Between crime and war:

Illicit flows and the institutional design of international policy responses

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PhD dissertation

London School of Economics and Political Science

2006

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Abstract

While the reasons why states *create* international institutions have attracted sustained academic interested in international relations for more than three decades, the question why states *design* these institutions in such a variety of ways is only emerging on the academic agenda. This study seeks to contribute to the institutional design debate by transferring the principles of transaction cost economics theory from the context of inter-*firm* to that of inter-*state* cooperation. Transaction cost economics shares with other functionalist design theories the core assumption that actors adopt the design that best addresses the specific hazards a given problem poses to their cooperative undertaking, whereby they have to balance the merits and drawbacks associated with individual design options. Specifically, states face a dilemma between adopting a mode of governance, which fosters higher levels of compliance (hard law with high levels of obligation, precision and delegation) and one, which allows for flexible adjustments to changing circumstances (soft law). Which type of design is most appropriate, depends on the underlying problem constellation—categorised here based on the three variables asset specificity, behavioural uncertainty, and environmental uncertainty. This study hypothesises that 'harder' governance structures are pertinent when the intensity of asset specificity (the incentives to shirk and the vulnerability to shirking by others) and behavioural uncertainty (the difficulty involved with detecting non-compliance) are high. In contrast, 'softer' institutions are required as the possibility of unforeseen changes in the understanding of the causes, consequences or remedies of a problem increases (environmental uncertainty).

Whether form does indeed follow function according to this logic will be tested qualitatively on the basis of four international institutions established between 1988 and 2003. These institutions have in common that they all seek to tackle problems arising at the fuzzy border between crime and war, such as conflict diamonds, the trafficking in narcotic drugs and small arms and light weapons, and money laundering. These institutions

differ from each other, however, in terms of their design, spanning the full spectrum from high to low degrees of legalisation.

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Acknowledgments

This study is the result of more than three years of wrestling with a topic as fascinating as elusive. This struggle would never have succeeded without the generous intellectual, financial and emotional support of a great number of people and institutions. I would like to put my two supervisors William Wallace and Martin Lodge at the very top of my 'thank you' list. They formed an unbeatable team, each of them offering me their own rich take on the study and practice of international relations and politics. While each conversation with William led to an explosion of my horizon (and by extension of my research focus), Martin showed me how to use existing theories to carve out a manageable piece from this complex universe. Their unshakable enthusiasm for and trust in my research has carried me through exhausting dry spells, which thanks to the London weather never lasted for too long. This study has benefited tremendously from discussions with David Lake, Oliver Williamson, Barbara Koremenos, and Tom Heller, as well as my interview partners in governments, NGOs, and industry organisations.

With deep gratitude I wish to acknowledge the generous financial support by the Rotary Foundation, British Council's Chevening Scholarship scheme, Janggen-Pöhn Foundation, Swiss National Academic Foundation, and the London School of Economics and Political Science, which allowed me to focus on my research and to dedicate the unshared attention and energy this project deserved.

Also, I wish to express my warmest thanks to my many old and new friends who have smoothened the ups and downs of this research project. The many dinner discussions, phone calls, tennis plays, concert visits, picnics and yoga classes I have shared with Christine Ammann, Andrea Anker, Stacy Closson, Francisco Columba and Elisabetta Cervone, Devon Curtis, Alexandra Dias, Catherine Gegout, Julia Glesner, Eva Gross, Heidi Kuster, Elizabeth Malcolm, Emanuela Paoletti, Kim Segel, Maureen Shannon, and Meredith Sumpter proved invaluable sources of energy and inspiration. Goodenough College has provided a more than 'good enough' setting in which many of these friend-

ships could emerge and blossom. My particular thanks go to Tim Toyne Sewell, Annie Thomas and Roger Llewellyn and Casimir Adjoe, who all in their very own ways invest their whole personality into making the College such a unique place.

With a deepest sense of gratitude I am remembering my mother who instilled the insatiable inquisitiveness in me which was the motor behind this study and will be behind all the exciting research I have in front of me. I am sadden that she did not live to see this result but comforted by the thought of how much she lives on in my intellectual endeavours. The family of my partner Marton Jojarth carried me through this research project with their ongoing interest in my work and by spiriting away massive piles of dirty dishes and by conjuring up fresh flours and fruit on my desk during the worst of the write-up period. The incessant support I received from Marton encompasses and surpasses all categories. Thank you, Marton, for showing me how wonderful life can be and for being the most wonderful part of it.

1 Introduction

Why did states agree that the international fight against the trafficking in narcotic drugs should be led by an international organisation possessing an independent juridical personality and a considerable budget, whereas no such far-reaching delegation was found to be necessary in the combat against the trafficking in small arms and light weapons? This question is striking, as the trafficking of narcotic drugs and that of small arms and light weapons seem—at first sight—to be very similar public policy issues: They invoke a comparable amount of human cost, and both require the coordinated response of a large number of production, transhipment and consumption countries. Why does a similar set of states decide to design very different types of international institutions for seemingly similar problems? This theoretical puzzle forms the core of the inquiry developed in this study. While the academic discussion about the macro question why independent states choose to facilitate cooperation through the establishment of international institutions has largely reached its point of saturation, the more fine-grained inquiry into the factors explaining the pronounced variance we can observe in the *design* of these institutions emerged on academic research agendas only recently. The academic understanding of the critical dimensions along which international institutions vary and the precise ways in which these differences matter is thus still at an early stage of development.

This study seeks to advance our understanding of the factors accounting for the variance observed in the design of international institutions by examining how particularities in the underlying problem constellation shape states' design preferences. More fundamentally, the analysis hopes to illuminate some of the basic mechanisms through which the design of international institutions reflects a match between form and function. These mechanisms are too general to explain the particular design outcome of each and every international institution, but may provide a template for thinking about the ways efficiency considerations translate into institutional designs of various cooperative under-

takings. This introductory chapter[1] serves four ends. First, it introduces the substantive focus of this study, the policy area lying in the intersection between crime and war. This choice of focus is motivated by the increasingly blurred difference we have been witnessing over the last few decades between profit-oriented organised crime groups on the one hand and ideologically-motivated rebel and terrorist groups on the other, and by the particular challenges this trend poses for policymakers. Second, the theoretical inquiry of this study will be positioned within the literature on functionalist institutional design and central terms will be clarified. Third, the methodology used in this inquiry is presented so as to allow the reader to better trace the substantiation of this study's core argument. Fourth, and finally, an overview of the plan of this study allows the reader to retain the big picture of the various building blocks assembled in the quest for a better understanding of the institutional design choices policymakers faced when addressing issues related to transnational organised crime and international security.

1.1 Between crime and war

Traditionally, crime and war have been seen as two separate worlds. The former has been conceived as confined to the domestic realm, driven by greedy criminals' quest for profits, and as a problem that is best addressed by law and order measures. This understanding of crime is, for instance, reflected in the definition of organised crime formulated by the United States National Security Council, which defines it as a 'continuing and self-perpetuating criminal conspiracy, having an organised structure, fed by fear and corruption, and motivated by greed' (e.g. National Security Council 2000)[2]. War, in contrast, has been assigned to the international sphere, where an anarchic world struc-

[1] This study consists of 8 chapters. Chapter are divided—with decreasing order of hierarchy—into numbered sub-chapters, numbered sections, numbered sub-sections and bulleted paragraphs. Chapters 1 through 3 as a whole are also referred to as part one (introduction and theory), chapters 4 through 7 as part two (case studies) and chapter 8 as part three (conclusion).

[2] This definition largely overlaps with the definition provided by article 2 letter a of the UN Transnational Organised Crime Convention of 2000, which defines organised criminal groups as 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'. While this definition is widely accepted by political scientists, 'material benefit' is not a necessary component of the definition of crime for legal scholars, as to enable activities such as racially motivated violence or drunk driving to be classified as criminal activities.

ture nourishes the inextinguishable fear that one sovereign nation-state may seek to project its power onto another state through organised violence (e.g. Luttwak and Koehl 1991)—a threat, which can only be averted through military means. In the post-Cold War era, this neat distinction is becoming increasingly blurred—maybe more as the result of changing perceptions than fundamental changes in real world praxis. The distinction between crime and war has come under attack from two opposite angles, with one emphasising the criminal elements in a number of contemporary wars, and the other depicting crime, in particular transnational[3] organised crime, as a security problem which needs to be addressed with military power.

A first attack on the separation between crime and war comes from scholars and policy-makers who identify a series of aspects of contemporary armed conflicts that set these conflicts apart from the political-rationalist theory underlying the classical understanding of war (e.g.Keegan 1993), and, in contrast, make them rather resemble organised crime operations. A first factor eroding the difference between crime and war is the proliferation of *intra*-state as opposed to *inter*-state wars in the post-Cold War era (Wallensteen and Sollenberg 1995). This led to an increasing prominence of non-state actors as sources of large-scale organised violence—a function classical war theories assume states to possess the monopoly on. Another facet of the growing importance of violent non-state actors is the strengthened determination and capacity of terrorist networks to cause death and destruction in pursuit of their ideological goals, as demonstrated most destructively in the terrorist attacks of 11 September 2001.

Other factors leading to an increasing resemblance of armed conflicts and crime originate from the evolving nature of internal conflicts of the post-Cold War era. Most impor-

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[3] The term "transnational organised crime" is preferred here over that of "international organised crime". Both terms are usually used synonymously, but the former is deemed to be better suited to capture the non-statist and typically very amorphous nature of the phenomenon. Other terms that are sometimes used to describe the same phenomenon are 'global organised crime' and 'multinational crime'.

tantly, 'new' civil wars differ from 'old' civil wars (Kaldor 1999)[4] with respect to the strategies employed by combatants and by their driving motives. Although often violated in practice, the classical concept of war establishes a clear distinction between combatants and civilians, with a duty of the former to spare the latter. In recent civil wars this distinction has often been ignored or even turned on its head, with civilians not only being *unintentionally* injured and killed in the course of military operations—as referred to under the problematic term 'collateral damage'—but in many cases being specifically targeted by rebel groups and militias. The 1994 genocide in Rwanda and the massacres committed in the violent break-up of Yugoslavia in the early 1990s, in particular in Bosnia and Herzegovina, are just two of the most infamous examples of this trend. Also in terms of their driving motives, these are new types of civil wars seen as differing from old civil wars, whereby the latter is associated with the desire to bring about political change for the benefit of a collective and the former, in contrast, with a predatory enterprise in the form of, among others activities, looting of natural resources and the extortion of ransoms, undertaken for personal gain. Although armed conflicts may not have been initially triggered by economic greed, one can find many examples in Colombia, parts of Africa, and the Balkans where during the course of conflict political motives became subordinate to the pursuit of financial and other material benefit (Apter 1997). The continuation of wide-spread violence then serves a rational economic purpose, as it confers 'legitimacy on actions that in peacetime would be punishable as crime' (Keen 1998b). Rebellion becomes a 'quasi-criminal activity' (Collier 2000). In policy circles, this view has been adopted most prominently by the secretary general of the United Nations (UN), Kofi Annan, who stated that the pursuit of diamonds, drugs, timber, concessions and other valuable commodities drives a number of today's internal conflicts. In some countries the capacity of the State to extract resources from society and to allocate patronage is the prize to be fought over' (Annan 1999). All these elements—the non-state nature of many fighting groups, the erosion of the distinction between combatants and

[4] Although such a categorical distinction between 'new' and 'old' civil wars is overdrawing the real differences, it still helps to shed light on important tendencies. See for a critical discussion of this distinction Berdal (2003) and Kalyvas (2001).

civilians, and the prominence of economic motivations fuelling many armed conflicts—all make many contemporary wars resemble more organised crime operations than classical wars.

