is not suggesting that this private role in lawmaking is a novel phenomenon. Apart from laws that reflect general morality,
such as the law of murder, every law or regulation reflects a private interest and is a response to the pressure of the group representing this interest. This is particularly true in the area of economic law and regulation. In addition to the direct lobbying exercised by private interest to influence the content of the law, legislative lawmaking is often but codification of existing practices and standards. Private lawmaking also has a long-standing role in custom as a source of law in many jurisdictions.

Property rights and the freedom of contract and the sanctity afforded to them under the law are another source of private power over the activities of others. For example, under the law of trespass, private owners have great powers to exclude others from access to their property or to regulate this access. In the past, such powers were used in the American South to exclude the Blacks from access to public places. This has been characterised as a "full-fledged regime of law with the private owners of property laying down the terms and the courts providing the sanctions, the principal one of which is the action of trespass."  

The relevance of this interpretation of property and contract as sources of private regulation to the present context is that it indicates that every privatisation of ownership and functions in the society involves granting a larger role to private power in regulating activities. The more privatised the supply of goods and services and the more deregulated this supply, the greater is the private power in determining the content of social and economic arrangements. One analyst has argued that "under the influence of laissez-faire doctrine the State has relinquished to the individual the 'sovereign' function of laying down the rules which govern society."  

In addition to these implicit forms of private role in law and regulation, private groups are now increasingly exercising an explicit role in lawmaking and regulation. Countries such as the United Kingdom and the United States incorporate consultation with affected parties within their lawmaking and regulatory processes. For example, Section 553 of the U.S. Federal Administrative Procedure Act imposes a notice-and-comment procedure on administrative agencies in their rulemaking process. Such a procedure guarantees substantial private participation in the agency's rulemaking. The agency is also required to demonstrate that it has considered all the alternatives and

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addressed the main arguments. 26 In the United Kingdom, The Financial Services and Markets Act (2000) imposes a general duty upon the Financial Services Authority (FSA) to "maintain effective arrangements for consulting practitioners and consumers." 27 As part of these arrangements, the FSA is required to establish a Practitioner Panel representing the interests of practitioners 28 and a Consumer Panel representing the interests of Consumers. 29 The FSA is obliged by the Act to consider any representations made by these panels and to provide a written and reasoned statement in cases of disagreement with any such representation. 30

Voluntary self-regulation is another form of explicit private rulemaking. The primary examples of this type of private rulemaking can be found in the International Organization for Standardization (ISO); an international organisation that brings together the leading national standardisation agencies in 140 jurisdictions. Such standards are typically of a technical nature pertaining to product configuration such as the size and shape of credit card and telephone cards. Some commentators deny the regulatory value of this form of rulemaking on account of their voluntariness. 31 This view, however, is limited. Regulatory agencies often adopt these standards and enforce them in a variety of ways, either by direct referral to the standards or by enforcement policy favourable to the firms that apply them. For example, the ISO9000 quality management and quality assurance standards and the ISO14000 framework for environmental management are increasingly becoming a condition for access to certain markets. 32 These market mechanisms enforce the standards sufficiently so as to render the voluntary character merely juridical.

Sometimes the exercise of private rulemaking is the result of direct delegation by the legislative authority. In this case, the legislature designates a specific non-governmental entity to set and implements standards subject to State agency oversight. This type of private regulation is termed audited self-regulation. 33 The most obvious example of this form of self-regulation is the authority given to the

28 FSMA 2000, s. 9.
29 FSMA 2000, s. 10.
30 FSMA 2000, s. 11.
31 Michael, D., "Federal Agency Use of Audited Self-Regulation as a Regulatory Technique". 47
32 Freeman, J., supra note 26, at 644-646.
33 See generally Michael, D., supra note 31.
professions to regulate themselves through their professional associations such as the English Bar, the Law Society or the Exchanges.\textsuperscript{34}

According to this analysis, one can identify various forms of private rulemaking: explicit \textit{v.} implicit, voluntary \textit{v.} commissioned, technical \textit{v.} policy oriented. Each of these categories might involve varying degrees of privatisation of rulemaking. It is generally to be observed, that private rulemaking has not superseded public rulemaking. Instead, it works in parallel, sometimes complementing and at other times supplanting. The State regulatory machinery remains, however, very close to the regulatory process.

The rationales for private rulemaking are manifold.\textsuperscript{35} First, the development of the rules by the parties addressed by them enhances the chances of compliance. Second, in an increasingly sophisticated economic environment, governments normally lack the expertise to write adequate rules regulating these activities. Such expertise is normally available at a prohibitive cost for governments with growing fiscal constraints. Delegating to the private sector is one option to gain access to the expertise needed without bearing the cost. Third, private rulemaking has sometimes developed as a solution to the limitations of the territoriality of State jurisdiction. Each of these rationales is becoming more compelling in the context of globalisation. To illustrate this point, the next Section will deal in more detail with the use of private power to bridge the territorial gap in the prescriptive jurisdiction.

\textit{3.2. Bridging the Territorial Gap with Private Rules}

\textit{Lex mercatoria}, the transnational law of commercial transactions that is made up of the general principles of commercial law and established commercial practices, is the most prominent example of private lawmaking as a response to the limits of territorial sovereignty. \textit{Lex mercatoria} long precedes the process of globalisation. It emerged in medieval Europe to regulate transnational commercial relations.\textsuperscript{36} Its role, however,


\textsuperscript{35} Jaffe, L., supra note 22, at 211-212; Michael, D., supra note 31, at 181-189.

has witnessed a new revival at a time coincident with the beginnings of globalisation processes. In 1962, the London Colloquium on the New Sources of the Law of International Trade Law was held at King's College. This colloquium represented the first major event to deal with *lex mercatoria* in its modern form.\(^{37}\)

Writers on *lex mercatoria* in its modern form marvel at the astounding features of an emerging self-validating legal regime of private rules.\(^{38}\) According to one author, the so-called "closed circuit arbitration" contract is "a self-regulatory contract which goes far beyond one particular commercial transaction and establishes a whole private legal order with a claim to global validity."\(^{39}\) This type of contract creates a hierarchy of rules including the standard rules of contract regulating the future activity of the parties. In addition, the contract creates higher order rules that govern the interpretation of the rules and the procedures for future conflict resolution. This latter set of rules is the most important in terms of the process of creating the contract as an autonomous self-validating legal order. The contract refers the determination of its validity to an external institution, typically arbitration. This institution while created by the contract is independent from it and has the power to preside over its validity as well as its own.\(^{40}\)

While in its original form, *lex mercatoria* was an informal law of trade practices and general principles, in its modern form, it has developed quasi-formal legal sources.\(^{41}\) These quasi-formal sources include standard contract, model clauses and rules adopted by international professional organisations.\(^{42}\) One of the leading international business organisations in this area of quasi-formal, private and transnational rulemaking is the International Chamber of Commerce (ICC).\(^{43}\) Amongst its more famous activities is the codification of standardised trade terms under the name of Incoterms. The first edition was published in 1936 and subsequent editions have continued to expand the coverage of the code.\(^{44}\) The ICC's rulemaking

\(^{37}\) Id., at 91.


\(^{39}\) Id., at 16.

\(^{40}\) Id., 16-17.


\(^{42}\) Id., at ¶22-001.


\(^{44}\) Garro, A., *supra* note 41, at ¶22-016 to ¶22-017.

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activities have expanded to other areas including a variety of forms such as: codes of conducts, guides and customs and practices, all of which are grouped under the term "voluntary codes." Professor Teubner refers to these quasi-formal rulemaking processes by transnational private business associations as another element of externalisation in the process of validating the transnational contractual legal order autonomously from sovereign laws.

The rationale of lex mercatoria and its revival in the present global context is that one of the outcomes of the territoriality of the prescriptive jurisdiction is the emergence of acute differences in rules and policies amongst various jurisdictions. Such differences render transnational transactions burdensome and uncertain. Resort to private legal orders that are equally transnational is one response to this problematic legal disparity.

Regulating cyberspace is another area where governments have resorted to private regulation explicitly to resolve the jurisdictional mismatch problem. The jurisdictional dilemmas produced by globalisation could not be more acute than they are on the Internet, the global medium par excellence. Internet activities take place across numerous national jurisdictions simultaneously. Absent clear rules on the applicable law to Internet activity, legal certainty would be undermined and with it the economic potential of the Internet as a marketplace. Private regulation figured and was utilised as one solution to this dilemma. While all the other rationales of private regulations apply equally to cyber regulation, this jurisdictional rationale was particularly important in this context.

Such concerns have led the American Bar Association to initiate its "Global Cyberspace Jurisdiction Project." The purpose of the Project was to examine the jurisdictional uncertainties resulting from electronic commerce. The Project lasted two years, and its Report was published in 2000 advocating a hybrid solution including: (i) creating private sector contract-based regimes to which local governments may defer to reduce jurisdictional uncertainty; and (ii) creating self-regulatory regimes that can produce useable standards and rules acceptable to a broad audience.

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45 Id., at 22-018.
46 Teubner, G., supra note 38, at 17.
majority of the e-commerce participants.\footnote{American Bar Association, "Achieving Legal and Business Order in Cyberspace: A Report on Jurisdiction Issues Created by the Internet" 55 Business Lawyer 1801 (2000), at 1823-1824.}

In certain situations, private rulemaking was the only alternative acceptable to governments in their attempts to reconcile their diverging national interests. The regulatory system for domain names is a case in point. Domain names are a scarce and valuable resource on the Internet. Assigning Internet addresses and controlling the data required to direct the Internet traffic to its right destinations is one of the few functions on the Internet that requires centralisation. Because of a historical accident, the control of this data and the exercise of this function fell to the United States Department of Commerce. With the expansion of the Internet and the development of its commercial uses, other countries especially in Europe expressed concern about the control of such an important resource by the United States. The solution that was devised to resolve this dilemma was the creation of the Internet Corporation for Assigned Names and Numbers (ICANN) as a non-profit corporation. ICANN function was to manage this scarce resource of Internet addresses and names. In performing this function, ICANN performs a number of regulatory functions using contracts, codes and standards.\footnote{For a very lengthy and critical discussion see Froomkin, M., "Wrong turn in Cyberspace: Using ICANN to Route around the APA and the Constitution" 50 Duke Law Journal 17 (2000).}

In all the contexts in which private rulemaking was used, certain concerns were raised and suspicions entertained. It is to this point that this Section now turns.

### 3.3 Issues and Possible Solutions

Private rule-making, like every other exercise of private power in what is perceived as a public realm, raises numerous and strong concerns. This is in a way a reflection of a deeply rooted weariness of private power in public law scholarship and its perennial concern with capture and interest group pressure as evils that befit the processes of public decision making.\footnote{Freeman, J., supra note 26 at 557 et seq.} Such manifestations of private power are known to undermine the capacity of public decision making processes at delivering disinterested decisions geared strictly towards the public interest.

The shortcomings of private rulemaking are manifold. Rulemaking should be done in the public interest and delivered by those who do not possess any conflicting interest that might distort the content of the rule. Private power, on the other hand, is
inherently self-serving, which makes these guarantees of neutrality absent. This is further accentuated by the informal character that rulemaking normally takes in a private setting. Informality excludes the procedural safeguards that might have worked to mitigate the bias of the private rule-maker. Private rulemaking often raises concerns for lack of transparency and predominance of certain interests and lack of representation of others. Also, the prevailing culture in private institutions differs normally from the public service culture that should ideally prevail in public institutions. Delegation to private rule-makers is often done without specification of any standards to cover the exercise of this new power, hence, the culture of private interest continues to prevail unchecked by rulemaking standards.

So far, the concerns raised relate to the norms of due process. Another related aspect of great concern is the lack of accountability that characterises private rulemaking. From a democratic perspective, such institutions are not subject to the popular accountability that exists in the case of public rulemaking. In the latter case, incompetent or corrupt officials could be removed from office by the electorate through the exercise of their franchise. In the case of private rule-makers, such mechanism of accountability is unavailable. Although they are subject to private remedies in tort, contract and competition law, in the absence of procedural requirements and clear mandates, they are largely insulated against judicial oversight for the legitimacy of their rulemaking.

Despite the problematic aspects of private rulemaking, the increasingly dominant view is that private power has a role to play in governance. As early as 1937, one writer analysed the role of private power in rulemaking arguing that private participation in lawmaking and government should not be dismissed lightly. He argued that the role of private power in lawmaking is pervasive and that it is not, by

53 On standards as a concern and solution see Jaffe, L., supra note 22, at 248 et seq. The author discusses the limitations of standards as a determinant of the validity of private delegation on account of the difficulty inherent in defining the standard and its lack of utility in the absence of public agency oversight.
54 The due process nature of the concerns over private delegation started with the earliest forms of such delegation. In Carter v. Carter Coal co. the U.S. Supreme Court stated that: "one person may not be entrusted with the power to regulate the business of another, [...] The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment[.]" 56 S.Ct. 855 (1936), at 311.
55 Freeman, J., supra note 26. at 574.
definition, contrary to the American constitutional tradition. More recent writers argued that "private actors are also regulatory resources capable of harnessing private capacity to serve public goals."

In order to remedy the defects of private rulemaking several mechanisms have been proposed. On one end, there is a growing body of literature that argues for treating private agencies that are exercising a public function as state actors and subjecting them to the same procedural requirements and constitutional constraints. This solution, if taken to the extreme, might undermine the whole rationale of privatising the regulatory function. It, however, remains of value in that extending some of the procedural and constitutional constraints to private actors might be a viable requirement to a certain degree. The oversight of a public agency is another obvious mechanism of accountability that can and is widely employed. Other commentators have sought alternative remedies to these due process and accountability deficits. Such mechanisms include the representative character of the private rulemaking body as an obvious remedy to the concerns for bias. If all affected interests are represented in the rulemaking body, the rules will be the product of a compromise amongst them. Also, transparency of the rulemaking process is another potentially potent remedy. Hence, if private rulemaking is here to stay due process and accountability safeguards should be designed to counter the shortcomings of this form of privatisation.

4. Privatisation of Enforcement
The third prong of the Government's legal function is that of implementing and enforcing its laws and regulations. The enforcement of public policy as expressed in a country's laws and regulations and as handed down by its judiciary is a very important phase in the realisation of the goals of any public policy. The effectiveness of such policy, to a very far extent, hinges on the effectiveness of the implementation and enforcement policies. The implementation and enforcement function is not merely an automatic implementation of a general rule. The content of the rule is largely shaped and ultimately determined by the implementation policies and the exercise of

56 Jaffe, L., supra note 22.
57 Freeman, J., supra 26, at 594.
58 Id., at 574 et seq.
59 Lawrence, D., supra note 52, at 688-689. One of the author's core arguments is that private delegation does not always involve a conflict of interest. Id., at 687-688.
enforcement discretion. Despite the importance of this stage in the life of a law, designing enforcement mechanisms often attracts much lesser public attention and debate.60

This Section provides an overview of the privatisation of the enforcement function in the context of globalisation. It is divided into two parts. In the first part, it discusses the privatisation of the regulatory enforcement. Examples in this Section are derived primarily from the areas of securities regulations and environmental regulations. The second is dedicated to the privatisation of enforcement in the realm of criminal justice by focusing on the privatisation of policing. The second part provides a prelude to the discussion of privatisation in the context of money laundering law.

4.1. Privatisation of Regulatory Enforcement

Command-and-control as an approach to regulation is generally a State-based approach founded on a deterrence theory of compliance. According to this approach, the State sets or adopts elaborate standards of conduct for the regulated industry and polices compliance with these standards. Failure to comply results in civil or criminal sanctions of such a magnitude so as to offset any incentive to violate the rules. Successful detection of violations is a prerequisite for the effectiveness of the regulatory system. This means that the regulator must continuously gather information on the performance of the regulated entities and determine whether there is any violation.

The process of policing compliance is often a costly one. It also typically requires expert knowledge of the industry that is not normally available to the State. With the growing complexity of the economic activity and the economic expansion especially in developed countries, the State has become less and less capable of meeting the costs of this form of economic regulations. In the area of environmental regulations, countries have become increasingly aware of the inadequacy of their environmental law enforcement.61 In a study published by the United States General Accounting Office (GAO) in 1991 examining the capacity of the Environmental

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60 Bhagwat, A., "Modes of Regulatory Enforcement and the Problem of Administrative Discretion" 50 Hastings Law Journal 1275 (1996). Arguing that granting the administrative agency ex ante enforcement powers as opposed to ex post powers can affect substantially the substance of the law and affect the distribution of power between the regulator, the regulated and the Congress.
Protection Agency (EPA) to fulfil its mandate, the GAO found that while the EPA's scientific and regulatory responsibilities have increased the EPA budget has not increased beyond its initial level on $1.7 billion in 1979. It further concluded that with a federal budget deficit of $300 billion at the time of the study, the Government's ability to meet the public expectations of protecting the environment at any cost would be sharply constrained.

In view of the growing demands for regulations and the increasingly limited resources available for this function, it was natural that concerns for efficiency should become paramount. Regulatory agencies have come under attack for their failure to meet this test. Economic analysts of regulations argue that government regulators do not possess the incentive to adopt regulations that are economically efficient. In analysing the incentives of government regulators, some have argued that bureaucrats either seek to maximise their budget or their political influence. Since such incentives are not normally aligned with economic efficiency, the conflict is often resolved in favour of a less optimum solution. According to this analysis a government regulator would opt for an enforcement mechanism that guarantees its agency a larger budget even if there was another more efficient option. Seeking political support can also explain sub-optimal regulatory choices.

Applying similar economic rationales to the United States Securities and Exchange Commission, one commentator argues that the bureaucratic structure of the Commission is unsuitable for effective civil enforcement of securities regulation. Any enforcement action in order to take place has to go through a very long bureaucratic cycle of preparation, review and authorisation. This lengthy path delays and hence undermines the deterrent effect of any such action. The role of the Office of the General Council (OGC) in the argument of this commentator was particularly negative. According to his analysis, the raison d'être of the OGC was to act as a check on the work of others. In the view of the commentator, the OGC was "structurally

63 Id., at 8.
66 Id., at 100-103.
biased" toward finding litigation risks and substantive issues that had the effect of slowing the pace of the enforcement. The OGC’s decisions had their incentive in "turf protection" rather than in the efficient use of the Commission's resources for enforcement.\textsuperscript{67}

All this concern over the limited resources available for enforcement and the inefficient use of these resources by government regulators has led generally to calls for innovation in regulatory and enforcement systems and more specifically for a degree of privatisation of these systems.\textsuperscript{68} Privatisation of enforcement can take different forms including relying on general market sanctions; creating market-based incentives for compliance; self-regulation; contracting out to a private enforcement agency; and relying on private actions.

Market forces sometimes operate as a spontaneous incentive for compliance with regulations. This is most evident with respect to environmental regulations. The growing consumer interest in protecting the environment, especially in developed countries, has meant that for corporations to market their products and appeal to the consumer they need to show environmental awareness and to create a corporate image that is environmentally friendly. This has meant that failure to comply with environmental regulations is now being sanctioned indirectly by consumers. The effective cost of violation is loss of market share.\textsuperscript{69} Regulatory policy has sought to capitalise on this market sanction by imposing on publicly-traded companies an obligation to regularly disclose information relating to their compliance with environmental requirements.\textsuperscript{70} While this market incentive works for firms that market their products directly to the consumer, it has limited influence on the behaviour of firms that are only sold to other commercial purchasers. Further, the consumer sometimes lacks the time or the expertise to assess the environmental soundness of most of the products that are consumed.\textsuperscript{71}

The second method of privatisation of enforcement is deliberately creating a market dynamic that would induce the regulated to comply.\textsuperscript{72} This method is normally

\begin{itemize}
\item \textsuperscript{67} Id., at 101-102.
\item \textsuperscript{68} See Harper, B., supra note 61; Cohen, M., and Rubin, P., supra note 64; Bhagwat, A., supra note 60.; United States General Accounting, supra note 73.
\item \textsuperscript{69} Rechtschaffen, C., "Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement" 71 Southern California Law Review 1181(1998), at 1195.
\item \textsuperscript{70} Id., at 1244-1252.
\item \textsuperscript{71} Id., 1196-1198.
\item \textsuperscript{72} United States General Accounting, supra note 62, at 30-33; Cohen, M., and Rubin, P., supra note 64. at 169-172. Providing economic analysis of market-based approaches to regulation.
\end{itemize}
accompanied by replacing the detailed specification of the standards of conducts expected of the regulated for a definition of the result or outcome to be achieved. An example of such mechanism is imposing a tax calculated as a charge per unit of pollution. The tax should be calculated in such a way that it offsets the benefit of polluting beyond a certain level. The advantage of this system is that it becomes in the interest of business to monitor its own polluting activity in order to secure accurate determination of its tax liability. The regulator still bears the cost of verifying the accuracy of the regulated self-audits. This cost could be burdensome in a complex economy.\textsuperscript{73}

The previous two methods of privatisation of enforcement are not but methods of inducing self-regulation. One, however, can discuss outright delegation to the regulated entities to police their own compliance as another distinct category of private enforcement. In this case, the sanction for non-compliance is not market-based but regulatory in nature. In the area of securities regulation, comprehensive self-regulation through the exchanges preceded government command-and-control methods and informed them. The International Organization of Securities Commission's (IOSCO) Principles of Securities Regulations recommend that the regulatory regime should make use of the self-regulatory organisations (SROs).\textsuperscript{74} According to a report by one of IOSCO's committees, "In its most complete form, self-regulation encompasses the authority to create, amend, implement and enforce rules of conduct with respect to the entities subject to the SRO's jurisdiction."\textsuperscript{75} Both in securities regulations and environmental regulations, self-regulation also takes the form of reporting and record-keeping requirements that permit the regulatory agency to perform its function in detecting violations.

Instead of delegating to the regulated entity itself, the regulator can delegate the enforcement to an independent private organisation. The advantages of such an approach is to benefit from the efficiencies of private organisations. This approach is often accompanied by the use of market-incentives for compliance and remuneration, such as tying the remuneration of a private environmental audit agency to a reduction

\textsuperscript{73} United States General Accounting, \textit{Environmental Protection: Meeting Public Expectations with Limited Resources}, GAO/RCED-91-97 (June 1991) at 31.

\textsuperscript{74} International Organization of Securities Commission, \textit{Objectives and Principles of Securities Regulation} (February 2002), Principle 7.

\textsuperscript{75} The SRO Consultative Committee, \textit{Model for Effective Regulation} (IOSCO, May 2000), at 3.
in the level of pollution below a certain standard. This approach raises concerns for confluence between the regulated entities and the contracted enforcement agency. Such risk of corruption, however, is equally present under a publicly run system of enforcement.

The final method of privatisation of enforcement and a very important one is the private right of action. An individual who is aggrieved by actions in violation of regulatory standards, can sue the violator for damages. By so doing, the plaintiff secures damages for the harm sustained and, maybe incidentally, enforces the regulatory norm. In addition to the rights of actions available under the general provisions of the law of tort or the law of contract, some regulatory schemes create specific private rights of actions as a method of private enforcement. Private securities fraud action created by the United States Securities Exchange Act 1934 are but one example.

Both in the context of securities regulation and financial regulation these "private attorney generals" are instrumental for the enforcement of the regulatory schemes. The advantages of private civil actions are many. The harm sustained by a particular individual is the best detector of a violation and the gravity of that violation. The individual harmed is probably in a better position to know the facts. Normally private action is speedier than the lengthy administrative procedures needed for taking a public enforcement action. This speed is necessary if enforcement is to influence the conduct of the regulated industry. The risk of legal liability also operates on the regulated firms as a cost-based market incentive for compliance. In countries like the United States, where class action is part of the legal tradition, the private bar and the advocacy groups have developed very sophisticated mechanisms for policing regulatory violations.

One commentator, arguing in favour of the privatisation of civil enforcement under the United States securities law, observed that the private bar is often faster to act upon detection or suspicion of regulatory violations than the Commission with its lengthy procedures. In response to the severe market decline of the U.S. NASDAQ (i.e., U.S. over the counter market) in 2000, the private bar initiated a larger number

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76 See generally Cohen, M., and Rubin, P., supra note 64.
77 Freeman, J., supra note 26, at 661.
79 Id.
of proceedings than the Commission. Also, the private bar's response to the issue of
the financial analysts' potential conflict of interest came only two days following the
first signals raised by the acting Chairman Laura Unger in her testimony to the
Congress. The commentator also noted the substantial technical resources available to
private firms and dedicated to detecting violations and publicising actions.80

Aware of the potential potency of private actions as an enforcement
mechanism in competition law and also aware of the limitations of centralised
administrative enforcement, the European Commission is currently seeking to amend
the regulations implementing the rules on competition laid down in article 81(1) and
81(3) of the founding Treaty (1957).81 Article 81 establishes the rules concerning
restrictive agreements. Art. 81(1) prohibits all restrictive agreements, while art. 81(3)
exempts certain agreements from the scope of the prohibition. Council Regulation No.
17 sets the rules of procedure for the implementation of the Treaty rules on
competition. It provides for the direct applicability of art 81(1), which means that
Member States shall apply the prohibition rule directly and enforce it through their
administrative and judicial authorities. On the other hand, Regulation No. 17 gave the
European Commission a monopoly over the application of the exemptions
encompassed in article 81(3). The application of this provision was subject to prior
notification and authorisation by the Commission of any exempted agreement. The
result of this procedure was a highly centralised regulatory competition scheme.

The current proposals for amendment focus on removing the restriction on the
application of art. 81(3) by the Member States through their competition authorities
and courts.82 The result of such amendments is decentralisation of the regulatory
scheme and opening the door for private action against anti-competitive behaviour
before national courts. In defending its proposal the Commission argues that the
proposed system will enhance the efficiency and effectiveness of the protection of
competition by adding more enforcers.83

Despite all the advantages of the private action, this approach has its own

80 Id., at 95-96.
European Communities, Proposal for a Council Regulation on the Implementation of the Rules on
Competition Laid Down in Article 81 and 82 of the Treaty, COM(2000) 582 Final, (Brussels,
27/Sept./2000).
82 Commission of the European Communities, id.
83 Id., at p.6. On the advantages of private enforcement see Mrio Monti, Effective Private Enforcement
of EC Competition Policy, Speech to the Sixth EU Competition Law and Policy Workshop (1-2 June
2001), Speech/01/258, (1 June 2001).
shortcomings. Two are particularly important. First, over zealous individuals, lawyers
and advocacy groups can cause over-enforcement of regulations. On the basis of the
finite nature of resources, including enforcement resources, there is an optimal level
of enforcement beyond which resources will be expended inefficiently. This means
that enforcing the regulations against trivial violations will result in diverting the
courts' time and resources away from more worthwhile cases in terms of societal
value. 84 One solution to this problem could be achieved through reform of the
standing rules and the rules of evidence. Restrictive rules of standing and stricter rules
of evidence will inevitably result in reducing private civil enforcement and vice versa. 85

The second criticism of private action is that it results in transferring the
control over the regulatory process away from the regulator to the private parties. It is
the private individuals who decide what actions to bring. Their choices in terms of
what violations to pursue could be different from those of the regulator. Such conflict
could even result in sabotaging an enforcement policy based on inducing compliance
co-operation by the regulated entities. 86 Further, Private individuals' primary concern
is often obtaining damages for harm sustained. Enforcing the regulations and
achieving the public interest embodied in them is typically incidental. Settlements
reached out of court could result in distorting or aborting the regulatory objectives
sought by the regulations.

Some safeguards have been proposed and employed in order to mitigate
certain of these conflicts in enforcement objectives. For example, Article 15(3) of the
European Commissions proposal introduces a right for the Commission and national
competition authorities to make submissions to national courts orally or in writing.
Such submissions are not binding on the national courts. 87 Other examples include
granting the regulatory agency the right to review any proposed settlement between
the parties before its submission to the court. these safeguards, however, are limited in
their use and effect. 88

85 Such concerns and policies informed the reforms of the United States securities laws during the
1990s. See Davis, T., supra note 65, at 78-82.
86 Rechtschaffen, C., "Deterrence vs. Cooperation and the Evolving Theory of Environmental
87 Commission of the European Communities, supra note 81, Article 15(3).
88 Rechtschaffen, C., supra note 86, at 1232.
In conclusion, the growing complexity of economic activities has resulted in a growing need for special expertise in implementing and enforcing their regulation. Coupled with the financial constraints that beset most governments, the demand for expertise and financial resources has resulted in devising innovative methods of regulatory enforcement that typically involve reliance on the private sector. This privatisation took several forms including reliance on market sanctions, creation of market-based incentives for compliance, self-regulation, delegation to independent private enforcement agencies and encouraging private action as a method of enforcement. Each of these methods had substantial merit but also triggered serious concerns. Considering that the enforcement stage is ultimately what defines the content of regulatory policy, all the due process concerns and the accountability concerns raised by private law-making apply. Some solutions and safeguards were devised, but their potential is yet to be assessed with more rigour.

4.2. Private Enforcement in Criminal Law

At this point of the discussion, it becomes apparent that wherever government seemed to struggle, the private role figured as an option. This applies to situations ranging from supply of goods and services to rule-making, adjudication and enforcement. Privatisation has thus become a familiar alternative. No amount of familiarity, however, would prepare an uninitiated observer for the idea of private criminal justice. As stated repeatedly throughout this volume, criminal justice is different. Security and order are the basic functions of the State in its most minimalist form. Legitimate use of force is supposed to be the exclusive domain of the State. The forces of globalisation however do not stop at such proclamations. Under the current circumstances, the State is not rich enough, is not expert enough and is not territorially big enough. As a result, private power has had the opportunity to claim a role in this exclusive space of criminal justice.

Closer inspection of the criminal justice system reveals that the private role is pervasive. The role of informants in the detection of crime, the practice of plea bargaining and granting the surety the power to arrest the bailee are all manifestations of private role in criminal justice. The trend, however, that this Section is concerned with is deeper and more structural than these random and secondary forms of private participation. The expanding role of private policing in the United Kingdom, the United States and many other countries is one aspect of this trend. Also, the growing
responsibilities of Internet Service Providers (ISPs) in policing the Internet are part of the same trend in the virtual space. Financial intermediaries and accountants play a similar role in the context of corporate and financial crime as will be discussed in the next Section. Another important aspect is the private role in the implementation of criminal sanctions such as private incarceration.  

The trend towards private policing has started in the 1950s and boomed in the 1960s. While privatisation often occurs as deliberate public policy, the early appearance of private policing was an entirely private initiative. It was tolerated by governments but not initiated by them. During the 1960s and 1970s, this trend has expanded rapidly. By mid-1980s, estimates indicated that private police in the United Kingdom, Canada and the United States has exceeded public police in number. Estimates in the 1990 indicate that in the United States the ratio of private security guards to police officers is three to two. In an affluent State such as California this ratio stands at over two to one.

Several reasons have been proposed to explain this phenomenon. As other incidents of privatisation, considerations of cost and limited resources of the government were paramount. One commentator argued that the changing economic climate, increased mobility and the emergence of organised forms of crime has placed a strain on the resources of public policing. Also, the emergence of new forms of criminality and the expansion of private places that are open for public use, such as shopping centres and entertainment parks, has further challenged the expanding but nevertheless limited resources for policing. In response to the growing demand for policing and the limited resources, public policy in the 1960s has shifted towards prioritisation. Police resources were increased and their functions and responsibilities limited. Such policy decisions did not address the question of who is going to fill the

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91 Sklansky, D., id., at 1174. The author also provides a brief history of policing see id. at 1193 et seq.
93 Sklansky, D., supra note 90, at 1221.
vacuum created by such withdrawal of public policing. It is in this sense that private policing is partly a "spin off" of public policy, albeit not directly created by it.

Governments in the 1980s have therefore perceived private policing as a good opportunity to reduce the government's law and order budget while providing the security needed by the public. Other rationales were also advanced in support of this trend. Commercial and industrial interests perceived private police as more flexible than State police and more responsive to their needs. In that sense it was perceived as more accountable to the consumers of security as a service.

Like other incidents of privatisation, private policing has raised serious concerns. The primary concern is one of accountability. This concern is particularly acute in this context in view of the coercive nature of the function assumed by private power. Although some private interests have perceived private policing as more accountable, this was based on a limited point of view. Like any exercise of private power, the interests served, unlike those served by State police, are particular ones. In this case they are the interests of those who pay the bill for the private guard. Wider societal interests and the interests of those who are subject to private enforcement are not taken into account.

The accountability deficit is obvious when one realises the limitations of the law governing private security personnel. As private citizens, they are exempt from the procedural and constitutional safeguards to which State police is subject. This is perceived as a virtue by some in that it grants such private forces the flexibility to pursue the interests of their employer. Again, this is a limited point of view. An exercise of coercive power unchecked by constitutional and procedural constraints could undermine the basic freedoms enshrined in the constitutions of all democratic societies. An illustrative example is the increasing use of private security guards to exclude the poor or members of certain ethnic groups from access to public venues. Accountability is further undermined by the secrecy that shrouds the private security industry and other private agencies of criminal justice for that matter.

94 South, N., supra note 92, at 79.
95 On the cost rationale and its validity see Matthews, R., supra note 90, at 4-6.
96 Sklansky, D., supra note 92, at 1183-1188.
98 Matthews, R., supra note 90, at 18.
Assessment of the success of privatisation often focuses on the cost savings achieved by privatisation and its contribution to flexibility and innovation. The specific nature of criminal justice makes other criteria paramount. Any evaluation of privatisation in this field must take into account the degree of accountability and the improvement in the delivery of justice. 99 While these criteria are qualitative in nature and therefore not as easily measured as cost, this should not mean giving more weight to cost considerations. In the context of criminal justice, justice should not be overlooked as part of the service delivered and any measure of privatisation should be assessed in terms of its impact on the quality of justice.

As previously indicated, enforcement is an important function. The dividing line between enforcement and policy making is fine. That is due to the fact that it is only at the enforcement stage that the policy takes its ultimate shape. This understanding of the enforcement process has highlighted other concerns with respect to the privatisation of criminal justice. Policing involves wide exercise of discretion. Upon detection of an offence, it is the prerogative of the police to determine the action to be taken. This exercise of discretion is significant in terms of its impact on criminal justice policy. In the context of State police, this discretion is exercised in accordance with the public policy. In the context of private policing, it has been noted that a form of informal negotiated justice is common. According to this process the victim, who is also the employer of private security, negotiates with the accused seeking restitution in exchange for refraining from reporting the offence and seeking public prosecution. This is also often used in the context of corporate fraud, where major corporations favour the secrecy of the informal process. This exercise of discretion and the resort to informal justice risk undermining the objectives of public criminal justice policy. The pervasiveness of this exercise of discretion would result in rendering minor offences more severely punished than more serious offences with the detriment to justice that this entails. 100

With respect to criminal justice, the same wisdom derived from the discussion of other forms of privatisation applies. Privatisation is here to stay, at least for the foreseeable future. It is a product of an expansion and sophistication of private activity, both legitimate and illegitimate, that supersedes the capacity of government.

99 Id. at 14 et seq.
100 South, N., supra note 92, at 96-97.
One question that needs further investigation is how can the benefits of this process be reaped without sacrificing the integrity of the legal order.

While the discussion in this Section has focused on uniformed patrol-and-beat private police, the phenomenon of private policing is much more widely dispersed than that. It is included in the growing number of statutory provisions that impose a duty to report crime on private citizens and especially on professionals. Similar concerns, however, apply. It is to one form of this policing in the context of money laundering law that the next Section turns.

5. Money Laundering Law as a Privatisation Instrument

This Section is primarily concerned with the regulatory/preventive dimension of money laundering law as opposed to its control side. There is a strong element of privatisation in the regulatory structure of money laundering prevention. Financial institutions, as the subjects of money laundering regulations, play an important role in the making of those regulations. They participate in the FATF process and the processes of other international standard-setters. At the domestic level they work closely with their governments in designing domestic regulations. At the enforcement stage, as a regulatory obligation and with the criminal liability as an incentive, the subjects of money laundering regulations are typically eager to install adequate internal controls, compliance audits and training programmes for their staff. This is not however the element of privatisation that this Section is concerned with.

Money laundering law is a tool of enforcement of other economic laws and regulations. Its function is to defeat sophisticated attempts at evading these laws and regulations. Through its regulatory instruments, money laundering law enlists a wide group of professionals to act as policemen for the purpose of detecting and preventing attempts at evading the laws and regulations it is created to guard. Designed to counter disturbing private power, money laundering law enlists other powerful but

101 Glazebrook, P., "On Being Required to be a Policeman, Untrained and Unpaid", 60:3 Cambridge Law Journal 537-552 (2001). This paper offers a good survey of such reporting requirements under English law. The author further attempts to develop a test of reasonableness.

102 Pursuant to U.S. Annunzio-Wylie Anti-Money Laundering Act of 1994, the Treasury created Bank Secrecy Act Advisory Group. The Group consists of thirty individuals drawn from the financial community. The purpose of the Group is to strengthen the relationship between the Government and the industry in the area of money laundering prevention. This Group plays an important role in securing industry input into the anti-money laundering regulations.
law-abiding private actors for the job. It is this particular aspect of privatisation that this Section is concerned with.103

This policing nature of the obligations created under money laundering regulations, which impose record-keeping and reporting requirements on financial institutions, was evident from the inception of this regulatory dimension. The Explanatory Memorandum to the Council of Europe's Recommendation No. R(80)10 indicated that the current forms of criminality require banks' collaboration with the competent authorities. It then went on to say that: "To that effect it seems that particular obligations should be imposed on banks without, however, allowing them to replace the police or be assigned functions involving the exercise of power or authority."104 The policing nature is reflected in the concern expressed regarding the exercise of power or authority by the banks.