Simultaneously to these moves towards greater emphasis on the criminal aspects of contemporary wars, there has been the inverse push towards the securitisation of crime with the equation of transnational organised crime as the 'new evil empire' (Raine and Cilluffo 1994), or as the 'the new communism, the new monolithic threat' (quoted in Horvitz 1994).

One central element of national security is a society's ability to defend its core values against any attempts by internal or external groups to challenge these values outside the legitimate political process. Transnational organised crime groups can pose a threat to national security, as they seek to effectuate at least the connivance of their ongoing defiance of societal values. For this end they serve themselves largely of two illegitimate channels: corruption and violence.

Corruption is the classical non-violent criminal instrument to gain influence over politics and policy decision makers. In several countries, criminals have learned to use their illicit profits effectively to create a political environment favourable or at least not detrimental to their operations. The alleged US$3.7 to 6 million contribution of the Cali cartel to the presidential campaign of the later winner Ernesto Samper in 1994 is just one point in case. Given the tremendous impact such practices can have, the pursuing corruption of government officials is therefore often seen as a defining characteristic of transnational organised crime (e.g. National Security Council 2000).

While non-violent criminal instruments may affect certain aspects of national security, it is rather violent means that are of even greater importance in this context. Above a certain threshold, such crime-related violence can shift from a matter of human security to one of national security, threatening the very viability of the state especially when targeted against government officials. In some cases, organised crime groups reach such a

dominant position in society that it suffices for them to threaten the instigation of widespread violence and chaos in order to coerce a government into a certain behaviour.

The United States has been at the forefront in this re-evaluation of transnational crime from being just an issue of law enforcement to being a national security problem. In 1995, then president Bill Clinton issued the Presidential Decision Directive (PDD) 42 in which he officially declared organised crime as a threat to national security (Godson 2003). This directive echoed the concerns aired one year earlier by James Woosley, then Director of the Central Intelligence Agency (CIA), who maintained that '...when international organised crime can threaten the stability of regions and the very viability of nations, the issues are far from being exclusively in the realm of law enforcement; they also become a matter of national security' (quoted in Galeotti 2001, 215f.). This push towards a securitisation of crime can only be partially attributed to real changes in the nature and dimension of transnational organised crime (Edwards and Gill 2003). At least equally important in this respect are the successful communications strategies deployed by Cold War security agencies, which sought to defend their organisational interests through the creation of a new mandate (Friman and Andreas 1999, 2; Lee 1999, 3; Naylor 1995a).

It has become commonplace to assert that organised crime, and in particular transnational organised crime, experienced a 'phenomenal increase in scope, power and effectiveness' in the twentieth century (Galeotti 2001, 203). This claim is rarely substantiated by empirical figures—which is partially understandable given the clandestine nature of the business—, but with reference to a number of factors, which are believed to have fostered such a development. Most importantly, organised crime has been able to expand its operational activities and geographical scope by embracing economic globalisation very much the same way as the licit business sector has. The increasing speed and significant drop in costs of communication and transportation combined with a drastic reduction of barriers to trade and financial flows allow legitimate businesses—but also organised crime groups—to shift to production networks that are organised globally rather than nationally (Evans 1997b). This, in turn, allows both businesses and transnational

criminal organisations to select different states as home base and as operational fields. Criminal organisations thereby choose the former guided by considerations to minimise the risk of detection and prosecution, while their choice of the latter is based on the potential reward a successful criminal enterprise is expected to generate. For instance, several Nigeria-based criminal organisations have become specialised in advance fee fraud schemes, whereby the fraudsters approach residents of richer Western states by mail, fax or email with a request to help them move large sums of money with the promise of a substantial share of the cash in return (Metropolitan Police 2005). In their search for a 'safe haven' criminal organisations and terrorist groups can thereby exploit asymmetries in national legal and regulatory regimes as well as in the capacity to implement such policies.

Economic globalisation has not only contributed to an internationalisation of the production and distribution networks of illicit products and services but also to the interlinking of formerly separated black markets for recreational drugs, counterfeit credit cards, fake designer watches and stolen diamonds—leading to the emergence of what Friman and Andreas called the 'illicit global economy' (1999). According to Naylor, this illicit economy is supported by its own systems of information, its own sources of supply, its own distribution networks, and its own modes of financing (1995b, 48). This illicit global economy is estimated to account for 5 per cent of world gross domestic product, which corresponds to US$2 trillion when taking the year 2004 as a baseline. Other estimates put the 'gross criminal product' generated by organised crime groups in 1996 to approximately US$1 trillion (Friman and Andreas 1999).

The globalisation of criminal activities is closely linked to the term 'illicit flows', which stands for the international movement of three types of goods and services. First, most obviously, it covers goods that are by themselves illicit, such as narcotics. Second, flows of licit goods may still be illicit, if these goods have been obtained or processed in illicit ways (e.g. conflict diamonds, money laundering). Finally, illicit flows also encompass the movement of licit goods obtained in licit ways but intended to be used for illicit purposes

(terrorist financing, precursors for narcotics). Typically illicit flows involve states from where the goods and services originate, one or more states serving as transhipment centres and states where the illicit good or service is consumed. Illicit flows do not necessarily create public policy problems at all points along this chain. For example, in the case of conflict diamonds, it is primarily the states where diamonds are mined, that suffer most from the illicit diamond trade, rather than the states which process or consume diamonds. Quite differently, in the case of small arms and light weapons (SALW), it is the countries amassing such weapons, rather than producing countries, which are at risk of these weapons being turned against them.

The international dimension of these flows necessitates an internationally coordinated response. However, as illicit flows affect countries very differently and with varying degrees of intensity, international cooperation does not follow automatically. Cooperation in law enforcement and national security matters is further impeded by the fact that police and judicial powers as well as national security are generally seen as defining feature of national independence and sovereignty (Farer 2000, ; Smith 1992). Despite these obstacles, a number of international initiatives were launched in the late 1990s seeking to curb illicit flows and mitigate their negative effects.

The cases presented in this study are all situated in this blurred borderland between crime and war. The first case study is dedicated to the trafficking in illicit drugs, a multi-billion dollar business which is often associated not only with criminal organisations but also with insurgent groups and terrorist networks who seek to finance their arms procurements through profits generated in drug-related activities. Money laundering, the second of the case studies presented here, is directly linked to drugs trafficking, as international control efforts to curb money laundering were first inspired as a tool to support the global war on drugs from the financial front. Diamonds, even more so than illicit drugs, have attracted international concern because of their exploitation not just by criminals but also by rebel groups and terrorist networks. The trafficking in small arms and light weapons, the subject of the fourth and final case study, is an obvious and indispensable component of every criminal as well insurgent operation.

1.2 Explaining institutional design

The growing concerns about transnational security threats emanating from the border between war and crime led to the launch of a number of international counter-initiatives in the past decades. These initiatives resulted in the establishment of a great number of international institutions, which differ considerably from one another with respect to their design. Whereas some of these international institutions are based on legally binding treaties and heavily rely on international organisations vested with far-reaching competencies, other institutions amount to little more than lofty declarations of intent. The theoretical puzzle this study addresses is to explain this variance—to explain why states endow international institutions tackling policy problems located in the same issue area with so very different designs. Before embarking on this task, a few definitional clarifications are deemed indispensable.

This study adopts Koremenos, Lipson and Snidal's understanding of international institutions, who define them as 'explicit arrangements, negotiated among international actors, that prescribe, proscribe, and/or authorise behaviour' (2001, 762). As the following paragraphs will show, this understanding of international institutions is closely related to—but not congruent with—the concept of international organisations, international agreements, and international regimes.

The definition of international institutions as referred to in this study is broader than that of international organisations. International organisations are characterised by a membership base constituted of predominantly states but also of other intergovernmental organisations, by a separate international legal personality, and by the existence of permanent organs with a will autonomous of that of the members (Schermers and Blokker 1995, §§32ff.). All international organisations are part of an international institution according to the definition employed here, in as much as they help to shape states' behaviour. However, not all international institutions rely on international organisations to facilitate their cooperative objective. For instance, the global anti-money laundering efforts facilitated by the intergovernmental Financial Action Task Force (FATF) repre-

sent an international institution according to the definition employed here despite the fact that the FATF lacks two central attributes of an international organisation, namely, an international legal personality as well as an autonomous will. Rather than equating international institutions with international organisations, this study seeks to explain why a particular international institution relies or does not rely on a pre-existing or newly created international organisation as part of its overall design.

International institutions as defined here are also broader than international agreements. Although international institutions are per definition based upon international agreements, understood as written authoritative documents (Iklé 1964), they encompass also the practice that evolves around such agreements. In this sense, this study's understanding of international institutions also covers 'interstitial law', i.e. the implicit rules operating in and around explicit normative frameworks (Finnemore and Toope 2001), and is comparable to a judicial interpretation which covers both *de lege lata* (codification of existing law) and *de lege ferenda* (progressive development of law) (Malanczuk 1997, 35). Such a broadening is justified by the fact that in many cases important regulatory practices are not directly established by a core agreement but are evolving later without any explicit codification. For instance, the international initiative to curb the illicit trade in conflict diamonds, the so-called Kimberley Process (KP), now encompasses elaborated monitoring and sanctioning mechanisms, which are, however, not provided for in the KP's founding document, the Kimberley Process Certification Scheme (KPCS) as adopted by the Interlaken Declaration of November 2002.

The definition of international institutions as employed here is both wider and narrower in scope than common definitions of international regimes. It borrows heavily from Robert Keohane's definition of international regimes as 'institutions with specific rules, agreed upon by governments, that pertain to particular sets of issues in international politics' (1989a, 4), which are created to 'prescribe behavioural roles, constrain activity, and shape expectations' (1989b, 3). This study's definition of international institutions is broader than Keohane's definition by its inclusion of *non-state actors*, such as inter-

governmental organisations, non-governmental organisations (NGOs), professional associations, or multinational corporations. Such a widening of the definitional scope is deemed necessary in the face of the increasing role non-state actors play in the various stages of what Koh refers to as the 'transnational legal processes' (1996, ; see also Shelton 2000). This study's definition is on the other hand narrower than another common definition, which has been formulated by Stephen Krasner, who describes regimes as 'implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations' (Krasner 1983, 2). This study's definition of international institutions focuses on *explicit*—although not necessarily written—arrangements at the expense of inexplicit norms and beliefs. This limitation is motivated by mounting evidence that suggests that explicit rules differ from norms both in their origins and in their impact on state behaviour (Slaughter 2004a, 41), thereby rendering it little useful to lump the two together.