5.1. Who Are the Private Policemen?
The list of professionals who possess such policing powers is determined by the list of businesses and institutions that are subject to money laundering preventive regulations.105 This list is typically an evolving one. While such reporting and record-keeping requirements are normally associated with banks and financial institutions, the reality is that a growing list of businesses and service providers is addressed and

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104 Explanatory Memorandum to Committee of Ministers of the Council of Europe Recommendation No. R(80)10 on Measures against the Transfer and Safekeeping of Funds of Criminal Origin (adopted 27 June 1980).

105 The FATF Recommendation No. 8 provides that Recommendations 10-29, which pertain to money laundering preventive measures, "should apply not only to banks, but also to non-bank financial institutions. Even for those non-bank financial institutions which are not subject to a formal prudential supervisory regime in all countries[.]" FATF, The Forty Recommendations (1996).
bound by these regulations. This includes and is not confined to: lawyers,\textsuperscript{106} accountants,\textsuperscript{107} travel agents, bureau de change, car dealers and real estate agents.

Adding a new profession or business to the list is normally the result of expert evidence that this business is used by launderers for their money laundering activities. The FATF publishes on periodic basis a report on the developments in money laundering practices. These reports normally identify businesses and professions that need to be targeted by regulations and enlisted in the policing of money laundering. This decentralised collection of information is bound to prove problematic from a due process and privacy perspective.

Extending the scope of the regulatory requirements to other categories of business takes little account of any other considerations apart from the use of the business for money laundering purposes. For example, Credit Unions in the United States have been included in the list of financial institutions to act as policemen of financial transactions regardless of their size and their level of expertise. A small credit union in Massachusetts was convicted for failure to file currency transactions reports (CTRs). This failure was largely due to the fact that its officers are unpaid volunteers who work part-time. This applies to most credit union officers, which renders their capacity to detect money laundering offences questionable.\textsuperscript{108}

The same approach to the question of extending the requirements could be observed with respect to the case of the Hawala system. There has been an ongoing concern about the use of the informal banking system for the purposes of money laundering such as the hawala system. This concern has become more acute after the September 11 events. The result of that was an FATF recommendation to extend the scope of regulations to informal banking systems. This means these informal organisations that are engaged in providing financial services will be expected to act

\textsuperscript{106} Extending these obligations to the lawyers has been particularly problematic in view of the right to counsel that exists and client-lawyer confidentiality that is directly linked to this right. On the problematic implications of this extension see Abendano, K., "The Role of Lawyers in the Fight against Money Laundering: Is a Reporting Requirement Appropriate", 27 Journal of Legislation 463 (2001). [arguing that such obligations are likely to undermine the confidentiality valued in the legal community and that any such measures would only be effective if they do not interfere with the lawyers' obligations towards their clients.]


as policemen on behalf of the State and to perform certain reporting and record-keeping duties. It is the opinion of this author that the effectiveness of such extension is minimal. The legal paradigm for money laundering control and prevention has been based on taking advantage of the point of contact between criminals and the regulated legitimate system. In the case of the informal banking arrangements, this logic is absent. Enforcing the regulations on such organisations would be as strenuous as direct policing of criminals.

In conclusion, it is arguable that other considerations apart from the use of a certain business for money laundering purposes should be taken into consideration in making the decision to extend the regulatory requirements to this business. The size and capacity of the business is one relevant factor. It is also a factor that is consistent with the policy of conducting cost-benefit-analysis as a pre-requisite for imposing regulatory requirements. It is also a factor that is consistent with the analysis of these regulatory requirements as a form of privatisation of the policing function.

5.2. The Scope of Information Gathering

Collecting information about the identity of the customer is the primary element of information gathering for the purpose of preventing money laundering. Financial institutions are required to identify their usual and occasional customers. To fulfil this requirement they should rely either on official documents or other reliable forms of identification.

The identification gets more intricate in two cases. The first is when the customer is acting on behalf of another. In this case, financial institutions are required to take reasonable measures to establish the identity of the persons on whose behalf the transaction is taking place. The second is the case of legal entities. Financial

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111 In this context a "financial institution" has a broad meaning. It refers to any business that is subject to money laundering regulations. This is an open-ended category that is defined by the relevant laws and regulations. See supra 105and accompanying text.


institutions are required to confirm the legal existence of the entity and understand its structure. They must particularly make sure that the corporate vehicle is not used to shield a natural person who desires to act with anonymity.\textsuperscript{114}

Verifying the identity of the customer is not a momentary process. The financial institution is required to monitor the account and update the identification periodically. It is also required to keep records of the identification for a period of five years after the end of the relationship.

New concerns for corruption have resulted in new identification requirements. The Basel Committee has recommended that banks should be required to verify whether their customer holds an important public position. The identification role of the banks in this regard demands substantial pro-activity. In order to verify the political status of the customer, banks are expected to consult public sources of information in addition to the information provided by the customer. In the case where the customer holds a political position, banks are required to verify the source of the funds.\textsuperscript{115}

In addition to retaining records of identification, financial institutions are also required to retain records on domestic and international transactions. The policing nature of this record-keeping requirement is obvious from the definition of the information to be recorded and the purpose of this record-keeping requirement. The FATF's Recommendation 11 provides that "such records must be sufficient to permit reconstruction of individual transactions so as to provide, if necessary, evidence for prosecution of criminal behaviour." In other words, the financial institution is required to approach the transaction and the customer relationship with an investigative eye and to collect evidence that might be helpful in a future criminal proceeding.

If a certain transaction seems unusual in that it is too large, too complex or does not have any obvious lawful commercial purpose, financial institutions should exercise more diligence. If the transaction was such that it raised suspicion that it stems from a criminal activity, financial institutions in many jurisdictions are now required to report this suspicion to the competent authorities and to act upon the authority's instructions subsequently. Suspicious transaction reporting now means more than just reacting to suspicion arising from a particular transaction to actually

monitoring the customer's account in order to identify any irregularity in the account's movement that might raise suspicion and require reporting.\textsuperscript{116}

The importance and sensitivity of the information gathered was poignantly expressed by Justice Douglas in his dissenting opinion in \textit{California Bankers Assn. v. Shultz}. His words are worth repeating here: "the banking transactions of an individual give a fairly accurate account of his religion, ideology, opinions, and interests[.\]"\textsuperscript{117}

5.3. Due Process Considerations

This massive and decentralised information gathering by financial institutions is bound to raise vexing due process concerns. Financial institutions are acting effectively as agents of the government in its policing function, yet they are exercising the powers of this agency free of the procedural requirements that bind State police and safeguard the rights of the subjects of this exercise. In \textit{California Bankers Assn. v. Shultz},\textsuperscript{118} these due process concerns were basis for a challenge of the constitutionality of the BSA. The Plaintiffs' main contention was that the Act and its implementing regulations violated their Fourth Amendment's guarantee against unreasonable search and seizure. The court dismissed the challenge on the basis that "both the legislative history and the regulations make specific reference to the fact that access to the records is to be controlled by existing legal process."\textsuperscript{119}

In an insightful dissenting opinion, Justice Marshall highlighted the vulnerability of this procedural safeguard when he stated that: "This attempt to bifurcate the acquisition of information into two independent and unrelated steps is wholly unrealistic. As the Government itself conceded, 'banks have in the past voluntarily allowed law enforcement officials to inspect bank records without requiring issuance of a summons.' [...] The plain fact of the matter is that the Act's recordkeeping requirement feeds into a system of widespread informal access to bank records by Government agencies and law enforcement personnel. [...] once recorded, [customer's] checks will be readily accessible without judicial process and without any showing of probable cause[.\]"\textsuperscript{120}

\begin{itemize}
\item \textsuperscript{115} This category of customers is referred to as "politically exposed persons ('PEPs')", see Basel Committee on Banking Supervision, \textit{Customer Due Diligence for Banks} (October 2001), §§41-44.
\item \textsuperscript{116} \textit{Id.}, §§53-54.
\item \textsuperscript{117} 39 L Ed 2d 812, at 854.
\item \textsuperscript{118} 39 L Ed 2d 812.
\item \textsuperscript{119} \textit{Id.}, at 835.
\item \textsuperscript{120} \textit{Id.}, at 860-861.
\end{itemize}
This vulnerability was demonstrated in *U.S. v. Deak-Perera*. In this case, an Internal Revenue Agent gained access to Deak-Perera's, a non-bank financial institution, records under the pretext of inspecting the company's compliance with the BSA record-keeping and reporting requirements. The Agent exceeded the purpose of its inspection and conducted a fishing expedition collecting information of Deak-Perera's customers. On basis of this information, a tax investigation was initiated and a summons was sought requesting Deak-Perera to produce all the records pertaining to one of its customers. The Company challenged the summons arguing that the information on which it was based was improperly obtained. The Court considered the actions of the agent an abuse of process, accepted Deak-Perera's argument and denied compliance with the summons. While the Court's ruling is commendable from a due process perspective, the case remains illustrative of the abuses that this private information gathering is susceptible to. Deak-Perera has acted in a responsible manner in protecting the legitimate interests of its customer. This is not however to be expected in all such instances.

In the aftermath of September 11, the legal response was characterised by a more fluid flow of information amongst: financial institutions, regulators, the police and investigators, and intelligence agencies. Due process and privacy inhibitions to such unrestricted flow were marginalised. Part 3 of *The United Kingdom Anti-Terrorism, Crime and Security Act 2001* concerning "Disclosure of Information," for example, extends existing disclosure powers drastically. Art. 17(2) extends disclosure power, under a long list of existing laws included in Schedule 4 to the Act, to include disclosure requested for the purpose of criminal investigation, criminal proceedings and the broader purpose of facilitating a determination of whether any such investigation or proceeding is needed. These new disclosure powers are more extensive than they seem once one takes into consideration the blanket authorisation granted to the Treasury to extend the application of this Section to any disclosure provisions included in any subordinate legislation.

122 Id., 1402.
Similarly the USA PATRIOT ACT\textsuperscript{124} relaxes the rules regarding access to information gathered by financial institutions and enforcement agencies. The Act permits financial institutions to share information pertinent to money laundering risks amongst themselves and with enforcement agencies. The Act further relaxes the rules regarding the Secretary of the Treasury's power to disclose information reported by financial institutions to other Government agencies. One of the most important developments in this regard under the Act is the inclusion of intelligence agencies amongst the Government agencies to whom disclosure of reported information maybe made. This development was of high priority in the minds of the drafters that it was included in an explicit amendment of the purpose of the BSA. The Purpose now reads: "It is the purpose if this subchapter to require certain reports or records where they have a high degree of usefulness in criminal, tax or regulatory investigations or proceedings, \textit{or in the conduct of intelligence activities, including analysis, to protect against international terrorism.}" [Emphasis added]

This exercise of policing functions under money laundering regulations involves a substantial exercise of profiling that is not governed by the clear-cut rules and procedures that govern State police in the exercise of their functions. The cost of this exercise to individuals and corporations could be onerous. Under the current economic conditions, access to financial services is a necessity for individuals and corporations to conduct their affairs. Financial institutions attempting to shield themselves against liability are likely to deny their services to certain individuals whose profiles fit the typical image of a drug dealer or a terrorist. Such exclusion could be based on minimal suspicion and would not necessarily be justified in reality. The costs of these outcomes to the freedom of association, the values of non-discrimination and equal opportunity deserve serious consideration.

In sum, Money laundering regulations create a broad and expanding contingency of professionals deputised by the government as private policemen. This stands in clear contrast with the "Surely not" response given by Bankes LJ in Tournier \textit{v.} National Provincial\textsuperscript{123} to the question of whether the banker is permitted to disclose information to an enquiring police officer about a customer who is charged with fraud. While the shift away from this view towards a closer public private partnership

\textsuperscript{124}PL 107-56 (October 26, 2001).
between financial institutions and the police is justified, in view of the massive shift in informational and economic power that took place in the latter part of the 20th century, some safeguards remain necessary. This decentralised exercise of policing functions poses serious threats to the values of due process, privacy and freedom of association. Such values are cornerstones of the legitimacy of the evolving legal order that merit procedural safeguards to secure their preservation.

6. Conclusion

In the second Chapter, it has been argued that privatisation of the economic activity was instrumental to the globalisation process. In terms of the two aspects of globalisation: the geographic and the political, privatisation as an instrument contributed mostly to the second. The phenomenal transfer of ownership and/or control that characterised major privatisation programmes has resulted in a shift in the balance of power in favour of private actors. When this shift was accompanied by a suitable infrastructure protecting competition, decentralisation of power also occurred.

In a way privatisation bred further privatisation. When confronted by the governance crisis that resulted from globalisation in general, the State especially in developed countries often resorted to divesting of its law and order functions in favour of private actors. This was sometimes done as a solution to the fiscal weakness of the State in relation to the cost of economic regulation, enforcement and dispute resolution. This cost is becoming particularly high as a result of the decentralisation of the economic activity, such as in the utility market, or as a result of the sophistication of the economic activity, such as in the context of environmental regulation of industrial activities. In other occasions, such as in the context of the Internet regulation, resort to private order was done to resolve the mismatch between the geographic scope of the activity and the jurisdictional territoriality of the State.

These capacity and jurisdictional difficulties have resulted in privatisation trends since the 1970s in all of the three legal functions of the State: adjudication, lawmaking and enforcement. Privatisation of each of these functions has taken many forms and raised substantial concerns. The concern often centred on the degree to which these forms of private legal order respect basic democratic values, respect the rights of the individual and secure justice. The common view, however, is that private

125 [1924] 1 K.B. 461, at 474.
order is here to stay and that safeguards should be introduced and sometimes specially designed to incorporate within it the desired values.

Privatisation of law and order and the concerns that it raises are manifest in Money laundering law, which can be viewed as a privatisation instrument. Since its inception, the primary goal of money laundering law has been to tap the information sources of financial institutions for the purposes of policing. Over the years, this has translated into an ever-growing list of reporting and record-keeping requirements. Again, this decentralised collection of information should be guarded by procedural safeguards.
CHAPTER SIX
NON-STATE GOVERNANCE II: SUPRANATIONAL LEGAL ORDER

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1. Introduction
Supranationalisation is the second modality of non-state governance. Creating a global agency to govern global issues seems to be an obvious response to the governance problematic. If the State is not big enough to govern a social activity that is assuming a global dimension, then one option is to create an agency that is big enough. Such a solution, regardless of its practicality or lack thereof, encounters a hard doctrinal obstacle, namely the doctrine of State sovereignty. Despite this deeply ingrained principle of the international legal order, some supranational trends could still be discerned in the governance of global issues.

This Chapter deals with this mechanism of governance in a number of sections. An understanding of the mechanism is not possible without a brief exposé of the doctrine of State sovereignty and its legal implications for the sources of the law and for the law of international organisations. Following this exposé, a number of supranational trends will be examined including the collective security system as a model of supranational enforcement and supranational adjudication as exemplified by the WTO Dispute Settlement Body and the International Criminal Court. The final Section deals with supranational trends in controlling and preventing money laundering.
supranational trends will be examined including the collective security system as a model of supranational enforcement and supranational adjudication as exemplified by the WTO Dispute Settlement Body and the International Criminal Court. The final Section deals with supranational trends in controlling and preventing money laundering.

2. Sovereignty and its Legal Implications

Sovereignty is about power and authority and their spheres and holders. It emerged out of the Middle Ages, initially to define the hierarchy of authority in the feudal society and subsequently to define the authority of the strong national kings vis-à-vis the Emperor and the Pope on one hand and vis-à-vis each other on another. Over its long history, the notion of sovereignty disintegrated into many different ideas without losing its currency. This state of affairs have led a leading international jurist to report that "writers on the law of nations often sigh: if only this word had never been invented and if only it could be torn out root and branch from the traditional juristic terminology."3

Theorists attempting to clarify the concept spoke of different meanings and different usage of the term sovereignty. Their distinctions in this regard again varied. Commentators commonly distinguish between internal and external sovereignty depending on the sphere within which sovereignty is asserted. One jurist, however, creates a three-pronged distinction between inward, outward and upward aspects. While the inward and outward sovereignty correspond to the internal and external spheres, the upward aspect refers to the question of whether a sovereign could be bound by any rules.4 A leading international relations expert on the subject offers another taxonomy distinguishing between domestic sovereignty, interdependence sovereignty, Westphalian sovereignty and international legal sovereignty.5 Other distinctions between absolute and relative sovereignty6 and positive and negative

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1 At this stage the concept was a relative one denoted by the Latin adjective superiortas meaning superior rather than supreme. This superlative version was only to enter the usage at a later stage. Verzijl, J., International Law in Historical Perspective Vol. 1 (1968), at 257.
2 Id., at 257-258.
3 Id., 256.
4 Id., at 259 et seq.
5 Krasner, S., Sovereignty: Organized Hypocrisy (1999), at 9 et seq.
6 This is a classic distinction both in constitutional theory and in international law theory. On the latter see Seidl-Hohenfeldern, I., International Economic Law (3rd ed., 1999), at 19-20.
sovereignty have also been circulated. While some of these distinctions are different names of similar notions, others are actually distinct shades of the notion of sovereignty.

It is not the purpose of this discussion to go through all these various classifications. It is merely to show the heterogeneity of the concept and the care required in tackling it. In the present discussion, the author adopts the common distinction between internal and external sovereignty. Internal sovereignty refers to the authority and control exercised within the State and external sovereignty refers to the tributes of independence vis-à-vis other actors in the international sphere. In the following few pages the meaning of both these aspects is expounded. The legal implications of the doctrine of external sovereignty with regard to the sources of international law and its institutions is also discussed.

2.1 Internal Sovereignty

This notion pertains to supreme power and authority within the State. It is a question of constitutional theory that has been the subject of continuous debate. The earliest systematic analysis of this question has been presented by Jean Bodin in his *Six Livre de la Republique* (1577). Writing at a time of severe political unrest that threatened the very existence of the State, he defined sovereignty as "the absolute and perpetual power of the Commonwealth". In elaborating his theory, he advocated the sovereignty of the ruler and indivisibility of sovereignty. A conception that was later on to provide the philosophic foundation for absolutism. In as much as Bodin's theory is concerned with the allocation of power within the State, it is not relevant to our present discussion. One query is however relevant and that is the question of what are the true marks, i.e. rights or prerogatives of the sovereign which distinguish him from any other loci of authority? This query was the starting point of Bodin's analysis, which sought to distinguish the sovereign from the senior administrative officials of the State. Its relevance to the present discussion is that it provides a classic account of the tributes most intrinsic to the concept of sovereignty as guidance for the subsequent discussion of supranationalisation.

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7 Jackson, R., *Quasi-States: Sovereignty, International Relations and the Third World* (1990), at 26 et seq.
On this question, Bodin wrote "I find that supremacy in a commonwealth consists of five parts. The first and most important is appointing the magistrates and assigning each one's duties; another is ordaining and repealing laws; a third is declaring and terminating war; a fourth is the right of hearing appeals from all magistrates in last resort; and the last is the power of life and death where the law itself has made no provision for flexibility or clemency." In Bodin's analysis the power of making laws is the primary mark of sovereignty. In his view "making and repealing law includes all the other rights and prerogatives, so that strictly speaking we can say that there is only one prerogative of sovereignty, inasmuch as all the other rights are comprehended in it".  