Whereas the question about the reasons for the creation of international institutions (or regimes) has attracted a great deal of scholarly interest from the 1980s onwards (e.g. Keohane 1982, ; 1984, ; Krasner 1983, ; Young 1983), the question why institutions were endowed with different institutional design arrangements has been addressed only recently (e.g. Goldstein et al. 2000, ; Koremenos, Lipson, and Snidal 2001). Design refers hereby to 'the creation of an actionable form to promote valued outcomes in a particular context' (Bobrow and Dryzek 1987, 201). Although not necessary implied by this definition, this study focuses on design seen as the result of intentional activities, without denying that under certain circumstances institutional design may be the result of accidents and (undirected) evolutions (Goodin 1996), as suggested by historical and sociological institutionalists.

Recent interest in the design of international institutions has led to a proliferation of design classifications. One that has attracted the greatest scholarly interest is the concept

of legalisation (Abbott et al. 2000)[5]. This concept arrays international institutions on a spectrum ranging from soft law (low levels of legalisation) to hard law (high levels of legalisation) based on the three criteria obligation, precision and delegation. Moving along this continuum from soft to hard law involves a trade-off between flexibility, found at the lower end of the spectrum, and compliance, which, in contrast, is facilitated by high degrees of legalisation. The central tenet of this study's inquiry is that international actors design institutions in ways that best help them achieve the desired outcome of their cooperative undertaking. Adopting a functionalist logic[6], it is argued here that the optimal design is largely determined by the particular constellation underlying the problem on which international actors seek to cooperate. This study contributes to the functionalist strand of the institutional design debate by transferring the principles of transaction cost economics theory—specifically its independent variables asset specificity, behavioural uncertainty, and environmental uncertainty—from the context of inter-firm to that of inter-state cooperation.

The explanatory hypotheses developed and tested here conjecture that international actors chose 'harder' governance structures when the intensity of asset specificity (actions which are required from states by an international institution, but which states would not take otherwise) and behavioural uncertainty (the difficulty involved with detecting non-compliance of other states) are high. In contrast, 'softer' institutions are preferred when the possibility of unforeseen changes in the understanding of the causes, consequences or remedies of a problem is high (environmental uncertainty).

1.3 Methodology

The central theoretical puzzle of this study—the variance observed in the design of international institutions established to tackle policy problems in the same issue area—is influenced by a large number of different factors, many of which are of idiosyncratic na-

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[5] Other approaches to describe international institutions will be discussed below in chapter 2.

[6] Competing design theories will be presented and assessed in chapter 3.

ture. In order to distinguish the systematic from the non-systematic components of the phenomenon, this study engages in the 'structured, focused comparison' of qualitative data (George and McKeown 1985) by adopting a case-oriented approach. This methodological approach presents itself as the most pertinent for three major reasons. First, the investigator's inability to control the actual behavioural event, here the design of international institutions, precludes the utilisation of experimental methods (Yin 1994). Second, the number of observable cases contrasts sharply with the multiplicity of contextual factors and possible explanations, thus confronting the researcher with the 'many variables, few cases' dilemma and the problem of overdetermination (Lijphart 1971). Third, and most importantly, the utilisation of quantitative methods is hampered by the fact that institutional design theories are still underdeveloped, thus, requiring the thick conceptualisation of the context and central characteristics as offered by the case study method (Ragin, Berg-Schlosser, and de Meur 1998). In fact, the explanation of institutional design is still in a very early stage of theory building, with the pioneering scholars calling their explanatory attempts 'conjectures' rather than 'theories' (Koremenos, Lipson, and Snidal 2001). The contribution of this study therefore cannot be to subject these conjectures to statistical tests and to reach any definite conclusion on the validity of rational design approaches. Rather, it seeks to reveal promising directions for the further development of such approaches towards a full theory by synthesising existing hypotheses and to subject predicted design outcomes to a rigorous comparison with the observed designs of actual international institutions. The qualitative hypothesis testing undertaken here is seen as part of an iterative process that interacts with theory development (Munck 2004).

In contrast to 'large-n' observational tests, the case study method does not build upon random samples but rather on cases that were intentionally selected based on theoretical considerations. One inherent danger of this approach is a potential omitted variable bias. This study seeks to control the potential impact of omitted variables by directing its case selection based on two fundamental considerations. First, cases were selected so as to maximise the uniformity in their background conditions. For this reason, only institutions were included which are based on multilateral (not bilateral) agreements, which

deal with problems located in the same issue area (transnational security threats), and which fall within the limited timeframe of two decades (or more precisely: between 1988 and 2003). Second, cases were selected so that they represent the complete relevant data base (van Evera 1997), ranging from international institutions with very high levels of legalisation (UN Drug Convention) to institutions which rely on soft law alone (UN Programme of Action on Small Arms and Light Weapons), with two intermediary cases (KPCS, FATF). Thus, the case selection strategy used here follows Przeworski and Teune's 'most different systems' design (1970, 34ff). Although not without its specific caveats (see King, Keohane, and Verba 1994, 141), this selection method based on the variation of the observed outcome is deemed justified here, given the early exploratory stage of institutional design theories where the most urgent challenge is to eliminate irrelevant systemic factors—a task Przeworski and Teune's most different systems design is best capable of tackling.

The inquiry undertaken here proceeds in three stages. First, for each of the four cases the problem constellation is analysed based on the three variables derived from transaction cost economics theory—namely asset specificity, behavioural uncertainty and environmental uncertainty. In conjunction with the hypotheses presented in the previous sub-chapter, this analysis allows for the formulation of certain expectations regarding the optimal design of international institutions created to deal with the problem in question. In a second stage, the institutions' actual design is scrutinised along the three dimensions developed in Abbott et al's (2000) concept of legalisation—namely obligation, precision and delegation. Finally, the design expectations raised in stage one are compared with the actual institutional design as assessed in stage two. This comparison presents the actual test of this study's design hypotheses. This same test will be carried out for all four cases selected for this study. Although not allowing for any law-like generalisation, these tests still generate valuable insights into the empirical plausibility of the causal inference derived from the adaptation of transaction cost economics theory to the context of institutional design in international affairs.

Throughout this investigative process explicit and codified assessment methods are used so as to make the inquiry as transparent as possible. A detailed framework in the form of a checklist will be developed to make the measurement of the levels not only of each problem constellation's transaction cost economics variables but also of the discussed international institutions' level of legalisation transparent. In general, the measurement of all variables will be made on a scale with the three levels 'low', 'moderate' and 'high'. As neither the problem constellation nor the degree of legalisation are amenable to any precise quantitative measurement, the operationalisation of the independent and dependent variables in the above mentioned unambiguous terms is indispensable to enable the reader to replicate the process of inquiry and to form his or her own judgment about the reliability of the insights generated by this study (King, Keohane, and Verba 1994, 8). Furthermore, this operationalisation renders this study's explanatory hypotheses falsifiable. The hypotheses developed and tested here offer the advantage of being parsimonious with respect to the number and complexity of variables used (Eckstein 1975, 89). However, this parsimony comes at the price of not being able to explain every potential outcome. Such a failure to accurately predict the design of an international institution can also result from the fact that this line of inquiry is based on a probabilistic rather than deterministic mode of causation (Munck 2004) and that the number of case studies presented here is too small to allow for any definite assessment of the explanatory power of the model.

While this study focuses on cases dealing with policy problems located in the intersection between crime and war, nothing of the theoretical framework developed here necessarily prevents it from being used for the analysis of international institutions dealing with problems related to other issue areas. In fact, transaction cost economics theory has already been successfully applied to international cooperative arrangements in other policy fields such as trade (e.g.Yarbrough and Yarbrough 1992) and military security (e.g.Lake 1999). Also, this study's dependent variable—the concept of legalisation—has been applied to policy areas ranging from human rights, security to environmental protection. Such transferability is important as we are witnessing a proliferation of international institutions and an ever increasing density of the global regulatory web (Slaughter

1997, ; Slaughter 2004b). It is therefore of central importance to understand how these institutions are to be designed in order to best cater for the specific contractual problems arising from certain constellations. However, any transfer into other policy areas and beyond the contemporary setting chosen for this study needs to follow careful procedures of concept adaptation in order to avoid conceptual stretching (Munck 2004, 113).

This study draws its empirical evidence from a wide range of sources in order to prevent reproducing any potential bias from an individual source. The problem constellation is analysed based on evidence gathered from academic and semi-academic writings, newspaper reports, and public records of individual governments and of intergovernmental organisations. Interviews with government officials, staff of international organisations, of non-governmental organisations and of affected businesses complemented these written sources and allowed to update the evidence used in all four cases. Furthermore, these interviews provided a valuable 'reality check' of the written sources that had been previously consulted. Interviewees were identified and selected based on written sources such as lists of participants to relevant conferences and hearings and on cross-referrals by other interview partners. The number of interviews conducted for each of the four case studies varied inversely with the availability of reliable written sources—with the illicit trafficking in conflict diamonds requiring the greatest number of interviews, and the narcotic drugs the smallest. In total, 34 interviews were conducted between January 2004 and September 2005. The interviews followed a semi-structured format in order to allow both for comparison between sources and cases and for flexibility to capture the individual perspective of the interview partner. The interviews were undertaken face-to-face and over the telephone and transcribed based on interview notes. In order to guarantee accuracy, transcripts were sent to interviewees for authorisation. Interview material used in this study is not attributed, but appendix 1 lists the professional affiliation of the various interview partners as well as the date of the interview.

1.4 Outline

This study consists of three parts. Part one lays out the theoretical foundations and the operationalisation of both the dependent and the independent variable. The second part applies this theory to the four case studies, while part three provides a summary and the conclusions.

The chapter immediately following this introduction addresses the question of how best to conceptualise the observed variance in the design of international institutions and, thus, of this study's dependent variable. It provides an overview and critical discussion of the relevant theoretical literature. It introduces the distinction between hard law and soft law as descriptive categories and shows how the design of international institutions arrayed along this continuum presents unique combinations of advantages and disadvantages in the form of greater or lesser degrees of flexibility and of credibility, respectively. This chapter concludes with the presentation of the three design dimensions suggested by the concept of legalisation, namely obligation, precision and delegation, followed by the development of a list of operationalised criteria which will guide the assessment of the international institutions examined in the case studies presented in the second part of this study.

The argument presented in the third chapter follows a similar structure but now with respect to this study's independent variables, i.e. the characteristics based upon which problem constellations are described and compared. First, competing theories on institutional design are discussed and their relative explanatory power compared before the focus shifts to the functionalist strand within the debate. The functionalist theory adopted here is derived from transaction cost economics theory, which has found strong empirical support for a causal relationship between institutional arrangements and three attributes underlying these institutional arrangements—namely asset specificity, behavioural uncertainty and environmental uncertainty. These three independent variables are again operationalised so as to maximise transparency in the assessment of the problem constellation underlying each of the four case studies. These two theoretical chap-

ters provide the grounds for the formulation of this study's prime hypothesis, which conjectures that international actors will establish institutions with high degrees of legalisation when dealing with problems characterised by high levels of asset specificity and behavioural uncertainty combined with low levels of environmental uncertainty. Inversely, low degrees of legalisation are chosen for policy problems with little asset specificity, behavioural uncertainty and considerable environmental uncertainty.