Almost a century later, writing in the very similar context of the English Civil War, Hobbes published his Leviathan substantially subscribing to Bodin's conclusions on sovereignty. The main difference worth noting is that while Bodin vested the sovereignty in the ruler, Hobbes invented the concept of the State as a person vested with the sovereign power that is exercised by the monarch or by an assembly of men depending on the form of government. With respect to the marks of sovereignty, a term used by Hobbes and reveals Bodin's influence, Hobbes reproduces a very similar list to that of Bodin's as cited above. Further, Hobbes subscribes explicitly to the indivisibility of sovereignty.  

One obvious fact regarding the evolution of the concept of internal sovereignty and one that is worth stating is that it is a notion that has been context-contingent. Thinkers who formulated the concept in the context of political disturbances such as Bodin and Hobbes tended towards a sovereignty that is absolute, indivisible and vested in a specific locus. Changes in the political context in a way that consolidated the power of the State have led later thinkers to argue for the divisibility of sovereignty as a way of creating a check on State power. Such thinkers include Locke, Mill and Marx. This evolutionary and context-specific nature of the concept is captured in the words of Laski, an English political thinker of socialist persuasion who developed his thought in the context of the totalitarian States of Germany and  

10 Id., at 58.  
12 Id., at 127.  
13 Id., at 125-128.  
14 Id., at 127.
Italy. He concluded his argument for a pluralist concept of the State and of sovereignty by stating "I imagine the absolute Hobbes, who has seen internal dissention tear a great kingdom in pieces, hold up hands of horror at such division of power. Maybe I who write in a time when the State enjoys its beatification can sympathise but too little with that prince of monistic thinkers."\(^{15}\) It is this teleological nature of sovereignty that one needs to bear in mind in arguing for it or against it.

### 2.2. External Sovereignty

Sovereignty in the external dimension is the organising principle of the international legal order. It dates back to the Peace of Westphalia in 1648. According to this Treaty the European World was to be organised into territorial entities that enjoy autonomy from the Emperor and the Pope. These territorial units were to exercise authority within their territories and possess the capacity to conduct foreign relations. Although the Treaty of Westphalia has introduced this territorial organisation of the community of kingdoms, it was not until a decade later that the principle of non-intervention in the internal affairs of other States was explicitly formulated.

While internal sovereignty means that within each State lies the authority to organise its internal affairs, external sovereignty adds another limb to this definition providing that such authority will be exercised to the exclusion of any external power. It is arguable that his rule of non-intervention is the core element of the doctrine of non-intervention. The principle of non-intervention was first advocated by two leading international jurists, Wolff and Vattel, during the second half of the 18\(^{th}\) century. The principle did not however become positive international law until 1933 when it was stipulated in the Montevideo Convention on Rights and Duties of States. Article 8 of the Convention reads: "No State has the right to intervene in the internal or external affairs of another."\(^{16}\)

The principle of non-intervention also applies to international organisations, which are typically required by their charters to refrain from any intervention in the internal affairs of their members. Article 2(7) of the United Nations Charter, stipulates it as a governing principle of the organisation that "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are


\(^{16}\) Montevideo Convention on Rights and Duties of States, Signed at Montevideo on 26. December 1933.
essentially within the domestic jurisdiction of any state”.

The doctrine of external sovereignty has posed a particular problem for international law scholarship. The question that arose was one of reconciling the concept of binding international legal norms with the external sovereignty of States. The question is in some way equivalent to the constitutional problem of absolutism in the international context. In this context scholars are again asking whether sovereignty is absolute or relative. Legal opinion was divided between three schools of thought: (1) those who argued that the State can voluntarily bind itself by contracting with other States, once such a will has been executed the merging wills of States create a lasting bond that States cannot dissolve; (2) others argued that the State can voluntarily bind itself for as long as it wishes to remain bound; (3) a third school and an extreme one argued that the State cannot possibly be bound and that such concept is antithetical to its sovereign character.17

International lawyers dismissed the extreme theory, which has the effect of essentially denying the existence of an international legal order. Verzijl argued that "'sovereignty' can only be maintained as an acceptable legal concept if it is used in the connotation of freedom for the nations to lead their national existence as they think fit, in complete mutual independence, but within the limitations of international law, irrespective of whether such limitations flow directly from its own commands or from competent international organs freely created in common.”18 While this definition qualifies sovereignty by explicitly subjugating the State to the norms of international law, it remains explicit on the voluntary character of these norms. This leads to the next point regarding what external sovereignty really means in terms of the sources of international law and its institutions.

4.3. The Legal Implications of Sovereignty

The principle of external sovereignty as the basic organising principle of international law begets an extensive number of legal principles across the various areas of the international legal order. This Section is not a comprehensive analysis of all such derivative principles. Instead, this Section focuses on the implications of external sovereignty for the sources of international law and for the law of international organisations.

17 Verzijl, J., supra note 1, at 258.
18 Id., at 259.
The basic principle here is voluntariness. International law does not recognise any supreme authority over the Community of States. Accordingly, States are only bound by the rules that they make and consent to abide by. Treaties are agreements that are only binding on their parties. Whatever rules they make would legally only bind those States that accept them. Some have recently argued that similar rules that appear in numerous treaties or rules that are included in a widely adopted multilateral treaty are declaratory of customary international law and hence binding on non-parties. Accepting such an argument would introduce a degree of "majoritarianism" in international law that would cut against the consensual character of its sources. This argument, however, has not been widely accepted and the opinion remains divided to the exclusion of this concept from the scope of positive international law.

The persistence of the consensual nature of the sources of international law is also reflected in the debate over the legal value of the UN General Assembly Resolutions. Despite all the attempts of the developing countries to secure a binding force for these resolutions and in spite of all the doctrinal creativity of legal scholars, the rule remains that UN General Assembly Resolutions may only create "non-binding norms."

The Vienna Convention on the Law of Treaties places great emphasis on consent as a core principle of treaty-making. In its "Preamble," the Convention confirms the commitment to the principles of international law concerning sovereign equality and independence of all States and non-interference in domestic affairs of States. Article 34 provides that "A treaty does not create either obligations or rights for a third State without its consent." Consent is further guarded by the Convention by Articles 49 through 52, which invalidate any consent obtained by fraud, corruption and coercion whether of the State or of its representative.

The voluntariness of the sources of international law is also reflected in the fact that it is almost a standard provision of international treaties to grant the parties the right to withdraw from the treaty subject to certain procedures. This practice is more consistent with the position of the second school of thought on the relationship between international law and sovereignty, which provides that the State can bind

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19 D'Amato, A., The Concept of Custom in International Law (1971), at 139.
21 Seidl-Hovenveld, I., supra note 6, at 30 et seq. The author finds evidence of the inconclusive nature of this argument in the context of bilateral investment protection treaties.
22 The Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969
applicable to international organisations. Membership, therefore, cannot be obtained by coercion. Further, the constituent treaties of international organisations typically permit unilateral withdrawal subject to certain procedures and, in some cases, to the fulfilment of obligations already incurred.

This brief exposé of the doctrine of sovereignty and its legal implications reveals that the structure of the international order remains a "horizontal" one. It is comprised of States that interact on basis of juridical equality and do not accept a supreme authority. The growing interdependence following the Second World War has led scholars and policy makers to urge for more derogation from and limitations on the principle of sovereignty in favour of more effective international legal order. Such derogation has also been observed as taking place and led some scholars to speak of the end of the nation State and the twilight of sovereignty. Others have however argued that external sovereignty is a form of "organized hypocrisy" in that it remains as a norm but it is often violated whenever such violation is more conducive to the promotion of national interests. It is the argument in this thesis that change did occur. While sovereignty has always been sporadically violated and ceded in the pursuit of national interests, the second half of the 20th century has seen more institutionalised forms of such cession and sometimes violation. So it is the institutionalisation of the derogation from the sovereignty that is novel. This institutionalisation has led to the emergence of supranational trends in global governance. It is to this modality of global governance that the discussion now turns.

3. Supranationalisation as a Solution

3.1. Introduction

Supranationalism is a term loosely used. It has not developed into a specific legal doctrine. Its history goes back to the 1950s and specifically to the formation of the European Coal and Steel Community. The treaty instituting this Community is probably the first international legal instrument to use "supranational" as a legal term. Despite the diversity of usage, a minimum common denominator could be established. Whenever the term is used it denotes an institutionalised exercise of

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24 Id., art. 5
26 Krasner, S., supra note 5.
European Coal and Steel Community. The treaty instituting this Community is probably the first international legal instrument to use "supranational" as a legal term.\(^{27}\) Despite the diversity of usage, a minimum common denominator could be established. Whenever the term is used it denotes an institutionalised exercise of power or authority over the State not by another State but by an international organisation or organ. The powers typically exercised are either judicial or prescriptive. That is to say that the supranational character has been attached to international organisations or organs that are either adjudicating disputes between States or prescribing rules of conduct to be followed by States.

One international scholar analysing the term "supranational" has identified a number of traits that would give a certain organ a supranational character. This taxonomy included, amongst others, the following practices:\(^{28}\)

1. an international organ or the organisation is empowered to make decisions binding on its Member States by majority voting;
2. a non-representative international organ of an organisation is empowered to make decisions binding on all the members of the organisation including those that are not represented in the organ; and
3. an international organ or organisation composed of individuals acting independently from their governments is empowered to make binding decisions on its member governments.

The common feature of these various practices as indicative of a supranational character is that they all depart from the principle of voluntariness and consent that govern the sources of international law and underlie the operations of international organisations.\(^{29}\) In that sense supranationalism is a departure from the doctrine of external sovereignty towards establishing structures of superior authorities in the international system. Sometimes this session of sovereignty is voluntary but at other occasions it is coercive or at least not based on genuine consent.

The clearest examples of supranational structures of governance are the organisations of regional integration. In terms of the depth of integration and hence the degree of supranationalism, the European Union is readily the most advanced of

\(^{27}\) art. (9) Paras. 5 & 6. Verzijl, J., supra note 1, at 285.
\(^{28}\) Id., at 287 et seq.
\(^{29}\) See id., at 286.
these integration arrangements. Successful regional integration requires strong institutions to enforce it. Exaggerated commitment to national sovereignty is bound to be detrimental to regional integration and in the extreme case might lead to its failure. The success of the European integration is a factor of the willingness of its members to accept the authority of its institutions. This acceptance is reflected in the evolution of the doctrines of "direct effect" and supremacy of Community Law as well as the exclusivity of the Community's jurisdiction. Another feature of the European integration is the highly evolved system of judicial review that guarantees the compliance of the members with the Community law as well as the uniformity of its application. The supranational character of the Union is also found in the possibility for majority voting in the Council and the increasing powers of the Commission.

Regional integration, while proliferating in this era of globalisation, is not primarily implemented as a response to the governance problematic posed by globalisation. It is implemented more in order to achieve certain economic and political benefits. It is for this reason that discussion of regional integration arrangements is beyond the scope of this study. The discussion in this Section is confined to supranational trends in the global order that specifically aim at governing activities stretching across national borders.

The discussion is organised along the same lines as the three core powers of the State, i.e., the prescriptive power, the enforcement power and the judicial power. While discussion of supranational enforcement and adjudication is addressed in this general overview, dealing with supranational lawmaking is deferred to the specific case of money laundering law. This case provides sufficient illustration of supranational trends in lawmaking. In the following two subsections, the discussion will focus on the emergence of supranational agencies performing judicial and enforcement functions. The first Section focuses on the collective security system and the UN Security Council as its main institution. This system serves as an example of a supranational enforcement function. The following Section focuses on supranational judicial organs focusing primarily on the WTO Dispute Settlement Body and the International Criminal Court.

3.2. The Collective Security System: A Case of Supranational Enforcement

After two world wars with devastating worldwide effect, the lesson was obvious. War is a global problem and security is a global concern. In this particular case, the
response was squarely supranational. The United Nations was established and at the core of its mission was "to maintain international peace and security." In order to achieve this end, the Charter created a collective security system with the UN Security Council at its heart. Description of this system is due.

According to article 24 of the Charter, primary responsibility for the maintenance of peace and security was conferred on the Security Council. The purpose of this arrangement, as stated in the article, was to secure the promptness and effectiveness of any action taken by the UN. This was further guaranteed by giving the decisions of the Security Council a force binding on all the members of the UN. The collective security system is essentially a dispute settlement system. It is however a comprehensive one involving determination of the issues and enforcement of the decisions. Like any other dispute settlement mechanism, the determination of the issues often involves creation of rules of conduct. This is particularly so in the context of the UN system in view of the typical vagueness of the rules of international law, which is bound to give the adjudicative process a strong norm-setting component. This is not to suggest that the Security Council is a judicial body. It is an executive body that exercises a dispute settlement function, which is bound to have an adjudicative component as will be illustrated shortly.

The rules governing the collective security system are included in Chapter VII of the Charter. The competence of the Security Council is confined to "any threat to the peace, breach of the peace, or act of aggression". Accordingly, the first step in the operation of the system is to determine whether one of these conditions or situations actual exists. The Security Council retains full discretion in determining whether a threat to the peace, a breach of the peace or aggression has occurred. It exercises this discretion according to the circumstances of each case and their gravity. The category of "threat to the peace" has proved to be the broadest. It is also the category that has been most utilised since the end of the Cold War to expand the enforcement jurisdiction of the Security Council.

Once it has been determined that one of the three conditions obtains, the Security Council has a choice between employing measures that do not involve the use of force according to article 41 of the Charter or taking measures involving the

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30 Charter of the United Nations, art. 1(1).
31 Charter of the United Nations, art. 25.
use of force to the extent necessary to restore the peace and security according to article 42. Article 41 measures may include suspending economic relations either totally or partially, interrupting means of transportation and communication, and severing diplomatic ties. The most extensive use of article 41 measures was carried out against Iraq in response to its invasion of Kuwait on 2 August 1990.33

Should the measures available under article 41 prove inadequate or are deemed by the Security Council to be inadequate, the Security Council may resort to article 42 of the Charter. Under this article, the Security Council has the power to employ force including any action by air, sea or land. Any action taken should be confined to what is necessary to "maintain or restore international peace and security". This determination is however again within the discretion of the Security Council. As originally envisioned by the Charter in articles 43 and 45, such use of force was supposed to be carried out by using armed forces committed by Member States to the enforcement actions of the Security Council according to agreements signed between the Security Council and all the Members. These agreements, however, never materialised. In the absence of articles 43 and 45 arrangements, the Security Council carried out its enforcement actions by delegation.34 The enforcement function was therefore carried out by one of the State Members or by a multinational force under the leadership of one of the Members or even by a regional organisation such as NATO acting under the authorisation and the flag of the UN.

The supranational character of the collective security system as operated by the UN Security Council is evident in two respects: (1) its composition; and (2) its voting procedure. The Security Council consists of fifteen out of the 160 members of the United Nations. Five of these are permanent members including the Republic of China, France, the Russian Federation, the United Kingdom and the United States. The other members are elected by the General Assembly subject to certain criteria.35 The decisions of the Security Council pertaining to the application of Chapter VII, as well as any other non-procedural matter, are made by a majority of nine members including the permanent members. Accordingly, the Security Council manifests two

33 Id., at 860-861.
35 Charter of the United Nations, art. 23 (1)
of the conclusive features of a supranational agency described in the introduction to this Section.

During the course of its operations and especially since the end of the Cold War, the Security Council has expanded its operations thus increasingly impinging on the internal affairs of States. In performing its international security function, the Security Council extended its intervention to what would have qualified as a strictly internal affair. It diversified its measures to include creating ad hoc tribunals to prosecute alleged war criminals, determining border disputes and enforcing its determination, and establishing compensation commissions. By expanding the concept of "threat to the peace" to include "widespread violations of humanitarian law," the Security Council expanded its enforcement powers considerably to include internal disputes and blurred the distinction between guaranteeing peace and security and humanitarian intervention.

This extensive exercise of power by the Security Council has been critiqued in terms of its legitimacy. One commentator observing the extent to which the Security Council has extended its jurisdiction asked whether "the practice of the Security Council permit the conclusion that it has exercised its exceptional enforcement powers legitimately and fairly?" He then concluded that at the level of perception, the diplomatic language of the Security Council resolutions is often vague and it fails to express the legal foundations for the Council's resolutions. This gives the perception of illegitimacy and creates the impression of unprincipled exercise of power. This problem of perception has been further exacerbated by the Council's tendency towards informality and the conduct of its affairs in "informal sessions off the official record."

The extensive exercise of power by the Security Council after the end of the Cold War is particularly alarming in the absence of a form of "check-and-balance" mechanism that holds the Council to account. Judge Shahabuddeen, in his Separate

39 Id., para. 16.
41 Franck, T., Fairness in International Law and Institutions (1995), at 221.
42 Id., at 230.
43 Id.
Opinion in the *Lockerbie Case* before the ICJ, raised the question: "Are there any limits to the Council's powers of appreciation? In the equilibrium of forces underpinning the structure of the United Nations within the evolving international order, is there any conceivable point beyond which a legal issue may properly arise as to the competence of the Security Council to produce such overriding results? If there are any limits, what are those limits and what body, if other than the Security Council, is competent to say what those limits are?"\(^{44}\)

In conclusion, the fact that the Security Council in its majoritarian manner implements these highly exceptional enforcement measures that clearly undermine the principle of non-intervention testifies to its character as the supranational organ *par excellence*. The extensiveness of the Security Council's power and its methods of implementing them have been criticised. The critique centres primarily on the accountability of the Council, the legitimacy of its exercise of powers, the consistency of this exercise and the Council's respect of the contours of its jurisdiction as defined by the Charter. The trend in the Security Council towards informality, accompanying the increase in its exercise of enforcement power under Chapter VII of the Charter, make legitimacy concerns more acute.

3.3. Supranational Adjudication: The WTO and the ICC

Establishing a rule-based mechanism for the resolution of disputes by independent and impartial arbiters, whose decisions are binding on the parties, marks the beginning of an advanced stage of organisation in any community. Allocating the settlement of international disputes to such machinery has been repeatedly attempted over the past two decades. The modern history of such attempts is said to begin with the Jay Treaty 1794\(^{45}\) between the United States and Great Britain.\(^{46}\) The Treaty delegated the settlement of various legal disputes to mixed commissions acting as arbitrators.\(^{47}\) Not unlike the history of adjudication in the domestic context, international adjudication has thus emerged out of the practice of arbitration. During the 19\(^{th}\) century and the beginnings of the 20\(^{th}\) century, arbitration has evolved away

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\(^{44}\) *Question of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya Arab Jamahiriya v. United Kingdom). Provisional Measures, Order of April 14, 1992, ICJ Reports 1992, 32.*

\(^{45}\) *1794 Treaty of Amity Commerce and Navigation*


\(^{47}\) Id.
from its informal origin of settling disputes according to principles of justice and equity, into a juridical process where disputes are settled in accordance with the law.\textsuperscript{48}

The question of adjudication in the international sphere is not distinct from the question of collective security discussed in the previous Section. In fact, both concepts are geared towards eliminating the prospect of war and achieving world security. The first attempt at creating a permanent international judicial organ took place after the First World War. The Permanent Court of International Justice started its operation in 1922. After the Second World War, the International Court of Justice was established as a substitute for the Permanent Court. Considering that the Charter of the United Nations outlaws the use of force as a method of resolving disputes by individual States, the creation of a judicial organ becomes a necessity.\textsuperscript{49} The persistence of the considerations of sovereignty, however, has limited the role of the International Court of Justice.

The attempt at granting an international court a compulsory jurisdiction has failed both in the creation of the Permanent Court of International Justice and the creation of International Court of Justice. The claims of sovereignty have prevailed over the need for collective organisation. As a result, the competence of the court remained entirely dependent on the consent of the parties.\textsuperscript{50} While membership of the Court is automatic upon membership of the United Nations,\textsuperscript{51} this does not mean that the Court possesses automatic jurisdiction over disputes between its Members. Each country retains the power to refer a dispute to the Court or to forestall such referral. As a compromise, Article 36(2) of the Statute of the Court provides that the States Parties may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in certain legal disputes. This has been referred to as the "Optional Clause". The idea behind it was that as the States' optional declarations proliferate, a situation akin to that of \textit{de facto} compulsory jurisdiction will prevail. The reality however did not confirm this anticipation and the \textit{ipso facto} jurisdiction of the Court remained limited. The result in terms of the context of this discussion is that the International Court of Justice remains a traditional international

\textsuperscript{48} Id., at 704-707.
\textsuperscript{49} The Charter of the United Nations, arts. 2(3) & 2(4).
\textsuperscript{50} The Statute of the International Court of Justice, art. 36.
\textsuperscript{51} Charter of the United Nations, art. 93(1).
court rather than a supranational one. Its jurisdiction is strictly contingent on the consent of States.

Some commentators describe adjudication as supranational only if the court possesses competence to try cases involving private parties litigating against the State. Examples include the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR). This definition is however too restrictive for the purposes of this discussion. In the present context, supranational adjudication denotes any judicial body that has *ipso facto* competence to decide disputes involving States. The supranational trend thus manifests in the departure from the principle of consent as the basis for judicial dispute settlement. The depth of the trend is thus determined by the degree of departure from the consensual character of the arrangement.

The WTO Dispute Settlement System represents such a supranational arrangement. Under this system, any dispute arising under any of the Multilateral or Plurilateral Trade Agreements is to be resolved in accordance with the Dispute Settlement Procedures provided for under the relevant agreement specifically, and under the Dispute Settlement Understanding more generally. The WTO Dispute Settlement System departs from the principle of consent in a number of respects: (1) Adherence to the Dispute Settlement Procedure is part and parcel of the membership of the WTO. State Parties do not possess the traditional prerogative to exclude the application of the dispute settlement mechanism, or any other provision for that matter, by making reservations. (2) The Dispute Settlement Body (DSB) possesses compulsory *ipso facto* jurisdiction not contingent on *ad hoc* approval by the parties. (3) Any complaining government has the right to the formation of a panel upon its request. This is a corollary of the compulsory *ipso facto* jurisdiction of the DSB. (4) Any Panel Report or Appellate Body Report is automatically adopted by the DSB unless it is blocked by consensus. This means that it is virtually impossible to block a report as long as the winning party participates in the vote.

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55 Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 6(1), in WTO, *supra* note 53.

56 *id.*, art. 16(4).
Another example of supranational adjudication is the establishment of the International Criminal Court (ICC) in 1998. This development has been celebrated by world federalists as a step towards their ultimate goal of a world federal government. The ICC is a supranational court in the strict sense referred to above. Its jurisdiction concerns the prosecution of individuals for the commission of certain acts that are criminal under international law. The Court as a supranational judicial body seeks to protect what are perceived as universal values. It is also another instrument in the protection of world peace and security. The Preamble recognises "that such grave crimes threaten the peace, security and well-being of the world". In fact, the Statute of the Court establishes the ICC as part of the machinery of the Collective Security System. Article 13(b) of the Statute permits the Court to exercise jurisdiction upon referral of a case by the Security Council operating under Chapter VII of the UN Charter.

The Statute of the ICC makes concession to the demands of State sovereignty by repeatedly confirming that the ICC "shall be complimentary to national criminal jurisdictions." The corollary of this principle is that a case shall be inadmissible before the Court if it is being investigated or prosecuted by a State that has a jurisdiction over it, or if a State that has such a jurisdiction has decided following investigation not to prosecute. These affirmations are, however, conditional. The Court shall nevertheless try a case despite such determinations by national courts, if the Court determines that the State concerned was unable or unwilling to genuinely prosecute. This determination will be based on an assessment of the process and the system of the State concerned and the extent to which its process was serious, genuine and impartial. The Court is ultimately the sole arbiter of its jurisdiction and of the admissibility of the cases before it. The supranational character of the Court is also

58 The crimes falling within the jurisdiction of the Court are genocide, crimes against humanity, war crimes, and crime of aggression. Id., art. 5.
60 Rome Statute of the International Criminal Court (1998), supra note 50, art. 17(1).
62 Rome Statute of the International Criminal Court (1998), art 17(2) and 20(3).
63 Id., art. 19(1).
evident in the fact that its Statute does not permit any reservations to its provisions.\textsuperscript{64} Further, any withdrawal is only effective after one year from the date of notification.\textsuperscript{65}

The rise of supranational adjudication has also raised its concerns in terms of legitimacy and democratic values. With respect to the ICC, concern was expressed regarding the effect of this tribunal on the procedural safeguards guaranteed to the accused in the criminal process. Such concerns were particularly raised by some commentators in the United States, who were opposed to the potential subjugation of U.S. citizens to the jurisdiction of the court.\textsuperscript{66}

The role of the WTO Dispute Settlement Body was equally problematic in the views of some. The strength of the resentment stems specifically from that fact that the DSB acts as a review panel of national legislative and regulatory measures in terms of their compatibility with WTO law. It has been argued that WTO suffers "democratic deficit" in three forms: (1) as an international organisation it is constituted of States and does not receive any "democratic input;" (2) the DSB exercises judicial lawmaking in the context of dispute resolution that is even less democratic than its national counterpart in view of the absence of parliamentary check; and (3) WTO as a forum for trade negotiations is vulnerable to capture by special interests, which are organised enough to influence their national representatives in this forum.\textsuperscript{67}

In conclusion, there are clear trends towards supranational adjudication as a modality of global governance. The more successful examples are emerging in the context of international economic relations. The WTO Dispute Settlement System is the main and most universal institution so far. There are, however, many other examples in regional contexts. While this is an institution that is indispensable if supranationalism is to be accepted as a legitimate approach to global governance, it has nevertheless been critiqued on accounts of legitimacy. Global governance at this stage of evolution still has not developed satisfactory systems of "checks-and-balance" that are necessary to legitimise its various institutions.

\textsuperscript{64} Id., art. 120.
\textsuperscript{65} Id., art. 127.
4. Supranational Features of Money Laundering Law

Since the beginning of the 1990s money laundering law has entered the supranational stage. The Financial Action Task Force (FATF) was created as an international body commissioned with the specific task of resolving the problems of controlling and preventing money laundering in the context of a global economy. As the operation of this body has evolved, it transpired into a supranational agency of distinct features. Money laundering law was being formulated within a deliberately unrepresentative agency and imposed worldwide through aggressive enforcement mechanisms and quasi-judicial review processes. This Section analyses in an evaluative manner the structure and operation of the Financial Action Task Force.


The FATF was created in 1989 by the G7 Summit in Paris. Its mandate consists of one paragraph in the Summit's declaration on "Drug Issues." Following a preamble on the seriousness of the drug problem, the Summit resolved as one of a variety of measures to "convene a financial action task force from Summit participants and other countries interested in these problems. Its mandate is to assess the results of cooperation 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 preventive efforts in this field, including the adaptation of the legal and regulatory systems so as to enhance multilateral judicial assistance. The first meeting of this task force will be called by France and its report will be completed by April 1990."68

Following its creation by the Summit, the FATF assumed a life of its own, without any limitations of mandate or timeframe. It is left to the FATF to decide its own destiny and to define its own mission. According to the Summit's practice and according to the standard operation of such entities, this body becomes independent of the Summit and no longer associated with it. Although what exactly this independence means is not entirely clear.

The FATF was called into meeting by France and it produced its first report ahead of the deadline in February 1990.69 Its existence was subject to periodic review

and was repeatedly extended for periods of five years. The last review took place in 1997-1998 and the operation of the FATF was determined to continue until 2004. In the second year of its operation 1990-1991, the FATF agreed upon its mandate. The mandate was set in terms of four tasks for the FATF to accomplish:

(1) self-reporting and mutual assessment (monitoring and surveillance) on the adoption and implementation of FATF recommendations by all members;

(2) coordination and oversight of efforts to encourage non-members to adopt and implement the recommendations;

(3) making further recommendations and evaluations of countermeasures while serving as a forum for considering developments in money laundering techniques domestically and worldwide; and for the exchange of information on enforcement techniques to combat money laundering; and

(4) standing ready to facilitate cooperation between organizations concerned with combating money laundering and between individual countries or territories.

This mandate was later one translated into three priorities for the Task Force's work:

(1) to define and carry out a systematic verification of the degree of implementation of its forty recommendations;

(2) to undertake in-depth assessment of laundering techniques and their implications for the recommendations; and

(4) to develop a well-focused and comprehensive external profile.

These three priorities, set in accordance with the FATF's 1991 mandate, continued unchanged in subsequent reviews. What has changed, however, is the order of these priorities.

In reviewing its operations and extending its existence in 1997-1998, the FATF revised its order of priorities and set as its main priority to "establish a worldwide anti-money laundering network and to spread the FATF's message to all..."
countries and regions of the globe. The other two priorities of monitoring compliance with the forty recommendations and continuing the review of money laundering trends and countermeasures remained but in secondary place to this primary worldwide lobbying function.

Following the September 11th event, the FATF held an extraordinary plenary meeting on October 31, 2001. In this meeting, the FATF expanded its mandate beyond money laundering to include terrorist financing. The FATF's action plan as set in this extraordinary meeting indicates that the Task Force will extend the same set of activities it conducts with respect to money laundering to include terrorist financing. This includes developing countermeasures, monitoring compliance, studying trends and spreading the system worldwide.

The FATF is of a fluid nature. This fluidity is even felt in the search for the right words to describe its operation and its actions. It does seem to express some form of collective will distinct from its members. It, however, does not possess any constitution and, apart from a small secretariat of four individuals, it does not possess any permanent organs separate from the members. Its entire work is conducted through plenary meetings deciding by consensus and ad hoc working groups of experts or is distributed amongst its members and carried out through their own domestic institutions. It is clear from the declaration that created the FATF, from subsequent practice and from explicit statements in FATF reports that its members do not wish to secure for it any legal personality or international organisation status. This leads to the inevitable conclusion that the FATF is not an international organisation.

It describes itself as an intergovernmental body defined by its purpose. According to the dictionary definition, a task force is: "a unit specially organised for a task" the FATF remains committed to this specific nature as it defines its mission and role in annual mandates geared towards clear goals. This fluid nature of the FATF is something that it takes pride in. It promotes this informality as one reason of

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75 Id.
76 Id.
78 "In keeping with the FATF's function as a task force, this work should be directed through annual mandates towards clear goals in each area." FATF, Annual Report 1993-1994 (16 June 1994), at para. 17, available at www.oecd.org/fatf (last visited April 29, 2002).
its success in building consensus and spreading money laundering control regime all over the world.

4.2. Membership

The FATF is not an open intergovernmental body. Its membership is restrictive and any extension of the membership is thoroughly calculated. Created by the G7 Summit, its core membership consists of the members of this group: United States, Japan, Germany, France, United Kingdom, Italy, Canada, and the Commission of the European Communities. Recognising the importance of wider participation in this effort, the Summit Participants invited a number of other countries to join the Task Force. The extension of the invitation was based on either the country's concern with the problem of money laundering or the country's special expertise in the fight against money laundering.79 Accordingly the invitation was extended to Sweden, the Netherlands, Luxembourg, Switzerland, Austria, Spain and Australia.80

During 1990-1991, the FATF extended the membership further by inviting the remaining members of the Organisation for Economic Co-operation and Development (OECD) to join. This group included Denmark, Finland, Greece, Ireland, New Zealand, Norway, Portugal, Turkey. In addition, the FATF II invited Hong Kong, Singapore and the Gulf Co-operation Council (GCC) to participate. The latter three invitees were chosen on basis of their importance as offshore financial centres or as representative of offshore financial centres.81 The GCC was invited to participate in order to reach a number of its members that are particularly important financial centres.82 The membership of the GCC includes Saudi Arabia, Bahrain, the United Arab Emirates (UAE), Oman, Qatar and Kuwait.

The decision to invite the GCC rather than its member countries reflects the measured approach that the FATF adopts towards the question of its membership. Including the GCC allows the FATF to reach important financial centres in the region such as Bahrain and the UAE while limiting their influence in the decision-making process within the Task Force. This is also reflected in the procedure followed for admission. In order to qualify for membership countries were required to endorse the Forty Recommendations. An entire meeting of the Task Force on the 17th of

79 FATF, Report 1990 (February 7, 1990), at 2.
80 Id.
82 Id.
December 1990 was dedicated to briefing them in order to help them assess the burden that they would incur by endorsing the Recommendations.\(^{83}\)

In addressing the question of membership by the FATF in 1991-1992, the Task Force resolved not to accept any new members at that point. It justified its decision on the basis that its existing membership of 28 members is nearly the maximum possible if the body is to maintain its ability to achieve consensus and to operate informally.\(^{84}\) The FATF reviewed the question of membership repeatedly in subsequent terms of operation. While deciding to keep the question under review, the decision not to extend the membership any further was maintained. The basis for the decision were always the desire not to jeopardise the "flexibility and efficiency"\(^{85}\) of the Task Force.

During the comprehensive review of its future mission and programme that was carried out in 1997-1998, the FATF set its policy regarding future membership. It decided that as part of its efforts to spread the message of money laundering control worldwide, the FATF will consider expanding its membership to strategic countries. The criteria membership were set to include: (1) Having certain key anti-money laundering measures in place such as criminalisation, customer identification and suspicious or unusual transaction reporting. (2) Possessing the political determination to make a full commitment to implement the Forty Recommendations. (3) having the capacity to play a leading role in their regions in the process of combating money laundering.

The FATF launched its effort to expand its membership in 1998-1999. The criteria set out in 1997-1998 were further tuned. Potential members were now required to undergo two rounds of mutual evaluations and to be active members of the relevant FATF-style regional body or willing to take the lead on establishing such a body where no such body exists.\(^{86}\) The FATF policy on expansion included taking into consideration the geographic balance of the Task Force and the need to re-enforce the FATF's representation in certain regions where it is under-represented. Accordingly, the FATF invited Argentina, Brazil and Mexico to become observers during the following term of the FATF. This status was only granted upon a written commitment from the target countries to endorse the Recommendations and to

\(^{83}\) Id.


undergo mutual evaluations. The three Latin American countries became full members in 2000 following one round of mutual evaluation. In its Report of 2000-2001, the FATF confirms its commitment to a policy of strategic expansion but it does not set out a specific plan.

One of the features of the FATF is its multidisciplinary character. This is reflected in the representation of different members in the meetings of the Task Force. Countries are typically represented by experts from various ministries including, finance, justice, interior and foreign affairs, financial regulatory authorities and law enforcement agencies. Annual meetings of the Task Force enjoy the participation of up to 150 experts. This multidisciplinary character is consistent with the nature of money laundering law and it is one of the strengths of the FATF.

In addition to its regular members, the FATF permits the participation of a number of observers from some of the main international organisations and regional bodies. The list currently consists of twenty organisations and bodies including the Asia/Pacific Group on Money Laundering (AGP), the Caribbean Financial Action Task Force (CFATF), the Council of Europe PC-R-EV Committee, the African Development Bank, the Asia Development Bank, the World Bank and the International Monetary Fund. The participation of international organisations in the FATF meetings is again subject to its discretion and strategic calculation. In 1995-1996, the FATF decided to increase the participation of observer bodies and organisations in its plenary meetings as part of its strategy for spreading anti-money laundering efforts worldwide.

In the same round (1995-1996), another important development has taken place. The FATF decided to cultivate co-operation with the financial services sector on an ongoing basis. For this purpose, it organised a Forum with representatives of the industry, which was held on 30 January 1996. The meeting brought together representatives from Member Countries and delegates from national banking and

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88 FATF, Annual Report 2000-2002 (June 22, 2001), at para. 18. An interesting addition to this Report on the question of membership is that in footnote 5 the FATF indicates that the choice of strategic countries for the purposes of expansion will be regardless of their level of economic development. The lack of access to minutes of meetings prevents the researcher from understanding the origin and implications of such developments.
89 Consult the list of “Observer Bodies and Organisations” on the FATF website (www.oecd.org/fatf).
insurance associations as well as participants from the non-bank financial sector and organisations of the financial services industry. It was geared towards soliciting the advice and support of the financial sector. The practice of consultation with the financial sector continued in subsequent FATF rounds. This development is an illustration of the role of private parties in governance at all its levels.

4.3. Structure of Governance

While the FATF is not an international organisation, which suggests that the use of the term "governance" is probably inaccurate, the FATF is still an international body that expresses a form of collective will. Discussing the structure of the FATF in terms of governance is useful for the clarity of subsequent analysis and evaluation.

During the first four years of the life of the FATF (1990-1994) one could see an evolving structure of governance with some degree of formality, continuity and specialisation. In the first year of its operation (1989-1990) and for the purpose of developing its first report which introduced the now key Forty Recommendations on Money Laundering, the FATF worked through a series of plenary meetings and the work of three specialised ad hoc working groups. Working Group 1 worked on money laundering statistics and methods under the presidency of the United Kingdom; Working Group 2 addressed the legal questions under the presidency of the United States and Working Group 3 focused on administrative and financial co-operation under the presidency of Italy. Each Group produced reports and documentation that formed the background material and basis of the First Report of the FATF and the Forty Recommendations. None of the background material compiled by the Groups, however, is published.

During the second round of the FATF in 1990-1991, the Task Force addressed explicitly its institutional structure. One of three working groups created for the purposes of this round focused specifically on planning the future of the FATF. Again none of the documents produced by this Working Group, nor the minutes of its deliberations is published or available for inspection. On the basis of the recommendations of this Working Group, the FATF resolved to continue on ad hoc and informal basis and to maintain its flexible structure. The structure envisioned by

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93 Id., at 4.
94 Id., at 25.
the FATF at this stage involved a presidency, a steering group, a small secretariat and *ad hoc* working groups as necessary. The presidency was to be held by one of its members and to rotate amongst them on yearly basis. The presidency is allocated by the FATF, which could only mean the plenary, on basis of the geographical location and membership in international groupings. The Report does not elaborate on the exact meaning of these criteria. The practice established in this Report has been followed in subsequent years. After the first two years of the French Presidency, the Presidency rotated for the first time in 1991-1992 and was passed to Switzerland.