This hypothesis (and its inverse) will be qualitatively tested on the bases of four case studies presented in the second part of this study. The four case studies are presented in the order of their decreasing degree of legalisation. Chapter four is dedicated to the 1988 United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which was selected as an example of an international institution based on comparably hard law. Chapter five scrutinises the Forty Recommendations of the Financial Action Task Force (FATF) of 2003, which establish an international institution against money laundering. Chapter six discusses the Kimberley Process Certification Scheme of 2002, an international initiative to curb the illicit trade in so-called conflict diamonds. Chapter seven concludes the empirical part with the analysis of the United Nations Program of Action on Small Arms and Light Weapons of 2001, which represents an international institution with a low degree of legalisation. Each of these case study chapters begins with an overview of the context of the case, establishing how the policy issue emerged on the international agenda, and how it has been addressed through various international agreements. The main part of each empirical chapter is dedicated to the comparison of the predicted and the actual design outcome for the international institution created to tackle the specific policy problem.

Finally, chapter eight synthesises the findings of the four preceding empirical chapters and assesses the strengths and weaknesses of the design hypotheses formulated in the first part of the study. It seeks to broaden the debate by suggesting promising areas for future research.

2 The concept of legalisation

By definition, illicit flows are a transnational problem, as they involve economic activities across borders that are criminalised by either the importing or the exporting state, or by both (Friman and Andreas 1999). They present particular challenges to international cooperation, as they affect states in very different ways, depending on the type of the illicit good or the service involved and on whether the country is the place of origin of the flow, a transhipment centre, or the country of destination. Matters are complicated further by the fact that, in many cases, the curbing of illicit flows requires the cooperation of states that do not feel any negative consequences of these flows and of states that may even benefit from them. Given this absence of harmony of interests, international cooperation does not emerge quasi automatically. Rather, strong international institutions need to be established that help to overcome the obstacles to cooperation arising from heterogeneous interests. It is thus little surprising that the increasing number and severity of illicit flows has led to an expansion of the number and scope of international institutions created to tackle this problem. This proliferation of international institutions has been accompanied by a growing diversity in terms of the governance structures they incorporate. In the last decade, international relations scholars have become increasingly interested in this observable variety of institutional designs and have developed several concepts to describe it. Some scholars adopt dichotomous design concepts (e.g. formal versus informal agreements (Lipson 1991, ; Morrow 2000), or the inclusion or absence of escape clauses (Rosendorff and Milner 2001)), while others include multiple aspects into their analysis (e.g. scope, membership, centralisation, control and flexibility) (Koremenos, Lipson, and Snidal 2001). The aspects that have attracted the greatest academic attention relate to the differences between international institutions in terms of their capacity to bind signatories in legal terms (obligation); to their ability to convey clear-cut objectives and action plans (precision); and to whether they commission a third party to perform certain tasks on behalf of the signatories (delegation). Taken together, these three characteristics—obligation, precision and delegation—constitute the

core elements of what has become known as the concept of legalisation (Abbott et al. 2000).

In this understanding, legalisation refers to 'a particular form of institutionalisation, [which] represents the decision in different issue-areas to impose international legal constraints on governments' (Goldstein et al. 2000, 386). This concept conceives legalisation as a continuum that stretches from soft law to hard law, where the soft end is characterised by low levels of obligation, precision and delegation and, conversely, the hard end by high levels of these three variables. When states chose a certain degree of legalisation to facilitate cooperation in a certain issue-area, they face a fundamental trade-off, as hard law enhances the credibility of the signatories' commitment, while soft law offers greater flexibility (Goldstein and Martin 2000, ; Koremenos 2001, ; Rosendorff and Milner 2001).

This institutional design dilemma will be subject of a detailed discussion presented here in the first sub-chapter. From this foundation, the discussion moves on to develop the three dimensions of legalisation—obligation, precision, and delegation—in more detail and to suggest ways how to operationalise these explanatory variables for the context of this study. This chapter builds upon two bodies of literature developed in distinct sub-fields of political science, namely government studies—largely concerned with the study of relations between the executive and the legislative—and international relations. Both bodies of literature address the credibility problem of the state and discuss the relevance of obligation, precision and delegation with respect to institutions created to overcome this problem. However, until very recently, little awareness existed among scientists of both camps about the relevant insights the other sub-discipline had to offer. This chapter, thus, attempts to demonstrate the potential of such 'cross-fertilisation'.

2.1 Credibility versus flexibility

This first sub-chapter addresses a fundamental dilemma that is inherent in every design option for international institutions: the trade-off between the credibility associated with

hard legalisation, on the one hand, and the flexibility offered by institutions with only low levels of legalisation, on the other. The first section explains why credibility is of paramount importance for states in dealing both with their domestic audiences and with each other. The discussion then moves on to show why a gain in credibility necessarily comes at the expense of flexibility, and why and under which circumstances this matters. The third and final section connects the two by arguing that the choice between high levels of credibility and flexibility is not binomial but rather continuous, that states can establish institutions that take on any position on the soft-hard legalisation continuum and that this position often shifts during the course of an institution's existence.

2.1.1 Credibility: A central problem of the state

International cooperation involves an 'exchange of conditional promises, by which each party declares that it will act in a certain way on condition that the other parties act in accordance with their promises' (Iklé 1964, 7). In that respect, cooperation between states is very much comparable to transactions between private parties. Both cases involve a sacrifice of the parties in exchange for a promised good the receiving party values at least as much, typically higher, than the sacrifice it has to make. In both cases the welfare enhancing outcome will only be achieved if all parties involved in the transaction believe that the other party will live up to its promises and this expectation materialises. In a key aspect, though, the private and the public sphere differ from each other. Promises made by private parties in private contracts gain considerable credibility through the existence of a juridical system, independent of the parties involved and vested with the authority and capacity to effectively enforce property rights and contractual obligations. The provision of such a juridical system is usually considered as one of the core functions of the state. When, however, the state itself becomes party to a contract the enforcement of contractual obligations is no longer ensured, as the juridical system is part of the state itself. This results in a lack of credibility for the promises made by states, undermining the state's ability to conclude agreements with either private parties or other states. Both scholars within government studies and within international relations have

taken a strong interest in this problématique. The former have typically focused on the credibility of states' commitment vis-à-vis private parties such as interest groups (e.g. Horn 1995, ; Moe 1990a), capital owners (Root 1994), or business communities (Levy and Spiller 1996) whereas the latter examined the credibility of promises exchanged between states. Both bodies of literature emphasise the importance of a state's ability to lend credibility to its commitments by binding itself through 'some voluntary but irreversible sacrifice of freedom of choice' (Schelling 1960, 22).

- Government science literature

The government science literature provides a rich discussion of the credibility problem a state faces and of several formal mechanisms through which a state can seek to overcome them. Promises made by a government are plagued with fundamental uncertainty as 'whatever policies and structures ... [an incumbent government] put[s] in place today may be subject to the authoritative discretion of other actors tomorrow, actors with very different interests who could undermine or destroy ... [the incumbent government's] hard-won achievements' (Moe 1990b, 124). This uncertainty affects a government's interaction with various stake holders. Moe (1990b), Horn and Shepsle (1989) and Horn (1995) demonstrate how this wanting credibility of a government's promises undermines interest groups' willingness to offer an incumbent government their full support, as they fear that the benefits they reach from a certain policy enacted by the government may only be of temporary nature. Root (1994) illustrates in his study of royal fiscal policy during absolutism in France the problems a government faces from political uncertainty when trying to borrow money from private capital owners. He argues that the king had to pay higher interest rates than private individuals because he had a reputation for reneging on his financial commitments and because the lenders were unable to hold him accountable for his non-compliance. Root calls this phenomenon the 'irony of absolutism' and notes that, 'because the king claimed full discretion, he had less power. Claiming to be above the law in fiscal matters made it more difficult for him to find business partners. The use of discretion reduced his payoffs in equilibrium because invoking ab-

solute power destroyed royal credibility' (1994, 177). In the contemporary context of telecommunications, Levy and Spiller (1996) demonstrate the importance of a government's ability to lend credibility to its regulatory policies so as to attract domestic or international investors; Gilardi (2002) expands this point to other business sectors. Henisz (2000) presents a related argument in his article on multinational investments where he describes investors' reluctance to invest in countries where government policies can easily be reversed. North and Weingast (1989) broaden the argument and demonstrate how a government's capacity to make credible commitments forms the indispensable underpinning of economic growth and sustainability. It is therefore of central importance that a government finds ways to overcome the 'irony of absolutism' Roots referred to, which applies to democracies with equal force. This requires mechanisms that allow a government to signal its intensions in a trustworthy way and to tie its own hands by insulating an enacted policy from the discretion of tomorrow's political decision-makers (Moe 1990b, 125; North and Weingast 1989).

The government science literature discusses several formal mechanisms a state can employ to enhance the credibility of its commitment. Most attention has been given to the separation of legislative, executive and judicial powers (Gely and Spiller 1990, ; Landes and Posner 1975, ; McCubbins, Noll, and Weingast 1987, ; 1989). Attention has also been paid to whether effective checks and balances can be established and maintained by having two different voting rules to elect two legislative houses, by the separation of politics from administration (Moe 1990b), by minority parities and by federal, decentralised structures (Ferejohn and Weingast 1997). Recent literature has taken a particular interest in the relationship between the legislative and the bureaucracy and the role delegation plays in this equation (Epstein and O'Halloran 1999, ; Horn 1995, ; Huber and Shipan 2002, ; Miller 2000). This literature demonstrates how the legislature can increase the value of a certain legislation in the eyes of the beneficiaries by passing detailed statutes imposing rigid constraints (Moe 1990b, 136) and by entrusting the execution of the policy to a permanent body removed from political oversight (Moe 1990b, 137). These mechanisms generate a 'lock-in' effect, as they insulate current policy beneficiaries from

future change by increasing 'the costs that future legislators must face if they attempt to undermine the original deal at the administrative level' (Horn 1995, 18).

- International relations literature

The task of achieving credibility when a state commits itself vis-à-vis another state is even more acute than in private-public transactions, as states have so far been more successful in creating credibility enhancing institutions on the domestic than on the international level. First steps have been undertaken in the direction of a credibility-enhancing separation of powers with the creation of international courts such as the International Court of Justice and the International Criminal Court. However, these attempts are still confined to an embryonic stage[7]. States typically retain the discretion to decide on a case-by-case basis whether they want to acknowledge the competence of an international court. Furthermore, it is left to the states to follow or disregard the court's ruling, as international courts cannot call upon a law enforcement body comparable to the police in the domestic context. In brief, international law rests largely on the consent of states (Bierley 1963, 7-16; S.S. Lotus (France vs. Turkey) PCIJ 1927). Many international relations scholars, in particular those associated with the realist camp, have questioned whether international law is law at all, emphasising the anarchic nature of world affairs, i.e. the absence of any central authority above states and vested with the authority and capability to effectively enforce pledges made by states (Mearsheimer 1994-1995, ; Morgenthau 1953, 296-7). This anarchic structure of global politics undermines the credibility of the pledges made by states. How severe this problem is, mainly depends on how strong the incentives are for states to shirk (Snidal 1985, 936-939; Stein 1983, 127-132). In cases of mere *co-ordination*, anarchy does not cause any problems, as no state has an incentive to shirk once it has agreed upon a common standard (Krasner 1991). All parties are better off living up to their promises independent of the other parties' action. Problems arise, however, in problem structures that resemble a *prisoner's dilemma*

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[7] The European Court of Justice presents an important exception in this respect.