The steering group envisioned in the FATF's 1990-1991 plan was to be constituted of representative of the Presidency for the last year and the next year plus the Chairmen of Working Groups if any such groups are formed. There is limited reference to the Steering Group and its operations in a subsequent reports. The practice of forming three Working Groups on the other hand continued in subsequent FATF rounds until 1994. In 1991-1992, signs of formalism in the structure were evident in two trends: (1) the Working Groups were formed with specific mandates; and (2) the mandates and the reports of the Working Groups were published as annexes to the FATF's Annual Report. This pattern persisted in 1992-1993.

The final limb in the FATF's institutional structure as established in 1990-1991 Report is the Secretariat. This is the only permanent organ in the structure of governance of the FATF. It is permanent in the sense that it remains in session throughout the year and continues for as long as the FATF is in operation. While the UNIDCP had offered to act as the FATF's secretariat, the FATF chose instead to invite the OECD to provide the secretariat services for the Task Force. According to the FATF's Report, this choice was made on basis of the OECD's "experience in areas related to those covered by the FATF, multidisciplinary nature, and compatibility with the aims of the of the FATF." The functions of the Secretariat include "collating, coordinating and summarising responses from FATF members and supporting FATF presidency." The Secretariat could also conduct studies upon decisions by the

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93 *Id.*
94 *Id.*
95 *Id.*
96 *Id.*
100 *Id.*
FATF but it is explicitly excluded from getting involved in any enforcement activities. The Report did not define what is meant by enforcement activities.

These various parts of the institutional structure of the FATF are managerial in nature. The decision-making power of the FATF resides entirely in the Plenary acting by consensus. Apart from the annual reports there is no information available on the procedures of the plenary meetings and such meetings are as a matter of rule not open to the public.

In addition to the various parts of the institutional structure of the FATF and its plenary meetings, the Task Force relies heavily on the endorsement of its decisions by the G7 Summits and by the Ministerial Meeting of the OECD. It is a view repeatedly expressed in the FATF's reports that this endorsement is important to give the FATF's action the necessary political force. It has been a regular practice for the G7 and the OECD to endorse the actions and decisions of the Task Force in their annual meetings.

During the first review of the FATF's work and future mission and programme in 1993-1994, a major shift in the institutional arrangements has taken place. The FATF decided to discontinue the structure of three working groups and to strengthen the functions of the plenary. Ad hoc working groups could be created to carry out specific functions. The Annual Report of that year marked the shift by not including in its Annex the reports of the three Working Groups, which were constituted for that round. The FATF also confirmed that it will continue to function as a "free-standing ad hoc group". It is the view of the author that this decision by the FATF marks a shift towards stronger informality and had the effect of reducing an already meagre degree of transparency.

4.4. Functions

Since the third year of its operations, the FATF continued to organise its work into three priority areas: monitoring the implementation of the recommendations, review of the money laundering techniques and countermeasures and external relations. This

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101 Id.
102 The FATF reports regularly to the G7 Summit and to the OECD Ministerial Meeting.
103 See for example conclusion to that effect in the FATF's first report in 1990. FATF, Report 1990 (February 7, 1990), at 28.
106 Id., at para. 24.
Section translates the work of the FATF in these areas into specific functions. The analysis of the work of the FATF reveals that it exercises in the area of money laundering law the following six functions: research and analysis, rulemaking, enforcement, lobbying, technical assistance and co-ordination. Research and analysis is one of the primary functions of the FATF and one that was stipulated in its original mandate. It is also a function that is closely linked to its rulemaking function. The Recommendations advocated by the FATF are under constant review on basis of its findings regarding developments in money laundering typologies. Each of these functions is analysed below in terms of its scope and the FATF's method of implementation.

Co-ordination, lobbying and technical assistance are all parts of what the FATF describes as its external relations priority area. This area, as indicated above, has become its priority area since 1997-1998. The FATF performs the function of co-ordinating the efforts of the ever-growing number of international organisations and bodies that are involved in combating money laundering. It does so through inviting such organisations as observers in its meetings and attending, to the extent possible, any meetings organised by them. It also avoids duplication of efforts wherever possible. One of the most sophisticated aspects of the FATF's external relations efforts is its lobbying function. The FATF uses various mechanisms to promote its recommendations in the area of money laundering including setting up satellite secretariat in different regions in the world and encouraging the creation of FATF-style regional bodies and participating in their operations in some capacity. The technical assistance function is also part of this lobbying effort. The FATF is not an international organisation, which means that it does not possess independent resources to provide technical assistance. Its efforts in this regard consist of pooling the resources of its Member States and co-ordinating their allocation.

Detailed discussion of the research and analysis, co-ordination, lobbying and technical assistance is beyond the scope of this study. The next two sub-sections will

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107 Until 1997, the FATF has been publishing the findings of its research on money laundering typologies as part of the body of its annual report. The account of findings has therefore been in summary form. Since 1998, the FATF has been publishing the full report on money laundering typologies as an annex to the main report.

focus on the rulemaking function and the enforcement function. It is through these two functions that the FATF's supranational role is exercised.

4.4.1. Rulemaking

The Forty Recommendations of the FATF constitute the most important and most comprehensive international instrument on money laundering. The Forty Recommendations cover all aspects of combating money laundering. The substantive details of the recommendations have been discussed in Section (3) of Chapter Four above. This Section, therefore, focuses on the features of the Recommendations that illustrate the nature of the rulemaking power of the FATF.

The main feature of the Forty Recommendations is described in the first version of the Recommendations as published in the FATF's first Report in 1990. The Report states that the recommended action steps "could constitute a minimal standard in the fight against money laundering for the countries participating in this Task Force, as well as for other countries." [emphasis added] Countries, therefore, are encouraged to go beyond the recommendations of the FATF wherever necessary.

The FATF's Recommendations are under continuous review in view of developments in the money laundering trends and typologies. This review is one of the priority areas of the FATF. Actual changes in the core text of the Recommendations are kept to a minimum. Responding to the changes is normally implemented through minor changes, annexes to the Recommendations and interpretative notes. The decision to recommend a certain course of action is adopted in a plenary meeting where the consensus rule applies. As a result of the secrecy and informality that surrounds the operation of the FATF, little is known about the actual procedure that governs these decisions. The first Report of the FATF in 1990 however has explicitly provided that "some of these recommendations reflect the view of a majority of delegates, rather than unanimity, so that they are not limited to the weakest existing solution in the participating countries on each topic." [10]

The FATF's Forty Recommendations are now under comprehensive review, the results of which have not yet been published. In addition to the Forty Recommendations, following the events of the September 11, the FATF has expanded its mandate to terrorist financing. On 31 October 2001, the FATF in an extraordinary

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110 FATF, Report 1990 (February 7, 1990), at 16.
meeting adopted eight "Special Recommendations on Terrorist Financing." This new set of recommendations is now subject to the same enforcement and review procedures as the original Forty Recommendations on money laundering.

The Recommendations are drafted in a non-binding language such as "countries should consider the feasibility[...]," "Countries should further encourage[...]," "the appropriate national authorities should consider[...]," "wherever possible[...]." The forms of the recommendations is also indicative of the non-binding nature in that they do not prescribe detailed strict rules. Instead, the rules are drafted with sufficient flexibility to allow for variations in national legal systems. For example, Recommendation 4 provides that countries should criminalise money laundering of the proceeds of drug trafficking as stipulated in the Vienna Convention 1988. It, however, encourages countries to extend the scope of the predicate offence to include serious offences more generally and grants them the discretion to decide which serious offences to be included in the scope of money laundering offence.

This expression of the will of the Members of the FATF, as reflected in the language of the Recommendations, suggests that "rulemaking" is an inaccurate description of the function of the FATF in this regard. The description more consistent with the formalistic analysis of the instrument is probably standard-setting. This is also the reference most commonly used. It is the view of the author however that the elaborate and stringent character of the enforcement system that supports the recommendations renders this non-binding characterisation illusory. Arguing this point however is not possible until a description of the enforcement function and system of the FATF is provided. It is this description that the next Section provides.

4.4.2. Enforcement

Enforcement in this context means the measures taken by the FATF to pressure a member or non-member country to comply with the FATF's Recommendations either on money laundering or terrorist financing. The purpose of this discussion is to elaborate on the degree of coercion in the FATF's compliance system and to understand the procedural principles and safeguards that are followed in the process. The discussion will focus on the process of enforcing the Forty Recommendations as opposed to that of enforcing the Special Recommendations on Terrorist Financing.

\[111\] FATF, Special Recommendations on Terrorist Financing (October 31, 2001).
This is because of the mature stage that the former has reached as opposed to the latter. The discussion of this function is organised in two parts: (1) enforcement against Member Countries; and (2) enforcement against non-member countries.

**Enforcement against member countries**

In order to secure compliance by its Members with the FATF's Recommendations, the FATF adopts two types of evaluation mechanisms that were agreed in 1991. The first monitoring mechanism is based on self-assessment and is carried out on annual basis. Countries are required to complete a standard questionnaire that is designed to measure the level of their compliance. The Secretariat uses this questionnaire to compile reports on the level of compliance with the Recommendations and also on the specific successes and failures in the reporting country's system.

The second mechanism of monitoring is one of mutual evaluation. The FATF has conducted two rounds of comprehensive mutual evaluation of the Forty Recommendations. The second round was completed in June 1999.\(^{112}\) The process of mutual evaluation is governed by four core principles: participation,\(^{113}\) efficiency, equality, objectivity and clarity.\(^{114}\) Equality was specifically and repeatedly emphasised in the FATF's documents.\(^{115}\) Consent is another principle that could be added to this list. In its 1991-1992 Annual Report, the FATF emphasised "the consensual nature of all the different stages of the evaluation process".\(^ {116}\)

The FATF has set a number of procedures in order to guarantee consistency and equality in the evaluation process. Primary responsibility lies on the Secretariat through its co-ordinating role.\(^{117}\) Further, common mutual evaluation questionnaires were prepared\(^ {118}\) as well as a common outline and set form for all the reports.\(^{119}\) In February 1997, a standard checklist of all the issues to be covered was prepared and given to the examiners as part of the same effort to guarantee equality and consistency.\(^{120}\)


\(^{113}\) *Id.*, at 144.

\(^{114}\) *Id.*, para. 130.

\(^{115}\) See for example *id.*, paras. 4, 131 & 133.


\(^{118}\) *Id.*, para. 132.

\(^{119}\) *Id.*, para. 134.

\(^{120}\) *Id.*, 133.
The evaluation process is conducted by three or four examiners through inspection of documents provided by the examined country and on-site visits. Each examination team is a multidisciplinary one consisting of legal, financial and enforcement experts. The examiners are selected from individuals voluntarily nominated by the Member Countries or directly solicited by the FATF Secretariat. The final decision on the selection is made by the President in co-operation with the Secretariat. In order to guarantee the principles of objectivity, the team consists of examiners from different countries and their background is taken into consideration. In fulfillment of the principle of participation, all members are encouraged to provide at least one examiner. The majority of examiners, however, were provided by the United States in both rounds of evaluation. During the second round the principle of participation was satisfied, at least in token, when each member provided at least one examiner.

The process of preparing and adopting the evaluation report is an elaborate one. The examiners' comments are provided to the Secretariat, which prepares the draft report according to a pre-set outline. The draft report is then sent to the examiners who provide their comments on the draft. Upon implementing the examiners' comments on the draft, the report is sent to the examined country for its comment. The country concerned communicates its comments to both the examiners and the Secretariat. The Secretariat prepares the final draft according to the examiners' advice and sends it to the delegates. Similar procedure is followed for the summary of the Evaluation Report, which is to be included in the FATF's Annual Report.

During the plenary the examiners and the country concerned with the involvement of the Secretariat resolve any disagreement on the wording through negotiation. The report is then discussed in the plenary following a brief presentation by the examiners and an opening statement by the country. This is followed by the comments of two intervenor countries designated by the President and then the other delegates are invited to present five questions to the country concerned or the examiners. The report is then adopted verbally by the Plenary along with all the agreed amendments. The final report and summary is submitted to the following plenary for final adoption.

\textsuperscript{121} Id., 140.
\textsuperscript{122} Id., para. 144.
\textsuperscript{123} Id., paras. 163-164.
In 1994, the FATF agreed a formal five-step non-compliance policy. The purpose of this policy was to secure that the FATF's members achieve a satisfactory degree of compliance with the procedures. The FATF perceives that failure by its own members to comply with its policies hinders its international mission of spreading anti-money laundering measures. It was also agreed that the process should be "a transparent one, based on a graduated approach, equality of treatment, and oversight by the Plenary of the various steps in the process."  

Countries whose systems suffer serious failures to comply with the Forty Recommendations will be required to rectify the failures. Failure to do so would result in taking the following graduated steps as described by the FATF in its report:

1. Requiring the members to provide regular reports on their progress in implementing the Recommendations within a fixed timeframe;
2. Sending a letter from the FATF President to the relevant minister(s) in the member jurisdiction drawing their attention to non-compliance with the FATF Recommendations;
3. Arranging a high-level mission to the member jurisdiction in question to reinforce this message;
4. In the context of the application of Recommendation 21 by its members, issuing a formal FATF statement to the effect that a member jurisdiction is insufficiently in compliance with the FATF Recommendations; and
5. Suspending the jurisdiction's membership of the FATF until the Recommendations have been implemented.

This process since its inception was applied to twelve countries. In most cases the matter did not go beyond the submission of progress reports. In the case of Austria however, which was pressured with regard to its anonymous bank accounts system, the conflict reached a threat of suspension. Upon which and following two years of defiance, Austria took the initial steps to bring its law in conformity with the Recommendations.

In conclusion, the FATF follows a strict but clearly procedural process of enforcement vis-à-vis its members. The core elements of the process are a procedure
of mutual evaluation and a policy for non-compliance. The process of enforcement is governed by principles of transparency, equality, objectivity, clarity, efficiency and graduation. The procedures that govern the process are geared towards guaranteeing these principles. The process could be characterised as supranational to an extent. Although the basis of the process is consensual, once a country has joined the group, it is necessarily subject to accepting the enforcement mechanisms and the processes of mutual review. In that sense the process could be described as supranational. This is particularly so in view of the scope of mutual evaluation and the ways in which it affects the legislative autonomy of the States concerned.

**Enforcement against non-member countries**

This is the aspect in which the FATF acts truly as a supranational agency. The enforcement of the FATF's Recommendations against non-member countries has always been part of the thinking within the FATF since its inception. The system of anti-money laundering measures as designed by the FATF is based on an assumption that "any discrepancy between national measures to fight money laundering can be used potentially by traffickers, who would move their laundering channels to the countries and financial systems where no or weak regulations exist on these matters".\(^{128}\) Concern for regulatory discrepancy in non-member countries have resulted in Recommendation 21, which proposes two special measures in dealing with countries that do not sufficiently apply the Forty Recommendations. The first measure is special due diligence to be exercised by financial institutions in their dealing with individuals and entities from such countries, and the second measure is special record-keeping and reporting requirements regarding suspicious or unusual transactions emanating from these countries.

As early as 1990-1991, the FATF considered the imposition of collective measures against non-member countries, which do not comply with the Forty Recommendations.\(^{129}\) The proposition was that Recommendation 21 should be applied collectively *vis-à-vis* a number of jurisdictions identified and publicly blacklisted. The FATF on specific advice of law enforcement experts deemed this exercise to be premature at that stage. Members, however, were left free to implement


Recommendation 21 individually against jurisdictions they domestically deem as posing particular risk.  

It was not until 1998-1999 that the FATF started considering proposals on measures to be taken against countries that do not provide effective international co-operation in the fight against money laundering. An ad hoc working group was formed to implement what was later on to be referred to as an initiative against Non-Co-operative Countries and Territories (NCCT). This initiative comprises of a number of steps:

1. identifying the rules and practices that are detrimental to the effective implementation of anti-money laundering measures and to effective international co-operation;
2. on basis of the previous exercise, determining criteria for defining the non co-operative countries and territories;
3. identifying the jurisdictions which meet the pre-set criteria;
4. agreeing on international action to encourage compliance; and
5. agreeing on protective countermeasures designed to protect the economies of Members against money laundering.

In February 2000, a Report on Non-Cooperative Countries and Territories was published identifying twenty-five criteria for non-cooperation. Countries were to be measured against these criteria in order to determine the sufficiency of their anti-money laundering measures. The criteria were based on the Forty Recommendations and were drafted in very broad terms. Each criteria is an indicator of a broader failure in the jurisdiction's anti-money laundering measure that renders it ineffective in meeting the requirements of international co-operation. The indicators or criteria include absence of authorisation or registration requirements for financial entities, the existence of anonymous accounts, lack of adequate record-keeping.