(Lipson 1984, ; Stein 1983). Under such constellations, states can only reach the full benefits from participating in a cooperative undertaking when all other parties honour their obligations as well. If, however, other parties do not comply with the agreement, a state may lose out from participating in an international co-operation arrangement compared to the option of staying away from it or to the option of shirking. It is therefore crucial for the success of a cooperative project that all participants believe in the promises given by the other parties. Given the absence of a pre-existing body that strengthens the credibility of these promises by threatening to enforce them in case of non-compliance, states need to create their own international institutions that specify 'illegitimate behaviour' and define 'procedures to discourage cheating' (Hasenclever, Mayer, and Rittberger 1996, 188). Such institutions are even more important in some of the cases examined in this study, which require the cooperation of states which do not directly benefit—at least not in material terms—from a successful outcome of the cooperative undertaking.

Similar to the domestic situation, states try to overcome their credibility deficit by establishing international institutions, which can limit their discretion and thus enhance the credibility of their commitments. The central mechanism through which international institutions achieve this goal is by raising the relative costs of revoking or defying a previously made commitment (Morrow 2000). They mainly do so by conveying signals that allow states to infer the true interests and likely future action of the parties to the institution (Morrow 2000, 68). International institutions can signal credible commitment when they make these signals costly, i.e. when they ensure that the act of sending a signal 'incurs or creates some cost that the sender would be disinclined to incur or create if he or she were in fact *not* willing' to honour the promises made under an international institution (Fearon 1997, 69). Fearon (1997) distinguishes two types of costly signals: sunk-costs signals and tying-hands signals. The former refer to financially costly actions undertaken by a party *ex ante*, such as the mobilisation of troops. The latter refer to international institutions' ability to create costs a state will incur in case it does not comply with the agreement. The most important form of this second type of costs is audience or

reputational costs. When a state makes formal promises and declares itself bound by an international institution but then does not live up to its obligations its reputation suffers on two levels. First, reneging from an international institution spoils a state's *international* reputation, making it more difficult for the state to enter international agreements in the future (Keohane 1984, 105f.; but also Morgenthau 1953, 313). The long-term negative effects on reputation may therefore outweigh the immediate benefits from non-compliance, thus creating a strong incentive for honouring the obligations signed up for (Lipson 1991, ; Morrow 2000). Second, a non-complying government's reputation also suffers on the domestic level. Bueno de Mesquita et al (1999), argue that those with the power to remove a current leader—either the mass electorate in democracies or a clique of oligarchs—care about their state's international standing and will sanction the leader in case he or she spoils it (see also Morrow 2000, ; Smith 1998).

The size of international and domestic audience costs, which a state incurs from non-compliance, depends on the extent to which an international agreement puts a state's reputation at stake. The audience costs are higher, when, firstly, a state makes an official declaration to consider itself legally bound by an international agreement (Lipson 1991), secondly, when the provisions of this agreement are specific enough to allow for a clear distinction between compliance and breach and, finally, when an independent agency is commissioned to monitor and to expose (non)compliance—in brief, when the agreement incorporate a high level of legalisation.

2.1.2 The downside of high levels of legalisation

Since obligation, precision and delegation seem to boost the credibility of an international institution, one could expect states to favour higher levels of legalisation, i.e. hard law, over lower levels of legalisation, i.e. soft law. This assumption is, however, not supported by evidence as demonstrated by the great and increasing number of international institutions with only soft legalisation (Shelton 2000). Scholars of international relations and international law discuss various reasons for why states may favour soft law over hard law under certain circumstances (Abbott and Snidal 2000, ; Guzman 2003, ;

Lipson 1991, ; Reinicke and Witte 2000, ; Rosendorff and Milner 2001, ; Shelton 2000). The aspect most widely discussed in the literature is the decreasing flexibility of harder forms of law. Levy and Spiller are right in pointing out that there exists a fundamental trade-off between the credibility and flexibility of an international agreement 'since the same mechanisms that make it difficult to impose arbitrary changes in the rules may make it difficult to enact sensible rules in the first place or to adapt the rules as circumstances change' (1996, 5). Hard law is associated with at least four different types of rigidities. First, the establishment of hard law usually entails a slow and costly process. It requires lengthy negotiations between top-level representatives of national executives and—after closure—a ratification process typically involving the approval of parliament or maybe even public approval in a referendum. Second, given the reputational stakes associated with hard law, states are very reluctant to enter an agreement with an ambitious agenda. For this reason, many hard laws represent little more than the lowest common denominator (Downs, Rocke, and Barsoom 1996). If an issue is contentious, 'anything other than non-binding agreements would deter states and non-state actors from participating, precluding the possibility of informal and formal cooperation' (Reinicke and Witte 2000, 94). Third, the high levels of credibility of hard law come at the expense of a flexible adaptation of the provisions to changing circumstances. The complex interaction of many policy issues with a fast changing and technology driven environment necessitates adaptive and responsive policy instruments (Reinicke and Witte 2000, 95). But as adaptations of existing hard law agreements usually require the consent of all parties, this process can be almost as cumbersome as was drafting the agreement in the first place. Fourth and finally, hard law is very rigid towards the inclusion of non-state actors, as the Vienna Convention on the Law of Treaties (VCLT) only recognises sovereign states as negotiators and signatories of treaties. It has become common place to note the important roles various types of non-state actors assume throughout all stages of the international policy making process, but only soft law allows for an official participation of non-state actors in the development and implementation of international rules (Shelton 2000, 13).

For these reasons, Johnston concludes that soft law arrangements may enjoy increasing popularity, perhaps 'motivated by the need to circumvent the political constraints, economic costs, and legal rigidities that often are associated with formal and legally binding treaties' (1997).

2.1.3 Hard or soft legalisation: a difficult trade-off

As the above discussion highlighted, international institutions endowed with low and high legalisation, respectively, both present certain advantages and drawbacks. International actors therefore face a difficult trade-off between flexibility and credibility when designing an international institution (Goldstein and Martin 2000, 605; Koremenos 2001, ; Rosendorff and Milner 2001).

Traditionally, scholars of international law made a clear-cut distinction between legally binding treaties and softer forms of international arrangements, dismissing the latter as non-law (Weil 1983), or as a mere second-best solution (c.f. Schachter 1977, 304). But over the last decade or so, scholars in both camps have increasingly recognised the growing importance of soft law. Koh argues that we are witnessing the emergence of a 'brave new world of international law' where 'transnational actors, sources of law, allocation of decision function and modes of regulation have all mutated into fascinating hybrid forms. International law now comprises a complex blend of customary, positive, declarative and soft law' (1995, ix). Adopting Koh's perspective on the nature of today's international law, this study perceives hard and soft legalisation not as mutually exclusive institutional designs, but as arrayed along a continuum ranging from arrangements that impose strong constraints on behaviour to arrangements that allow for almost complete freedom of action (Abbott et al. 2000, ; Reinicke and Witte 2000, ; Shelton 2000, 4).

The distinction between hard and soft law is far from clear-cut as many legally binding treaties 'soften' their degree of obligation through vague formulations and/or weak enforcement mechanisms, while non-binding arrangements may provide for supervisory mechanisms traditionally associated with hard law (Shelton 2000, 10). Furthermore,

hard law and soft law often assume complementary roles. Shelton (2000, 10) notes that soft law can rarely be found in isolation, but is usually part of a complex regime consisting of hard law and soft law arrangements both seeking to regulate the same issue area. Soft law agreements often assume the function of authoritatively resolving a treaty's ambiguities or of filling in gaps and omissions. The separation between hard and soft law is also not static. Soft law is often the first step on the path towards legally binding agreements (Abbott and Snidal 2004). Especially when an issue is of highly contentious nature, soft law presents the only arrangement that diverging parties can agree upon. Reinicke and Witte (2000) point out how informal and formal cooperation based on soft law can lead to a convergence of perceived interests of states, thus promoting closer cooperation. However, as Kal Raustiala (2004, 9) points out, there is no automatism leading to the hardening of soft law over time. Although, many examples exist in support of the assumption that institutions tend to harden over time, there are also cases which remained permanently on the soft end of the spectrum or where even a reversion took place.

Despite of this blurred boundary between soft law and hard law, this study embarks on categorising international agreements according to their level of legalisation. Three broad categories—low, moderate and high levels of legalisation—will be used, and the assignment to either of these categories will be based upon the three criteria, obligation, precision and delegation, discussed in detail below.

2.2 The three dimensions of the concept of legalisation

The concept of legalisation as developed by Abbott et al (2000) distinguishes three dimensions—obligation, precision and delegation—along which the relative position of an international institution on the flexibility-credibility spectrum can be localised. An international institution is assumed to present a case of hard legalisation, when states unambiguously commit themselves to comply with an agreement (obligation), when the provisions of the agreement are precise enough to allow for a clear distinction between compliance and non-compliance (precision), and when substantive power is transferred

to a third party vested with some degree of independence (delegation). These three aspects of legalisation and their importance for the credibility-flexibility trade-off will be explained below. Assessing the levels of obligation, precision and delegation incorporated in an international institution is necessarily of approximate nature. Two measures are adopted here in order to allow for the greatest possible degree of intersubjectivity. First, the discussion below details which observable elements of an international institution are considered to present indicators for soft and hard legalisation respectively. These indicators will be compiled into a checklist, which will guide the assessment of international institutions in the second part of this study. Second, given the impossibility to generate any meaningful and precise quantitative measurements for the three explanatory variables, this study contents itself with discerning three qualitative levels (low, moderate, high) of obligation, precision and delegation. Not only the three major components of legalisation—obligation, precision and delegation—will be given one of these values, but also the indicators mentioned above will be assigned a value on this three-step scale in part two of this study.

2.2.1 Obligation

'Sovereignty' is a fundamental principle of classical international law. It establishes that every state is equal in terms of its legal rights and that a state's right, including the right to organise and conduct its internal affairs at its own discretion, which must not be circumscribed by any international institution unless the state has given its explicit consent to this institution. Against this background, obligation refers to the extent to which a state considers an international institution to create legally binding rules and formally commits itself to comply with these rules (Schachter 1977). By declaring an international agreement as legally binding, states accept it to become part of the legal system governed by customary law and the Vienna Convention on the Law of Treaties. Most importantly, the legal principle of *pacta sunt servanda* enshrined in article 26 of the VCLT applies, which obliges states to implement the rules of the institution in good faith. If they fail to do so, they become legally responsible and parties injured by this breach may claim

reparations—either in form of material compensation or an official apology (Abbott et al. 2000). A high degree of obligation increases the reputational stakes and thus enhances the credibility of an agreement.

The assessment of the degree to which an international institution is obliging states to a certain type of behaviour involves three interrelated elements: legal bindingness, the use of provisions attenuating the degree of obligation—such as escape clauses, withdrawal provisions, reservations—, and finally, monitoring and enforcement mechanisms.

- Legal bindingness

As a first step to assess the degree of obligation enshrined in an international institution we can establish whether or not the underlying international agreement is of legally binding nature. In order to do so, one needs to refer to the 'intention by the parties to create legal rights and obligations or to establish relations governed by international law' (Schachter 1977, 296). This intention is, however, not always clearly stated in an international agreement, as states are sometimes reluctant to declare explicitly that an agreement lacks legal power. Therefore, the true intention has to be inferred from the 'language of the instrument and the attendant circumstances of its conclusion and adoption' (Schachter 1977, 297). The *language* in which an international agreement is phrased can indeed often serve as a good auxiliary indicator for the parties' intention. It has become common practice to use certain formulations in agreements that are meant to be legally binding. One can typically find phrases such as 'The Parties to this Convention, ..., hereby agree as follows' in the preamble of legally binding treaties such as the UN Drugs Convention of 1988. Non-binding agreements, in contrast, prefer formulations such as 'participants ...recommend the following provisions' (see for example the Interlaken Declaration of the Kimberley Process Certification Scheme). Other terms typically found in legally binding but not in non-binding agreements include 'obligations', 'shall' and 'should'. An agreement's legal bindingness can, secondly, be deduced from the inclusion of certain procedural provisions it involves.

Legally binding agreements typically contain *provisions on procedural issues* such as accession, entry into force, safeguards and denunciations (more on the latter two below) which are all absent in legally non-binding agreements. Also, ratification process through which an international agreement is adopted can help to interpret parties' intention. States usually envisage different domestic procedures for the adaptation of international agreements depending on the agreement's bindingness. Typically, international agreements that are legally binding involve stronger forms of legislative scrutiny than non-binding agreements. The US constitution, for example, requires the 'advice and consent' of two thirds of the Senate for the ratification of an international treaty (article II, section 2, clause 2 of the US Constitution); in Switzerland, some binding international agreements even require the consent of the majority of the people (Constitution of the Swiss Federation, article 141).

A third auxiliary indicator for states' intention suggested by Schachter is the *registration* of an international agreement under article 102 of the UN Charter. This article stipulates that 'every treaty or international agreement, whatever its form and descriptive name, entered into by one or more members of the United Nations' has to be registered with the UN secretariat and be published in the United Nations Treaty Series. However, as both legally binding and non-binding agreements are required to be filed with the UN, the registration of an agreement is a very weak indicator for an agreement's legal bindingness. Some exceptions, most prominently the Helsinki Final Act of 1975, exist where the parties of the agreement explicitly decided against the registration with the UN secretariat. Such a non-registration bears the importance consequence that parties forfeit the right to invoke the agreement before any organ of the United Nations (article 102 paragraph 2). Therefore, a non-registration can be seen as a strong indicator for the parties' intention to underline the *non*-binding status of the agreement, whereas registration does not in itself indicate its bindingness. However, using the non-listing of an agreement in the United Nations Treaty Series as an indicator for the soft law character of an agreement, is problematic for the practical reason that the Treaty Series currently

runs a back log of around ten years (Max Planck Institute 2004). This third auxiliary indicator of legal bindingness is therefore omitted in this study.

- Attenuation

Legal bindingness is an important first indicator for a high level of obligation of an agreement. However, it alone does not suffice, as the obligation created by a legally binding institution can be attenuated in three major ways: reservations, escape clauses and withdrawal.

As already noted, international agreements typically do not posses direct effect but need to be converted into domestic law before becoming enforceable. This transposition opens the door for states to adapt the terms of the agreement in their favour, either through definitional changes or through explicit reservations. Most legally binding international agreements allow for such reservations, which the Vienna Convention on the Law of Treaties defines as 'unilateral statement[s], however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, where, ... [they] purport to exclude or to modify the legal effect of certain provisions of the treaty in their application to the State' (article 2 letter d). Reservations can undermine the credibility of an agreement and void it of its content. For this reason, the Vienna Convention tries to safeguard the integrity of the treaty by limiting the application of reservations. Article 19 letter c specifies that a state may not submit a reservation which is 'incompatible with the object and purpose of the treaty'. As this provision is vague and leaves plenty of room for interpretation, some international agreements explicate which of its provisions are open for reservations and which cannot be unilaterally modified. For instance, article 42 of the Council of Europe Convention on Cybercrime (CETS 185 of 23 November 2001) explicitly lists the provisions of which a party can modify the legal effect and interdicts reservations relating to any other provisions. An agreement which limits the application of reservations more rigidly is considered to have a higher degree of obligation than one that does not impose any constraints on reservations. In this

sense, provisions on reservations can serve as a second criterion to assess the degree of obligation exerted by an international institution.

Many international agreements—and virtually all agreements on trade (Milner, Rosendorff, and Mansfield 2004)—soften their legal bindingness by including *safeguards* and escape mechanisms. Such provisions explicate the conditions under which a state may temporarily suspend the fulfilment of its treaty obligations (Hoekman and Kostecki 2001, 303). Escape clauses weaken the credibility of states' commitment as states may misuse these clauses to whitewash their failures to live up to promises whenever they face growing domestic pressure (Rosendorff and Milner 2001). In order to prevent such a vitiation of an agreement's credibility, parties need to include provisions that impose some costs upon every country that invokes escape clauses. Under GATT, this is achieved by requiring that countries temporarily erecting trade barriers with reference to an escape clause must negotiate compensations with the affected exporters or lower barriers in another area (Milner, Rosendorff, and Mansfield 2004). The number, the scope and the constraints of escape clauses incorporated in an international agreement can therefore serve as a second criterion to assess the degree of obligation enshrined in an international institution.

Mindful that at some point the temporary suspension of some specific obligations may not suffice, states endow most legally binding agreements with provisions on *withdrawal.* These allow states to renounce their previously made commitments all together. Obviously, the credibility-weakening effect of the withdrawal option is even more severe than the escape option. In order to balance states' reluctance to sign on to obligations they cannot renounce at a later stage and the need for credibility, almost all legally binding international agreements allow for withdrawal[8] but specify procedures that constrain the exercise of this option. International agreements vary, however, with respect to the constraints they impose on withdrawal. The aforementioned Council of Europe Conven-

[8] A notable exception is again the EU, the founding treaties of which do not contain any clauses on withdrawal.

tion on Cybercrime of 2001, for example, specifies that a denunciation of the convention by any party becomes effective three months after the secretary general of the Council of Europe has been notified (article 47). The United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, in contrast, requires the elapse of one year after notification until the denunciation takes effect for the party concerned (article 30). The 'height' of the hurdles an international agreement erects to prevent easy withdrawal affects the degree of obligation imposed by an international institution and can therefore serve as a third criterion for the extent to which obligation is attenuated through procedural provisions.

- Monitoring and enforcement

Third and finally, the degree of obligation created by an international agreement that is legally binding and that restricts the use of reservations, escape and withdrawal may still not be very high when breach remains undetected and without significant consequences. Agreements which specify procedures to monitor compliance and to mend breaches of commitments are therefore considered to have a higher level of obligation than those that lack such provisions. Such monitoring and enforcement mechanisms include 'sunshine provisions' that enhance transparency (Weiss 2004, 146f.), the imposition of sanctions (e.g. the suspension of trade in species with a non-complying state under the Convention on International Trade in Endangered Species (CITES) or in rough diamonds under the Kimberley Process Certification Scheme), membership sanctions, the authorisation of reciprocal measures (e.g. WTO), and procedures of 'naming and shaming' (e.g. 'blacklist' of the Financial Action Task Force on money laundering, or Country Resolutions by the UN Commission on Human Rights[9]). In many cases, the consequences of non-compliance are not spelled out in an international agreement. Particularly in the case of in legally non-binding agreements, monitoring and enforcement mechanisms are

[9] The Commission on Human Rights is empowered to adopt resolutions criticising a UN member state in "situations which reveal a consistent pattern of violations of human rights", according to resolution 1235(XLII) passed by the UN Economic and Social Council (ECOSOC) on 6 June 1967.

developed in practice often without being enshrined in any official document. It is for this very reason, this study focuses on international institutions (as defined in the introduction) rather than just the international agreements around which the institutions evolved.

Monitoring and enforcement instruments vary again with respect to the costs they impose for non-compliance and, thus, to the extent to which they constrain state action. The analysis of whether at all—and if so which kind of—procedures are established by an international institution to deal with non-compliance can serve as a final criterion that guides the assessment of the degree of obligation of an international institution.

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In sum, the assessment of an international institution's degree of obligation can be based on its formal legal status, the extent to which it constrains reservations, escapes and withdrawal, and on the monitoring and enforcement mechanisms it envisages.

2.2.2 Precision

The above assessment of the degree of obligation enshrined in an international institution is an important, yet insufficient, first step to locate the institution on the soft law-hard law continuum. A second dimension of institutional design has attracted considerable interest among both IR and IL scholars: precision. The degree of precision can only be assessed based on a written document, as this concept refers to the openness of formulations. For this reason, we cannot directly assess the precision of an international institution, but only of the international agreement or agreements that form the institution's very core. The practice that evolved around these texts is, in contrast, not susceptible for such an assessment.

Whereas some scholars name lack of precision as one major reason for non-compliance (Chayes and Handler Chayes 1993, ; 1995, ; Hirsch 2004, ; Shannon 2000), this study

takes a contrasting perspective on this issue. It argues that the primary problem with vague rules is not that they increase non-compliance but rather that they make non-compliance logically impossible (see with respect to human rights Simma 1988). The most fundamental consequence of vague rules is that they allow for multiple interpretations, thus rendering it impossible to distinguish clearly between acceptable and unacceptable behaviour. Low levels of precision can therefore undermine the credibility created by high levels of obligation. On the domestic level, many examples can been found where courts have refused to rule on the grounds that the laws they were meant to use were too imprecise[10], thus rendering a (binding) law practically ineffective. With respect to international law, Chinkin notes that 'the conclusion of an agreement in treaty form does not ensure that a hard obligation has been incurred. Treaties with imprecise, subjective, or indeterminate language ... fuse legal form with soft obligations' (2003, 25f). In a very similar vein, Schachter points out that 'statements of general aims and broad declarations of principles are considered too indefinite to create enforceable obligations and therefore agreements which do not go beyond that should be presumed to be nonbinding' (1977, 297). Morgenthau deplores the prevalent imprecision of international law and sees in it a 'ready-made tool [used by governments] for furthering their ends. They have done so by advancing unsupported claims to legal rights and by distorting the meaning of generally recognised rules of international law' (1953, 299)[11]. Abbott and Snidal refer to this phenomenon as 'self-serving auto-interpretation' (2000, 427). Such a deliberate manipulation is not surprising as ambiguity and openness of international rules and standards often result from profound disagreement among the negotiating parties in the first place (Iklé 1964, 12; Shelton 2000, 14). When an issue is highly contentious it is considerably harder to reach an agreement among the parties, and thus in-

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[10] E.g. for the United States: Sun Ray Drive--In Dairy, Inc. v. Oregon Liquor Control Com., Court of Appeals of Oregon, 16 Ore. App. 63; 517 P.2d 289; 1973 Ore. App. LEXIS 672, November 26, 1973, Argued, December 24, 1973; Soglin v. KauffmanNo. 17427, United States Court of Appeal for the Seventh Circuit, 418 F.2d 163; 1969 U.S. App. LEXIS 10315, October 24, 1969; both cases mentioned in Diver (1983).

[11] Similar views—though not with the same negative connotation—were also expressed by legal realists (e.g. Jerome Frank) with respect not just to international law but to law in general. In their views, the belief that there could be anything such as a firm content to legal and constitutional rules was an artifact. Rather, judges changed the law according to what was felt "convenient" at the time.

creasing the duration and the costs of negotiation process. Negotiating parties may therefore choose to phrase an agreement in ambiguous terms which plaster their substantive differences. Horn's (1995) analysis of legislative decision-making in the domestic context confirms such a relationship between the level of conflict and the degree of vagueness of a law that is being passed (see also Huber and Shipan 2002).