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130 Id.
131 FATF, Annual Report 1998-1999 (July 2, 1999), at paras. 153 et seq. This initiative took place in the context of other similar developments in the OECD and some of its member countries. During the same period initiatives within the OECD geared towards coercing offshore financial centres to align their policies with the OECD countries' desire to enhance the effectiveness of their tax laws were also taking place. See Hay, R., "Offshore Centre under Attack", 6 Private Client Business 345 (1999).
134 Id., Criterion No. 4.
requirements,\textsuperscript{135} secrecy provisions that cannot be lifted by administrative or judicial authorities,\textsuperscript{136} and failure to criminalise laundering of the proceeds from serious crimes.\textsuperscript{137}

The next step in the initiative was the identification of non-co-operative countries and territories on basis of the pre-set criteria. This involved first selecting specific jurisdictions for review and then reviewing their laws and regulations in terms of the twenty-five criteria in order to determine their level of compliance. The choice of countries for review was based on two general tests: (1) the financial activities of the jurisdictions should be of such size and character that shortcomings in their legal systems would undermine the effectiveness of the anti-money laundering regime\textsuperscript{138} and (2) the use of the jurisdiction for money laundering schemes on basis of the data gathered on law enforcement and money laundering typologies.\textsuperscript{139} The selection of a particular jurisdiction was ultimately based on a complaint of an FATF members against "jurisdictions, where in the recent past, there have been difficulties"\textsuperscript{140} in soliciting co-operation. Members are required to explain the nature of these difficulties.\textsuperscript{141}

In the period between 14 February and 22 June 2000, the FATF conducted a review of twenty-six jurisdictions.\textsuperscript{142} The review was conducted by four regional review groups: Americas, Asia/Pacific, Europe and Africa and the Middle East.\textsuperscript{143} The exact composition of each group is not revealed in the FATF's reports. The review groups were required to work with the Secretariat of the FATF and allowed to work with the Secretariats of relevant regional groups.\textsuperscript{144} The process of the review involved gathering information on laws and regulations in the jurisdiction concerned, contacting the jurisdiction for further information, drafting the report and submitting it

\textsuperscript{135} Id., Criterion No. 6.
\textsuperscript{136} Id., Criteria Nos. 8 & 9.
\textsuperscript{137} Id., Criterion No. 19.
\textsuperscript{138} FATF, Report on Non-Cooperative Countries and Territories (February 14, 2000), at para. 38.
\textsuperscript{139} Id., at para. 39.
\textsuperscript{140} Id., para. 39.
\textsuperscript{141} Id.
\textsuperscript{142} Antigua and Barbuda, Bahamas, Belize, Bermuda, British Virgin Islands, Cayman Islands, Cook Islands, Cyprus, Dominica, Gibraltar, Guernsey, the Isle of Man and Jersey, Israel, Lebanon, Liechtenstein, Malta, Marshall Islands, Mauritius, Monaco, Mauri, Niue, Panama, Philippines, Russia, Samoa, Kitts and Nevis, St. Lucia, Vincent and the Grenadines. FATF, Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures (June 22, 2000), at paras. 10 et seq.
\textsuperscript{143} FATF, Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures (June 22, 2000), at para. 8.
\textsuperscript{144} FATF, Report on Non-Cooperative Countries and Territories (February 14, 2000), at para. 39.
to the jurisdiction with an opportunity for comment. The reports and the comments were discussed in face-to-face meetings between the Review Group and the relevant jurisdiction. The Review Group drafted a report indicating its assessment of the jurisdiction against the twenty-five criteria. The Review Reports were then endorsed by the Plenary.\(^{145}\)

The first review of non-member countries resulted in black-listing fifteen jurisdictions as "non-cooperative countries and territories" (NCCT's).\(^{146}\) Subsequently, the jurisdictions were urged to address the deficiencies identified. FATF expressed willingness to provide technical assistance to the identified jurisdiction in the design of their relevant systems. As a response to the FATF's action, the black-listed countries reacted by a surge of rapid legislative activity. For example, in the period from 22 June to 29 December 2000, the Bahamas enacted ten new legislative acts covering areas of prudential regulations, commercial and corporate law, international co-operation and criminal law.\(^{147}\)

The counter-measures envisioned by the FATF for failure to comply include, in addition to Recommendation 21, blanket requirements to report transactions with such jurisdictions to the competent authorities in Member countries; restrictions on the establishment of subsidiaries, branches or representative offices of NCCT countries in FATF member countries, warning non-financial sector businesses against transaction with entities and individuals within NCCTs in view of the risk of money laundering. The FATF first NCCT Report also suggested that FATF members might consider using measures to prevent financial institutions located in NCCTs from using facilities located in FATF member countries, such as information technology facilities.\(^{148}\)

As originally envisioned, the FATF initiative indicated that the identified NCCTs will be kept under continuous review but it did not design a procedure for de-
listing. This was established in June 2001.149 According to June 2001 Report, the test applied in order to remove a jurisdiction off the list of NCCTs is whether the jurisdiction "has taken sufficient steps to ensure continued effective implementation of the reforms."150 This test presumes that the relevant jurisdiction has enacted the necessary laws and regulations to meet the concerns raised by the FATF. It further requires evidence of sustainable effective implementation. The assessment of the latter requisite will depend on submissions by the concerned jurisdiction to the FATF of implementation plans and specific targets.151 The assessment of the jurisdiction's eligibility for de-listing will be decided by the competent Review Group.152 The decision to de-list will be taken by the Plenary on basis of the recommendation of the relevant Review Group.153 The FATF's procedure requires continued monitoring of the de-listed jurisdiction as well as public announcement of any remaining concerns.154 According to the FATF's policy, such continuous monitoring will be measured against the "implementation plan, specific issues raised in 2001 progress reports and the experience of FATF members."155

In June 2001, four previously listed jurisdictions were removed off the list of NCCTs on the basis of extensive and rapid legislative actions.156 Thirteen countries were reviewed in the second round of reviews of non-members.157 Six of the reviewed jurisdictions were listed as NCCTs.158 In December 2001, the FATF decided to impose counter-measures on Nauru for its failure to address the concerns raised by the FATF in June 2000.159 These counter-measures were determined to continue in the Plenary of February 2002.160 While the countermeasures adopted by the FATF might seem mild and essentially preventive, their effect on increasing the transaction cost for

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149 FATF, Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures (June 22, 2001), at paras. 13 et seq.
150 FATF Policy Concerning Implementation and De-listing in Relation to NCCTs, in FATF, id., Appendix 2, at para. 5.
151 Id., at para. 2.
152 Id., para. 3.
153 Id., at para. 5.
154 Id., at para. 7.
155 Id., at p. 30.
156 Bahamas, Cayman Islands, Liechtenstein and Panama. FATF, Review to Identify Non-Cooperative Countries and Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures (June 22, 2001), at paras. 18 et seq.
157 Czech Republic, Egypt, Guatemala, Hungary, Indonesia, Myanmar, Nigeria, Poland, Seychelles, Slovak Republic, Turks and Caicos, Uruguay, and Vanuatu. Id. At paras. 57 et seq.
158 Egypt, Guatemala, Hungary, Indonesia, Myanmar, Nigeria. Id. Para. 88.
countries operating within a target jurisdiction could be substantial. That in addition to the fact that liability risk could lead financial institutions in FATF member countries to decline to deal with institutions from NCCT jurisdictions. Considering the reliance that offshore financial centres have on operating and conducting their business in onshore jurisdictions, such consequences could have extreme detrimental effects on the small economies of the offshore centres not just on the financial institutions operating there.

4.6. FATF Supranationalism: Analysis and Critique

In juridical terms the FATF recommendations are soft law instruments that are not, according to the prevailing view, legally binding.\footnote{161} The \textit{de facto} nature of these instruments, however, is far from optional. The FATF has developed a sophisticated enforcement regime that sanctions failure to comply with its non-binding norms. This enforcement apparatus, as explained above, applies both to member countries and to non-member countries sometimes even more strictly to the latter. To the extent that the FATF sets norms that are \textit{de facto} binding upon non-members and takes measures to sanction these rules, the FATF is a supranational agency. Its practices constitute a significant departure from the principle of consent in international law and are highly exceptional to State sovereignty.

In exercising these self-proclaimed powers, the FATF relies on substantive legitimacy.\footnote{162} This type of legitimacy depends on the desirability of the outcome, in this case money laundering control, and the capacity of the measures taken to achieve this outcome. This argument is based on the assumption that there is such a thing as a self-evident global public interest. This assumption is expressed repeatedly in the FATF reports. Recent developments do suggest the emergence of some common interests that might qualify as global public interests, such as the interest in controlling "global warming." The global legal order, however, still lacks legitimately constituted agencies vested with the task of determining the content of a global public


\footnote{162} FATF, Annual Report 1991-1992 (June 25, 1992), at para. 99. The FATF "substantive legitimacy stems from the political and moral obligations to implement the forty recommendations drawn in 1990."
interest. Absent notions such as natural law or divine laws, substantive legitimacy is not a substitute for procedural legitimacy.

The FATF is procedurally illegitimate on all scores. In rulemaking agencies, representation of relevant interests is a procedural requisite for legitimacy. The FATF is an elitist organisation with highly restrictive membership policies. Its core soft law instrument, the Forty Recommendations, reflects the views of the carefully selected fifteen countries, which were the total of the FATF membership in 1990. The care with which the FATF protects its culture to the exclusion of others to whom its instruments would eventually apply was reflected in its decision to decline the UN offer of secretariat facilities in favour of an OECD Secretariat. The Secretariat is the only permanent organ. It is an influential organ in terms of shaping the culture of an institution despite its seemingly administrative nature.\textsuperscript{163} Allowing the Secretariat to be hosted by the United Nations was likely to create for the FATF a stronger perception of legitimacy even if it did not actually create an imprint on its culture.\textsuperscript{164}

The FATF is an amorphous and faceless body. The affairs of the FATF are conducted in secrecy and all public reports of FATF meetings and operations are carefully edited. It is the declared policy of the FATF that its meetings are not open to the public. It is not an international organisation and it does not possess a charter or a constitution. Its operations are not subject to any specific set of principles apart from the principle of efficiency. During the early years of the FATF there were signs of an emerging formal structure and some reference to fairness and objectivity as principles governing the FATF operations.\textsuperscript{165} This trend, however, was reversed in 1994-1995 in favour of a flexible and informal structure. Any reference to fairness was omitted. Limited references to principles such as equality appear in the context of the mutual evaluation process. The main cost of this shift to informality is lack of transparency.\textsuperscript{166} Generally, the FATF does not operate under any code of conduct.

The legitimacy deficit is most striking in the context of the NCCT initiative. In this context the FATF exercises a quasi-judicial function reviewing the laws and

\textsuperscript{163} On the role and structure of the international secretariat see Royal Institute of International Affairs (ed.), \textit{The International Secretariat of the Future: Lessons from Experience by a Group of Former Officials of the League of Nations} (1944); Ranshofen-Wertheimer, E., \textit{The International Secretariat: A Great Experiment in International Administration} (1945).

\textsuperscript{164} On the significance of the location see Royal Institute of International Affairs (ed.), \textit{id.}, at 47-49.


\textsuperscript{166} Zaring, D., "International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations". \textit{33 Tex. Intl L. J.} 281-330 (1998). Discussing different examples of similar informal institutions such as Basel Committee and their tradition of secrecy.
regulations of the non-member countries against so-called international standards, which are principally the FATF Recommendations. The process was not governed by any principles. The procedural requirements are meagre. They are however worth listing in this context:

(1) The Review Groups are required to involve the Secretariat in the process as a safeguard of the consistency between the various review reports; 167
(2) The Review Groups are required to contact the jurisdiction under review for further information in order to secure the objectivity of their findings;
(3) The draft report should be sent to the relevant jurisdiction for comments;
(4) The Review Group should hold face-to-face discussion of the findings with the competent authorities in the relevant jurisdiction.
(5) In considering the de-listing of NCCTs, the chairmen of the Review Groups should meet, if necessary, to secure consistency in their responses to the NCCTs. 168

The procedural failures are several:

(1) Some of the criteria of assessment are very broad, especially those pertaining to the effectiveness of the regulatory system and of international co-operation, which gives ample opportunity for abuse;
(2) The timeframe allocated for the review was short casting substantial doubt on the seriousness and reality of the process;
(3) According to an interview with a member of the Secretariat in August 2001, it was confirmed that there is no procedure to exclude the Member Country of the FATF whose complaints have triggered the review of a jurisdiction from acting as the reviewer of that jurisdiction. This a clear departure from the principle of the neutrality of the arbiter as a requirement of legitimacy;
(4) By contrast to the detailed procedures for the nomination and constitution of the examination team in the context of mutual evaluation amongst FATF Members, there is no reference whatsoever in the FATF documents

168 FATF Policy Concerning Implementation and De-listing in Relation to NCCTs, in FATF, Review to Identify Non-Cooperative Countries and Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures (June 22, 2001), Appendix 2, at para. 3.
to the constitution of the examination team in the context of an NCCT review;

(5) As explained above, the rights of the examined Member, in the context of a mutual evaluation process, to defend its position before the plenary and to influence the wording of the report are sufficiently protected by a lengthy negotiation process and detailed procedure for the adoption of the report. By contrast the reviewed country in the context of NCCT process does not possess any right of presentation before the Plenary.

The pressure of the FATF sanctions and the speed with which it requires compliance has resulted in a spree of legislative activity within the listed jurisdictions. This pressure undermines the democratic processes within the affected jurisdictions. This is yet another illustration of the conflict between different policies in the global sphere. While in other contexts, developed countries and international financial institutions are leading campaigns for democratisation in developing countries often supported by sanctions, the pressures of the money laundering control regime are undermining these nascent democratic values.

Finally, the FATF is an unaccountable institution. The sanctions applied by the FATF can be serious for the survival of a small economy. Any country that sustains damage by an FATF action will not have any venue for redress. These concerns are particularly alarming in view of the suggestion entertained by the FATF that it could ban NCCTs from using facilities, such as information technology services, that are located in FATF countries. Considering the concentration of clearing systems such as SWIFT in FATF Member countries and the indispensability of access to such facilities for the operation of any financial system, this proposition is serious. Leaving the decision on access to such facilities to the whims of a group of countries through an unregulated process is a clear symptom of the deficiency of global governance.

5. Conclusion

Over the past three centuries, a system of international governance based on State sovereignty has been taking shape. Sovereignty as a core organising principle has meant that States are only bound by their consent and are not subject to any superior
authority in the organisation of these affairs. Globalisation and the growing interdependence amongst States have rendered certain issues in need of collective governance. Environmental concerns and financial markets are two examples of such issues. In order to fill the governance vacuum, certain agencies have emerged exercising what can be described as supranational form of governance. The supranational feature, as understood in the discussion in this Chapter, refers to the departure from the principle of consent that these agencies display. Examples of supranational agencies exercising rulemaking, judicial and enforcement functions could be found. The UN Security Council, it has been argued, performs a supranational enforcement function of serious intrusiveness. The purpose of the UN Security Council is to secure global peace and security on effective and prompt terms. Also, recent years have witnessed the emergence of supranational judicial organs. The WTO Dispute Settlement Body is probably the most obvious and most promising example of this category. The International Criminal Court, is the youngest and markedly supranational member of family of international dispute resolution bodies.

Money laundering law provided a strong case of supranational rulemaking. Since the creation of the Financial Action Task Force in 1989, it has assumed a primary role in developing anti-money laundering legal and regulatory measures. Since the beginning, this fluid and informal body has intended to exercise an aggressive enforcement function for the sake of spreading its model worldwide. In 1998-1999, this intention was translated into reality through an initiative that aimed at assessing the compliance of non-members with the standards set by the FATF. The sanctions for failure were serious and this seriousness was reflected in the rushed legislative response by the countries that were subjected to the process.

In every incident of supranationalism substantial legitimacy concerns were raised. This stems from (1) the alien nature of such agencies to the pre-dominant State-based structure of governance. This has meant that existing mechanisms of accountability, especially democratic accountability, are absent. (2) there is a degree of informality in the current models of supranational enforcement and rulemaking governance. This informality undermines the perception of legitimacy and leaves the process open for abuse.
CHAPTER SEVEN

CONCLUSION: MONEY LAUNDERING LAW AND TRENDS IN LEGAL GLOBAL GOVERNANCE

Chapter Outline

1. Globalisation and Money Laundering Law: An Interactive Relationship
2. Six Observable Responses to the Legal Problematic
3. There is a Broader Picture
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   4.1. Informalism
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1. Globalisation and Money Laundering Law: An Interactive Relationship

Writings on money laundering law often proceed from an understanding that money laundering is as old as crime itself and that globalisation, understood as liberalisation of capital markets, and the rise of powerful and affluent criminal organisations have aggravated the threats of this activity. The relationship between globalisation and money laundering stops at justifying the legal intervention and calling for stronger control and prevention measures. It does not go as far as explaining the structure of money laundering law and defining its boundaries in terms of its rationales.

This study has proceeded from a sense of the particularity of money laundering law. It was triggered by an observation that money laundering law disturbs and deviates from some of the most fundamental principles and traditions of the established legal order. Money laundering law largely develops within international bodies of restrictive membership, especially the FATF, and is enforced upon non-member States through powerful mechanisms of coercion in contradiction to the traditional principles of sovereignty and consent in the organisation of international affairs. Money laundering
offences, in domestic, regional and international instruments, are drafted broadly; this leaves ample scope for judicial and prosecutorial discretion to the detriment of the principles of legality, certainty and equality as fundamental principles of criminal justice. The presumption of innocence and the prosecutorial burden of proof as its corollary are disturbed by the more lenient evidential requirements in the prosecution for money laundering. Even the right to counsel in criminal proceedings is threatened by the broad prohibitions against laundering. Further, anti-money laundering regulatory measures transfer to the private sector one of the traditional functions of the State, namely, policing. These are only some of the particular aspects of money laundering law that instigated the analysis in this study.¹

In order to understand these deviations and departures, to assess their legitimacy and delimit their scope, an understanding of the interaction between money laundering law and its context is necessary. This study has argued that money laundering law is a response to certain structural changes in the social context, often referred to collectively as globalisation, and its deviation from fundamental principles is only justified to the extent necessitated by these contextual changes.

Globalisation is a process of social change that has two core dimensions: one is geographic and the other is political. In its geographic dimension it involves de-territorialisation of our social and economic activities. Increasingly, social and economic activities are transcending the boundaries of the State. This is taking place at the level of the individual, the small NGO and the medium-size corporation, not only at the level of the most affluent or the largest private actors. The other dimension of the process is political. The description "global" is used not only for its geographic connotation but also for its omission of the State. The political dimension involves a massive shift in economic and informational power away from the State in favour of private Parties. The information supremacy of the State, which gives rise to arrangements such as the prosecutorial burden of proof, is now a partial reality.²

These shifts in the geographic and political landscapes have had troubling consequences for existing structures of governance. Over the past two centuries the State

¹ See supra Chapter One, Section 2.
² See supra Chapter Three, Section 2.
has become entrenched as the primary agency of governance and the primary performer of public functions. The legal order has been organised around its external and internal sovereignty. Territoriality is the principle that delimits the scope of the State's sovereignty. With the proliferation of transnational and global private actors, the State, as an agency of governance, has become insufficient. Territoriality as the organising principle of legal order has resulted in a mismatch between government's jurisdiction and the scope of the activities that it should govern. The supremacy of State power, which has bred a number of "checks-and-balances" that sought to temper the exercise of this power, has become challenged by the rising power of the subjects. In very broad terms, the State has become too small and too under-equipped to govern some of its subjects and their activities.³

These geographic and political shifts are occurring within the legitimate as well as the illegitimate spheres. Some criminals are acquiring economic and informational powers that are unfavourably disproportional to the State. They are also taking their activities across borders. Their power and geographic expansion are undermining the capacity of the State to sanction and deter through its machinery of criminal justice enforcement.⁴ It is in response to these structural changes and their effect on the effectiveness of legal governance that money laundering law has rapidly developed. It is also in terms of this function that money laundering law should be designed and delimited.

2. Six Observable Responses to the Legal Problematic

Crime for profit is proliferating and generating enormous wealth. As an economic organisation it operates for profit and incurs expenses. Money is therefore its lifeblood. It is this wisdom that led criminal justice policies to shift away from the focus on the offender to focus on the proceeds of the criminal activity. Hence the proliferation of confiscation laws that do not only take away the instrumentalities of the crime but also the profits that it generates directly and indirectly. In order to evade the application of these laws, offenders resorted to the newly liberalised and technically sophisticated

³ See supra Chapter Three, Section 6.
⁴ See supra Chapter Three, Section 4.2.

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capital markets to transfer their ill-gotten gains beyond the jurisdiction of the State. The enforcement mechanisms of the State were rendered inadequate vis-à-vis this coalition between powerful and transnational private actors: the financial institutions and criminal organisations. In response, money laundering law rapidly developed as an enforcement instrument with the aim of bridging the geographic gap and redressing the imbalance of power in favour of the State.