Precision helps to strengthen compliance (Franck 1990) with an international institution, and thus its credibility, in two major ways. First, as already noted, they help to narrow the scope of permissible interpretation (Franck 1990), thus facilitating convergence of state behaviour. Second, by formulating rules that are precise enough to allow for a clear-cut distinction between acceptable and unacceptable behaviour, states increase the reputational stakes of non-compliance. Only if a certain type of behaviour can clearly be discerned as in breach with the agreement, can it become the basis for 'naming and shaming' strategies or other sanctions. In this sense, precision can serve as a screening device to discern states that more sincere with living up to their pledges from states that are less.

Although there exists a wide-spread agreement that precision matters, few scholars have so far tried to specify the term in ways that would allow for a systematic comparison and assessment of the degree of precision found in different agreements. The 'precision' variable still remains under-developed compared with 'obligation' and 'delegation'. Abbott et al (2000) have undertaken a first step towards levelling this discrepancy between the three variables. They specify that '[p]recise sets of rules are often, though by no means always, highly elaborated or dense, detailing conditions of application, spelling out required or proscribed behaviour in numerous situations' (2000, 413). These authors also suggest to assess the degree of precision enshrined in an international agreement based on the precision in which the individual provisions contained in an international agreement are formulated (determinacy) as well as of the precision of the agreement in its entirety (coherence) (Abbott et al. 2000).

- Determinacy

Franck (1990) uses the notion of 'determinacy'[12] to describe rules' ability to specify 'clearly and unambiguously what is expected of a state or other actor [...] in a particular set of circumstances' (Abbott et al. 2000, 412). Precision can be achieved either through relatively precise 'rules' or through more general 'standards'. The former refers to provisions such as 'no person may pilot a commercial airplane after his sixtieth birthday' (example taken from (Diver 1983)), that use words with 'well-defined and universally accepted meanings' (Diver 1983, 67). Such rules are 'transparent' in Divert's notion. They increase the 'accuracy of prediction' (Franck 1990, 118-119) of how the provision will be applied, as the enactors of the provision determine ex ante which behaviour is deemed acceptable (Abbott et al. 2000). The wording of standard-like provisions, on the other hand, is more general, opening room for an ex post interpretation in order to allow for greater 'congruence', i.e. to foster 'the law's substantive moral aims by promoting outcomes in individual cases consistent with those aims' (Diver 1983, 71 emphasis added). In analogy to the example presented cited above, a standard-like provision sounds like 'no person may pilot a commercial airplane if he poses an unreasonable risk of an accident' (example again taken from Diver 1983). The formulation 'unreasonable risk of accident' is obviously susceptible to widely varying interpretations. Standard-like formulations commonly used in international agreements include 'as appropriate', 'to the greatest extent possible', and 'as may be necessary'. The actual range of diverging interpretations of such formulations depends on who is entrusted with the task of interpreting and applying a standard-like provision and on the 'thickness' of the institutional context surrounding such provisions. Domestic legal systems, usually entrust the interpretation of standard-like prescriptions onto independent courts. These courts interpret the open term with reference to precedents and the special meaning the term might have acquired through previous cases (Diver 1983). The assessment of a provision's determinacy thus requires an examination of its interpretative context (Smith 1995). If the competent

[12] See also Dworkin's use of the term in his book *Taking Rights Seriously*.

court is independent and following professional standards and if a sufficient number of precedents exist, the predictability of a given standard-like provision can become almost as high as that of a rule-like provision. It is, for example, possible that through a number of precedents the term 'unreasonable risk of accident' has developed the special meaning of 'older than 60' among the intended audience of that provision (Diver 1983). On the international level, however, we face the problem that the authoritative interpretation of disputed provisions of an agreement requires the consent of the states concerned. When no independent juridical body exists vested with the authority to impose its interpretation of standard like prescriptions, there exist no constraints to prevent states from taking refuge in self-serving interpretations. In the case of the European Convention on Human Rights, standard-like provisions are not as problematic, as the European Court of Human Rights can make binding decisions and impose material sanctions. However, the degree of independence and authority enjoyed by this court presents a rare exception in world politics[13]. It remains that in the absence of such delegation, precision can only be achieved through rule-like provisions. Standard-like provisions, in contrast, have to be seen as an indicator for low levels of precision. This study therefore assesses an international institution's precision based on the relative number of standard-like provisions contained in its core agreement. The greater the relative number of standard-like provisions, the lower is the degree of precision.

- Coherence

The second element of the assessment of an international agreement's precision—coherence—refers to the relation amongst the individual provisions contained in an agreement and to the relation between these provisions on the one hand and the legal system in which they are embedded on the other hand. Referring to Dworkin (1986), Franck (1990) uses this term to describe a situation in which the provisions of an agreement do not contradict each other and fit with other principles and rules of the interna-

[13] Similar: the International Criminal Court as established by A/CONF. 183/9 in 1999.

tional legal system in a non-contradictory way. The central idea behind the coherence requirement is that legal uncertainty arises when provisions within the legal system contradict each other and when it is not clear which one is to prevail. This legal uncertainty in turn threatens to undermine the credibility of an international agreement and of the system as a whole. The desirability of a coherent legal system is apparent, but, as Georgiev (1993) argues, it is very difficult to achieve in practice. This is mainly due to the fact that international law, as the product of human beings, necessarily reflects their conflicting interests and that many situations require a very delicate balancing of two incompatible but equally desirable values. The text on self-determination in the UN Declaration of Principles concerning Friendly Relations among States of 1970 (A/8028) provides a good illustration. The declaration upholds, on the one hand, the virtue of the principle of self-determination of all peoples and, on the other hand, equally forcefully, the principle of territorial integrity and political unity of sovereign and independent states. Contradictory provisions are not unfamiliar to the domestic legal system either. Jurists of both domestic and international law have developed several principles on how to resolve such contradictions, such as *lex posterior derogat priori*, *lex specialis derogat generali*, and *lex superior derogat lex inferior*. In international law, an example of the last principle is the superior status assigned to *ius cogens* from which it follows that *ius cogens* cannot be abrogated by contractual stipulations between states. These juridical rules of interpretation enhance the predictability of a necessarily contradictory legal system. However, this enhanced predictability can only be achieved when conflicting norms are indeed submitted to a body which seeks to resolve contradictions according to juridical professional standards. Similar to the first dimension of precision, i.e. determinacy, the predictability of an international agreement which is either self-contradictory or which is in conflict with other provisions of the wider legal system can only be saved when the settling of interpretative disagreements is delegated to an independent judicial body. In the absence of such a delegation, the resolution of norm conflicts is left to the unpredictable haggling between the politically motivated actors who created the agreement. Incoherence therefore undermines the predictability of an international agree-

ment and the credibility of the enacting coalitions' commitment—*a fortiori* in the absence of high levels of delegation.

To some extent, determinacy and coherence are interdependent, as coherence can only be assessed when an international agreement possesses at least a minimum level of determinacy. When an international agreement is formulated in highly ambiguous terms, no contradiction between individual provisions or between the agreement and other rules of international law can be clearly established as these vague formulations allow for multiple interpretations, some of which may or may not be contradictory. In sum, an international agreement, and by extension the international institution of which it forms its core, is considered highly precise when the ratio of standard-like provisions to the total number of provisions is low and when, in cases where coherence can be assessed, an agreement's provisions do not contradict existing rules and principles of international law.

2.2.3 Delegation

The third dimension of legalisation—delegation—refers to the 'extent to which states and other actors delegate authority to designated third parties [...] to implement agreements' (Abbott et al. 2000, 415). Delegation in this sense is granted on a conditional basis and empowers the party to which authority is delegated (the agent) to act on behalf of the entity from which the authority emanated (the principal) (Hawkins et al. 2004, 5). States typically create and/or serve themselves of entities such as administrative organisations, expert panels, courts, or other states to act as their agents.

Recent literature on delegation focuses on three factors that motivate states to delegate certain tasks to third parties: efficiency gains through specialisation, blame-shirking in the face of potentially unpopular policy-decisions (Fiorina 1982), and credibility enhancement. This study focuses on the last aspect, which has attracted great interest among scholars studying the phenomenon in both the domestic (Bawn 1995, ; Diver 1983, ; Epstein and O'Halloran 1999, ; Horn 1995, ; McCubbins and Page 1993, ; Miller

2000, ; Moe 1990b) and in the international context (Hawkins et al. 2004, ; Lake and McCubbins 2004, ; Martin 1993, ; Stone 2002). Majone, for example, posits that 'political sovereigns are willing to delegate important powers to independent ... [bodies] in order to increase the credibility of their policy commitments' (1997, 139-140). Delegation to an independent agent increases credibility because it implies that governments renounce their discretion and bind themselves to more or less rigid rules, the implementation of which is beyond their immediate control. This is an effective tool to 'tie a government's hands', as the entrusted agencies ideally operate according to incentive structures that do not encourage the short time-horizon and volatility associated with elected and democratically accountable bodies (Dixit 1996, ; Shepsle 1991). Delegation is thus an important component of the 'lock-in' effect already mentioned above as it insulates current policy beneficiaries from future change (McNollgast 1987).

In the domestic context, we find such delegation in its most fundamental form in the separation of powers, and in particular in the independence of the judiciary. Other examples include the delegation of monetary policy to independent central banks (Barro and Gordon 1983, ; Keefer and Stasavage 1998), and the delegation to independent regulatory agencies of regulatory policies in policy fields such as telecom, electricity, railways (Gilardi 2002, ; Thatcher 2002). In international context, delegation is often seen as the aspect of legalisation that states are most reluctant to establish and to commit to. This results from the fact that delegation impinges directly on national sovereignty, i.e. the authority of states to organise and conduct their internal affairs according to their own discretion. As Andrew Moravcsik notes, 'governments often refuse to assume the political risk of delegation, preferring instead imperfect enforcement and inefficient decision-making, to the surrender of sovereignty' (1993, 509). Given the centrality of national sovereignty to the concept of statehood the many instances of delegation that do exist on the international level, thus present an intriguing theoretical puzzle. The most far-reaching example of delegation presents the European Union, where member states delegated substantive rule-making and implementation power to the supranational European Commission and judicial power to the largely autonomous European Court of

Justice (Alter 1998a, ; Tallberg 2002). Andrew Moravcsik (2000) explains the creation of the European Court of Human Rights and the far-reaching delegation of authority states agreed to in this field with reference to the desire of then unstable democracies to 'lock in' the protection of human rights against potential autocratic regimes that might re-impose themselves at some point in the future. In contrast, much more limited in scope is the delegation of powers to the World Postal Union, the secretariat of the Convention on International Trade in Endangered Species, or the Codex Alimentarius Commission, to mention just a few examples.

The notion of delegation refers to two dimensions (Abbott and Snidal 1998): independence and centralisation. The degree of delegation increases the broader the scope of the tasks delegated to an agent (centralisation) and the greater the agent's decision making abilities (independence).

- Independence

The second aspect of delegation, independence, refers to a body's 'authority to act with a degree of autonomy, and often with neutrality, in defined spheres' (Abbott and Snidal 1998, 9). An agency's independence is assessed based on the extent to which it can take decisions that are not predetermined in advance by the principal (Bawn 1995, 62). Three aspects seem particularly important constituents of agency independence: human resources, financial resources and decision-making procedures.