The sophistication of financial transactions and the speed with which they take place pose the primary difficulty in the enforcement of confiscation laws. Once the proceeds have entered the channel of international finance, the prospects for any enforcement action against it becomes bleak. The policy thinking that informed money laundering law was based on a realisation that financial institutions are the "keepers of the gates" and, therefore, they are better positioned to police the transactions that are conducted through their institutions. This understanding has resulted in transferring the policing function to a growing number of private actors including banks, insurance companies, bureaux de change, brokers and dealers, travel agents and many others. This process of privatisation was done through the imposition of regulatory duties of reporting and record keeping. The total effect of these regulatory requirements is to enlist a growing number of professionals as private policemen with the task of detecting crime and gathering evidence on daily basis and as part of their daily business obligations. These obligations were enforced by criminal sanctions for failure to comply as well as for active involvement in attempts at placing the funds beyond the enforcement apparatus of the State.5

While "guarding the gates" is a good pre-emptive solution, it is not, despite all good intentions, watertight. This means that assets are likely to escape the gatekeepers into the enforcement spheres of other jurisdictions and hence beyond the reach of the State. In order to address this possibility, money laundering laws seek to establish channels and mechanisms of co-operation with other countries in the area of gathering evidence and seizing, freezing and confiscating assets.6 In order for such co-operation mechanisms to be effective, countries around the world needed to have in place

5 See supra Chapter Five, Section 5.
6 See supra Chapter Four, Section 5.2.
regulatory requirements that impose upon their subjects duties of reporting and record keeping. Also, due to certain restrictions on international co-operation in penal matters such as the principle of dual criminality, the effectiveness of co-operation became contingent on the incrimination of money laundering in various jurisdictions. These considerations have led to an elaborate process of harmonisation that involved the approximation of criminal laws and financial regulations in the area of preventing and controlling money laundering. Another form of co-operation is also incorporated in money laundering laws.  

Harmonisation of national laws in this sphere relied initially on traditional international law instruments, such as the Vienna Convention 1988, which imposed upon Member Countries the duty to criminalise the laundering of drug proceeds. This definition of the crime of laundering was then to become the model definition of this crime in subsequent international, regional and national instruments. Soon after the Vienna Convention, harmonisation of money laundering law and its development took supranational dimension. Making laws at the national level was perceived by the countries, which were particularly alarmed by the failures of their national enforcement systems, as insufficient. The FATF was created for the specific purpose of developing anti-money laundering measures. By the mid-1990s, its seemingly "soft standards" were enforced coercively against countries that were not forthcoming in adopting anti-money laundering laws and regulations. This coercion was exercised even more forcefully against non-members of the FATF, which gave it its supranational characteristics.  

Denying or restricting access to capital markets was one instrument of coercion, which was readily available to the FATF and its members. Countries who failed to adopt necessary measures against money laundering were warned that such failure might result in restricting their access to the financial markets of the FATF members. Such reaction to the problems of enforcement is in a way an attempt to reverse the trend of globalisation in order to protect a national interest against the threats of this process. It is in a way a measure of de-globalisation.

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7 See supra Chapter Four, Section 4.2.
8 See supra Chapter Six, Section 4.
9 See supra Chapter Four, Section 2.2.
Money laundering law also makes use of the traditional mechanism of extraterritorial jurisdiction in order to reassert the power of the State vis-à-vis transnational actors. Some countries seek to impose their anti-money laundering regulatory requirements on foreign financial institutions and on foreign branches of their national financial institutions. By doing so they attempt to utilise such institutions for the enforcement of their national laws. Also, the breadth of the actus reus of money laundering offences permits countries to exercise seemingly territorial jurisdiction over offences that has in fact taken place outside their jurisdiction. A check drawn on a U.S. Bank as part of an operation of laundering the proceeds of corruption of a Nigerian public official through Swiss bank accounts would give the U.S. basis for assuming jurisdiction. 10

Money laundering law, therefore, can be seen to utilise six modalities in order to bridge the territorial gap between the State and the criminals it pursues and to restore the balance of power in favour of the State. The purpose of money laundering law is to secure the effective enforcement of criminal laws against economic crime. Some of the modalities seek to empower the State by reversing the process of globalisation that threaten its authority (de-globalisation), by extending the reach of its jurisdiction beyond its territory (extraterritoriality), by securing the co-operation of other States in the enforcement of its domestic laws (enforcement co-operation) and harmonising the laws of these States in order to secure the effectiveness of their co-operation (harmonisation). The other two modalities constitute a resort to other agencies in order to perform some of the functions of the State in rulemaking and policing. The use of private professionals in policing money laundering (privatisation) and the effective rulemaking and enforcement exercised by the FATF (supranationalisation) introduce private and supranational agencies in the attempt to exercise effective control against criminal enterprises.

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10 See Supra Chapter Four, Section 3.2. This feature of money laundering law was re-enforced in the legal responses to the September 11 events, especially in the U.S. On this point see Norton, J., and Shams, H., Money Laundering Law and Terrorist Financing: Post-September 11 Responses-Let Us Step Back and Take a Deep Breath", Int. Law. (Forthcoming, Spring 2002).
3. There is a Broader Picture

The problems of legal governance are wider than the problem of controlling and curbing transnational crime. Social and economic regulation of legitimate transnational economic activities is equally problematic. It is beset with the same problems of geographic and political mismatch between the State and the actors it is seeking to regulate. Examining various areas of the law such as securities regulation, environmental regulation, international trade law, human rights, Internet regulation, utilities regulation, and international peace and security, has revealed that the trends towards de-globalisation, extraterritorialisation, harmonisation, co-operation, privatisation and supranationalisation are pervasive.

International liberalisation arrangements such as the Articles of Agreement of the International Monetary Fund, which seeks to stabilise the international monetary system, to maintain the liberalisation of current account and to encourage the liberalisation of capital account, include provisions that permit the resort to capital controls by State Parties subject to certain measures. Similarly, the GATT/WTO, which aims essentially at liberalising international trade, contains safeguard provisions that permit countries to restrict cross-border movement of goods. To the extent that liberalisation is an instrument of globalisation, these measures constitute limited and regulated mechanisms for reversing the tide of globalisation. Similar trends could be observed in the area of Internet regulation in some countries such as China. 11

Harmonisation of national laws is also discernible in many areas of the law. The intensity of harmonisation efforts is manifest in the proliferation of so-called international standard-setters, whose function is to develop "soft law" instruments in certain areas of the law for the purpose of approximating national approaches in this area. Harmonisation efforts are most obvious in the area of private law. Harmonisation is, however, also evident in aspects of public law. Most obvious are the attempts at harmonising national approaches to the control of drug trafficking and organised crime through international treaties. 12

11 See supra Chapter Four, Section 2.2.
12 See supra Chapter Four, Section 4.1.
The history of criminal jurisdiction is a history of the attempts at expanding the reach of the State beyond its territorial jurisdiction. Doctrines such the nationality principle, the protective principle and universality principle have emerged specifically to achieve this result. Recent years have seen increasing and liberal reliance on such principles to secure jurisdiction over acts that occur outside the territorial ambit of the State. It was in the area of competition law that the "effects doctrine" developed as an attempt to expand the territorial jurisdiction of the State to acts that merely produce an indirect economic effect within its territory. Similar trends could also be observed in the regulation of the Internet.\textsuperscript{13}

The private role in public governance is probably one of the most striking features of legal order today. The private role pervades all three functions of the State in this sphere. In many areas of social and economic regulation, the State is delegating its prescriptive, judicial and enforcement functions to private agencies. Rulemaking is most evident in areas of technical regulations and professional standards. The important allocative effect of these exercises of rulemaking highlights their significance. Alternative dispute resolution is also becoming the favoured mechanism of settlement of business disputes and increasingly between business and consumers. This is especially true with regard to disputes pertaining to on-line transactions. The role of private actors in the enforcement of the law in all areas of economic and social regulation is substantial. This is directly linked to the question of State capacity as compared to its subjects. The pervasiveness of the private role in enforcement becomes apparent once it is observed in the area of criminal justice. Collection of fines, patrol police and the management of prisons are all areas where private enforcement has become common.\textsuperscript{14}

There is also a strong presence of supranational agencies in the current legal landscape. The FATF's model of seemingly soft standards supported by other strong measures of coercion against non-members can be observed in other areas of the law. The use of "conditionality" by international financial institutions to impose so-called international standards upon borrowing countries is only one example of what could be described as supranational trend in rulemaking. The WTO Dispute Settlement Body is

\textsuperscript{13} See supra Chapter Four, Section 3.1.
\textsuperscript{14} See supra Chapter Five, Sections 2-4.
currently hauled and attacked as a form of supranational adjudication. The youngest member of this category of supranational agencies is the International Criminal Court. Its scope of competence gives its creation significance as an evidence of the trend towards supranationalism. Even the most intimate function to the State, namely, enforcement, has been exercised and in a very aggressive manner by the UN Security Council. In the scope of its powers and its limited membership, the Security Council is arguably the supranational agency *par excellence.*

The examples discussed in this study are not exhaustive. They are merely signs of the presence of trends. The search for evidence was by no means strenuous. This was to the author a confirmation of the commonality of these modalities as instruments of legal order in a global context.

4. Legal Order in a Global Context: Challenging Features

4.1. Informalism

As defined by a leading analyst of this phenomenon, legal institutions "are informal to the extent that they are nonbureaucratic in structure and relatively undifferentiated from the larger society, minimize the use of professionals, and eschew official law in favor of substantive and procedural norms that are vague, unwritten, commonsensical, flexible, ad hoc, and particularistic." It has been observed throughout this study that informal legal arrangements and a shift away from legal procedures in favour of flexible structures and mechanisms could be observed in various aspects of money laundering law and the emerging legal order more generally. The definition of informal legal institutions cited above applies most accurately to the FATF as the main setter of anti-money laundering standards at a global level. In analysing the operations of the FATF and its nature, it became clear that the FATF has explicitly favoured an *ad hoc* and informal structure and it did so on account of the flexibility and efficiency that this structure might secure. A similar trend was also

15 See supra Chapter Six, Section 3.
17 See supra Chapter Six, Sections 4.1. & 4.3.
observed in the work of the UN Security Council, which in recent years has tended to conduct its affair in an informal and secret manner.\textsuperscript{18}

Informality could also be observed in the area of international co-operation. There are repeated calls amongst academics and law enforcement officers to abolish or limit the restrictions on international co-operation. Informal mechanisms of information sharing both in criminal law and regulatory enforcement are now well established. In the context of money laundering law, informal co-operative arrangements, both bilateral and multilateral, are taking place amongst Financial Intelligence Units (FIU).\textsuperscript{19}

Informality is also characteristic of private rulemaking, adjudication and enforcement. The informality of alternative dispute resolution (ADR) processes has been subject to detailed discussion in academic literature. The same trend also obtains in the context of private enforcement and private rulemaking. The case of ICANN as the private regulator of a scarce resource, namely, Internet Domain Names, is illustrative.\textsuperscript{20}

Evaluating informal legal arrangements is not an easy or a conclusive exercise. This is evident from the amount of criticism that bureaucratic institutions have received over the years. For the present context, two concerns need to be raised.\textsuperscript{21} As illustrated in the analysis provided by this study, there is a correlation between informality and secrecy. This is a cause for concern. Any exercise of power that is shrouded in secrecy is bound to be susceptible for abuse. The second point of concern is that informality essentially means abandoning procedural requirements in favour of discretionary \textit{ad hoc} processes. Since procedures in the liberal democratic tradition are typically geared towards providing protection to the weaker party in a transaction, each abdication of a procedural requirement bears with it the risk of enforcing the advantages of the more powerful party.\textsuperscript{22} This is clearly illustrated in the case of the FATF.

\textsuperscript{18} Franck, T., \textit{Fairness in International Law and Institutions} (1995), at 230.
\textsuperscript{19} See supra Chapter Four, Section 5.2.2.
\textsuperscript{20} Froomkin, M., "Wrong turn in Cyberspace: Using ICANN to Route around the APA and the Constitution" 50 Duke Law Journal 17 (2000).
\textsuperscript{21} On the conflicting evidence regarding the value of informal legal arrangements see Abel, R., "The Contradiction of Informal Justice", in Abel, R. (ed.), supra note 16, 267.
\textsuperscript{22} Abel, R., supra note 16, at 10-11. "Without questions, [formalism] remains an essential defense of the powerless,[...] The requirement that the be represented by counsel in most criminal prosecutions has clearly inhibited state control, a point on which conservatives and liberals agree."
Concerns of this sort and especially their effect on the perception of legitimacy have led to the re-proceduralisation of legal arrangements and the introduction of alternative safeguards. For example, in the case of ICANN certain procedural requirements for decision making were mandated. Also, the FATF and other similar agencies, such as Basel Committee, seek to substitute for the lack of representation in their decision-making processes by relying on processes of consultation and dissemination of information. It is important in this regard to evaluate the capacity of these alternatives to secure the requisite protection of the fairness of the process and hence its legitimacy.

4.2. Principle v. Effectiveness

It is a continuous thread in this argument that legal arrangements that emerged as an attempt to govern increasingly global context place more emphasis on efficiency and effectiveness at the cost of principle. It has been repeatedly indicated that principles such as sovereignty and consent in international law, the principle of legality in all its applications and derivations across the legal order, the principle of mens rea and the presumption of innocence in the context of criminal justice are coming under attack. It is almost invariably the argument that the principle is undermining the effectiveness of the legal order. These principles are nothing but expression of the liberal ideology of governance. Abandoning the principles or simply eroding them in an unmeasured way is alarming in terms of the ultimate form of governance that this path might lead to.

In more advanced democracies, this departure from the strict protection of principles mainly through formal procedures is done in reliance on the sound exercise of discretion by those who are in a position of authority, whether setting the rules, enforcing them or settling disputes. Such reliance could be problematic and unjustified in nascent democracies. Even in advanced democracies, the discretion of those in power is not always reliable. Civil libertarian values are not as deeply entrenched as some might like to believe. It is on account of these differences amongst societies that the imposition of

23 Walker, G., International Banking Regulation: Law, Policy and Practice (2000), at Part I, Chapter 1, Sections 7.5 & 7.6. The author argues that the consultation processes secure a degree of democratic
money laundering law with its highly discretionary powers on less democratic societies can be criticised.

4.3. Accountability Deficit

Informalism, secrecy and departure from principles all result in loosening the structures and mechanisms of accountability in the society. Concern for accountability either through judicial processes or democratic processes has been sounded in the context of private order, supranational governance, and informal international co-operation. This is compounded by the fact that over the past two centuries, structures of accountability were based on the State as the primary agency of governance with representative accountability, the separation of powers and judicial review as the primary forms and guarantees of accountability.

In a highly decentralised legal order, democratic accountability in its traditional sense is becoming inadequate to hold the current agents of governance accountable. Corporations and NGOs that play now a substantial role in governance cannot be held accountable to the electorate through the election process. Current form of decentralised governance maybe more in keeping with the rationales of separation of powers and more conducive to social participation. Its decentralised character, however, might hinder the effective implementation of "checks and balances." This was illustrated in the area of Internet regulation where standardised contracts are the norm and the capacity of the user to assert one's rights is limited. In the context of money laundering law, the extensive powers exercised by the financial institutions in policing their customers and denying the service on basis of suspicion require careful examination.

4.4. Policy Conflict

Another shortfall of a highly fragmented system of governance is the problem of co-ordination. The resort to de-globalisation measures in order to enforce money laundering laws upon non-compliant countries is an illustrative example of the policy conflicts in global governance. As a system of governance, it is based on the assumptions of the virtues of liberalisation and open borders. In an attempt to avert the harms of
globalisation in various contexts, countries have resorted to regulatory measures seeking to reconstruct their boundaries to shut out the threats. In the context of the WTO, such measures could be scrutinised through the Dispute Settlement Body (DSB). This structure provides a mechanism for policy co-ordination, *i.e.*, co-ordinating State's desire to protect its interests with the collective interest, as expressed in the text of the WTO agreement and its annexes, in maintaining a liberal economic order.

Such co-ordination and review mechanism is absent in other areas of the legal order. Money laundering law is an illustrative case. In this context, anti-money laundering policies conflict with other policies in the global legal order in two respects. The first is the aforementioned conflict between de-globalisation and liberal economic assumptions. The second is the conflict between the emphasis on the values of democracies and its transmission to less developed countries on the one hand, and money laundering law with its extensive discretionary structures and top-down processes of imposition on local democratic processes on the other.

5. Some Signposts for the Future

5.1. Functional Rule of Law

The emphasis on the State as the agent of public order has resulted in a deeply entrenched public/private distinction. This distinction has meant that there are certain acts that the State can do while private actors cannot. It also meant that there are certain limitations on the exercise of power that are binding on the State and not binding on the private actors. Primary amongst these limitations are constitutional constraints, which bind the State and does not bind private parties. This dichotomy has resulted in attempts to extend to private agents, who are increasingly exercising prescriptive, judicial and enforcement functions some of the procedural and constitutional constraints that bind the State. This is done through doctrines such as the "act of state doctrine."

In view of the decentralisation of the functions of law and order, a case could be made for a function-based approach to the "rule of law." It is not the State alone that should be subject to constitutional, human rights and procedural constraints. It is any agent that purports to exercise a prescriptive, judicial or enforcement function. Each of
these agents should be subject to rules that govern the exercise of the function performed. The task that lies ahead is to determine the standards that should govern each of these functions and to examine possibilities for holding the agents accountable in the exercise of their functions. There are lessons to be learnt from existing experience including the experience of regulating utility providers, private policemen and professional associations. The proliferation of supranational agencies certainly calls for such standards and structures of review.

5.2. "Aggregate Accountability"

Traditional mechanisms of accountability, such as parliamentary accountability remain relevant to the extent that the State is still a primary and an essential agency of governance. In fact, such mechanisms remain the guarantee of any future reforms of the system of legal order.

Such mechanisms are, however, insufficient. More innovative mechanisms of review are essential for the legitimacy of the emerging global legal order. The concept of "aggregate accountability" has been proposed by one writer as a solution to the problem of accountability in the context of private governance. This concept is relevant in more general terms. Informal mechanisms such as ombudsmen arrangements, private law mechanisms through contractual and tort liability and mechanisms that enforce transparency are but some options of alternative approaches to accountability.

5.3. Principled Revision of Principles

The principles that underlie a certain legal order are not rules of natural law. They are ultimately institutions that are contingent on the context that produced them. It follows necessarily that significant changes in the context should invite a revision of the basic principles that underlie this legal order. This revision, however, should be guided by principles. Revision and abdication of principles on basis of short terms consideration of convenience is not the course advocated in this context.

Revision is taking place in various areas of the law. In international law, the principle of sovereignty is being continuously revisited. In the field of international cooperation in penal matters the process of revision is spanning many of its well-established principles and restrictions. In the area of criminal justice, mens rea and the presumption of innocence are but two examples of aspects of criminal justice that are undergoing substantial revision. While principled and systematic revisions are evident in academic writings, legal changes typically reflect less principled approaches. It is important at this stage to develop alternative principles that reflect the development in the context without undermining the ideological basis of the system.

26 Id., at 42.
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