In terms of *human resources*, an agency's independence is undermined, if the persons constituting the agency are representatives of and directly accountable to the delegating parties, as it is the case with the Council of the European Union. An agency's independence is increased when is has a permanent body of employees; with long terms of office. The ability of delegating parties to either dismiss or renew the contract of an agency's decision makers, in contrast, decreases the independency of the agency (Gilardi 2002).

An agency can be assumed to be more autonomous when it possesses a source of *income* which is independent of the parties on the behalf of which it is to take decisions or to implement certain acts. For instance, in order to strengthen the independence of the European Community vis-à-vis the member states, the funding system was changed in the first half of the 1970s from one based on national contributions to one based on 'own resources', such as common customs tariff duties, agricultural levies, and a proportion of the Value Added Tax. Also the World Bank and regional development banks largely rely on own resources. The United Nations High Commissioner for Refugees (UNHCR), in contrast, relies almost exclusively on voluntary contributions, thus, constraining its independence considerably. Intermediary forms of financial independence are found in international organisations which rely on mandatory contributions, the level of which is predetermined either as a fix sum equal for all member states—as in the case of the Organisation of Petroleum Exporting Countries (OPEC)—or, more commonly, based on certain criteria such as member states' GDP (Klein 1997).

Finally, the level of delegation also depends on the shape of *decision-making procedures*. If binding decisions require unanimity, as is for example the case under the Kimberley Process Certification Scheme and in the Financial Action Task Force, parties retain full sovereignty, as no act can be imposed on them against their will, and delegation is low. This is particularly the case, if all delegating parties are allowed to have a representative in the decision making body. Other bodies take decisions based on simple or qualified majority votes, as for example the International Narcotics Control Board which requires a two-third majority for decisions to be adopted (article 22). The smaller the required quorum, the higher the degree of delegation.

- Centralisation

The second element of delegation, centralisation, refers to the range of activities a principal delegates to an agent (Koremenos, Lipson, and Snidal 2001, 771). Centralisation matters, however, only when a certain minimum level of independence as defined above is achieved. If, in contrast, an agreement assigns an extensive range of functions to a plenary the overall level of delegation remains low, because the plenary typically enjoys no notable independence. In international affairs, either of three distinct collective activities or a combination thereof are delegated (McCall Smith 2000): rule making (including facilitating negotiations of agreements), implementation (including operational activities like providing technical assistance and monitoring, information collection and analysis) and dispute resolution and enforcement. The degree of centralisation varies in any of these three functions.

With respect to *rulemaking*, the agency to which certain functions are delegated may, for example, be limited to a supporting role for negotiations. Levy, for example, notes that the capacity of the five-head strong secretariat for the Convention on Long-Range Transboundary Air Pollution was fully utilised with doing little else 'but keep the meetings running smoothly' (1993, 84). In other cases, the agent is granted the right to come up with its own initiatives which might even develop into legally binding decisions. The paramount example provides again the European Commission as it is vested with the authority not only to draft extensive policies but also to claim direct effect of these policies.

A central aspect of credibility-enhancing delegation in the *implementation* stage is monitoring. International institutions provide a wide range of monitoring provisions, which vary considerably in their ability to overcome commitment problems. The weakest form of monitoring contents itself with occasional and informal statements of states on their own behaviour or, somewhat stronger, more formal self-reporting requirements. In both cases delegation is zero with respect to information-collection, but a third party may still play a role as a 'fire alarm' by publicly denouncing behaviour it finds wanting

based on analysis of information submitted by the states (Raustiala 2002)[14]. More far-reaching centralisation, and thus delegation, is found when a third party is entrusted to conduct formal inspections of state behaviour and compliance, in which case, the principal acts as a 'police patrol' (Raustiala 2002).

Dispute resolution and enforcement are probably the functions that have attracted the greatest interest in IR literature. A considerable degree of variation exists in terms of how far-reaching the delegation to third parties goes with respect to these two functions. The role of third parties in dispute settlement may be limited to the offering of 'good offices', i.e. to act as channels of communication between protagonists and to encourage them to seek peaceful means in settling their differences. An example of this weak form of delegation presents the Conciliation and Good Offices Commission which was created to settle any future disputes between parties to the Convention against Discrimination in Education (429 UNTS 93) of 1960. Third parties may also, in contrast, be vested with the authority to pass decisions which the protagonists accept ex ante as legally binding, as in the case of arbitration or court ruling. The commitment of states can be seen as particularly credible when they extend the circle of legitimate plaintiffs to include non-state actors and individuals, as it is the case with the European Court of Human Rights (Helfer and Slaughter 1997, ; Keohane, Moravcsik, and Slaughter 2000, ; McCall Smith 2000, ; Rittberger and Zangl 2004). Intermediary forms delegation with respect to dispute resolution are found in binding and non-binding arbitration arrangements or mediation.

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This chapter has introduced the explanandum of this study, namely the varying degrees of legalisation enshrined in international institutions. It has been argued that policy-makers are confronted with a fundamental dilemma when designing international agreements as strong credibility associated with high levels of legalisation comes ineluc-

[14] Raustiala adopts here a distinction introduced by McCubbins and Schwartz (1984).

tably at the expense of flexibility, which agreements with low levels of legalisation typically provide. The discussion above has furthermore laid out ways how the core elements of legalisation—obligation, precision, and delegation—can be measured and, thus, how the level of legalisation of individual agreements can be assessed. This framework of analysis is presented in Table 2.1.

From this basis, the discussion moves on in the next chapter to explore the variables transaction cost economics suggests as possessing considerable power in explaining the varying levels of legalisations enshrined in international institutions.

Indicator	Low level of legalisation	High level of legalisation
1. Obligation		
A. Legal bindingness	▪ Intention of signatories was merely to recommend or to state a fact	▪ Intention of signatories was to create legal rights and obligations
a. Language	▪ Agreement is named 'recommendation', 'programme', 'declaration', etc. ▪ Participating states are referred to as 'participants', 'countries', etc. ▪ Obligations formulating using 'should'	▪ Agreement is named 'convention', 'treaty', etc. ▪ Participating states are referred to as 'member states', 'parties', 'signatories', etc. ▪ Obligations are called 'obligations' and are formulated using 'shall'
b. Procedural provisions	▪ Agreement contains no provisions on procedural issues such as entry into force, accession, amendments ▪ On the domestic level: agreement effective with adoption, no formal signing and ratification process	▪ Agreement contains such procedural provisions ▪ Agreement becomes effective after going through domestic ratification process typically involving the approval of the legislative
B. Tenacity of obligation	▪ Agreement does not limit use of reservations, and is significantly attenuated through reservations registered by signatories ▪ Parties can evade obligations through lax escape mechanisms ▪ Parties can withdraw from the agreement on short notice	▪ Agreement strictly limits the scope of reservations ▪ Agreement contains no escape mechanisms ▪ Signatories cannot withdraw from the agreement
C. Non-compliance		
a. Monitoring	▪ No provisions on monitoring or only occasional self-reporting	▪ Independent monitoring on regular basis ▪
b. Enforcement	▪ Consequences for non-compliance are not spelled out in the agreement nor developed in practice	▪ Institution establishes procedures and remedies for breaches of commitments, such as: ▪ Membership sanctions ▪ Authorisation of reciprocal measures ▪ Procedures for 'naming and shaming'

2. Precision		
A. Determinacy	▪ Definitions of the rights and obligations in the agreement allow for multiple interpretations ▪ Impossibility to distinguish between acceptable and unacceptable behaviour ▪ Agreement contains statements of general aims, standard-like provisions and broad declarations of principles ▪ No independent judicial body and precedents exists to help the interpretation of the agreement	▪ Provisions do not leave room for interpretation by states ▪ Acceptable behaviour can be clearly discerned from non-acceptable behaviour ▪ Provisions relate to one another in a non-contradictory way ▪ Provisions are tailored to clearly circumscribed situations ▪ Precedents exist to clarify vague provisions
B. Coherence	▪ Clauses within the agreement contradict each other ▪ Clauses of the agreement contradicts other principles and rules of the international legal system	▪ Clauses within the agreement do not contradict each other ▪ Agreement fits with other principles and rules of the international legal system
3. Delegation		
A. Independence		
a. Human resources	▪ No permanent staff ▪ Agency's personnel is appointed and dismissed by delegating parties ▪ Agency's decision makers directly accountable to delegating parties ▪ Short-term of office	▪ Permanent staff ▪ Agency's personnel cannot be dismissed at delegating parties' discretion ▪ Decision makers have long terms of office and cannot be dismissed by principal
b. Financial resources	▪ Agency relies entirely on voluntary contributions from principal	▪ Agency possesses its own sources of financing (e.g. from taxation or tariffs)
c. Decision making	▪ Unanimous decision making ▪ Decision making body encompasses representatives from all delegating parties	▪ Majority rule ▪ Decision making body is smaller than the number of delegating parties
B. Centralisation		
a. Rule making	▪ Agency's functions are limited to support roles, no right to own initiatives	▪ Agency sets its own agenda ▪ Agency's makes rules without interference from delegating parties
b. Implementation	▪ Agency's role limited to the compilation and dissemination of information	▪ Agency active in data collection ▪ Agency involved in service provision (e.g. legal assistance)
c. Dispute resolution and enforcement	▪ Agency's function limited to offering 'good offices'	▪ Agency passes decisions which the delegating parties accept ex ante as legally binding ▪ Circle of legitimate plaintiffs include non-state actors and individuals

Table 2.1 Overview of indicators of the level of legalisation.

3 Problem constellation

The concept of legalisation as presented in the previous chapter provides a heuristic tool for capturing essential differences in the design of international institutions. Although a number of scholars have applied this concept in their theoretical and empirical studies, explanations for the so-categorised variance in the design of international institutions have been much less systematic. Those studies that do make a first step in this direction do so from different theoretical perspectives, which fall broadly within the three major theoretical strands of International Political Economy (IPE)—namely power-based or realist, functionalist and domestic politics-based theories. These three different schools of thought will be briefly introduced in the first sub-chapter. This discussion suggests functionalism as the best developed and most promising to explain legalisation, in particular with regard to international institutions addressing illicit flows. From this basis, the second sub-chapter introduces transaction cost economics theory in greater detail. The core tenet of transaction cost economics is the assumption that actors design the structure of cooperative efforts in ways that maximise the efficiency of their transactions dependent on the specific constellation of the problem they seek to solve through their cooperative efforts. The theoretical and empirical literature on transaction cost economics identifies three variables as possessing the greatest explanatory power, namely asset specificity, behavioural uncertainty and environmental uncertainty. The third and final sub-chapter is dedicated to translating these three variables from the world of inter-*firm* to that of inter-*state* relations.

3.1 Competing theories on institutional design

From the 1970s onwards, international relations scholars have addressed the question *why* states create international institutions or regimes to facilitate their cooperation. This inquiry has led to an abundant body of literature[15]. The question of *how* these insti-

[15] See for a comprehensive overview Hasenclever, Mayer and Rittberger (1997).

tutions are designed and why states design international institutions in different ways has, in contrast, caught scholarly interest only very recently and presents by and large a still underdeveloped field within IR. Abbott and Snidal forcefully deplored that 'regime theory deals with institutions at such a general level that it has little to say about the particular institutional arrangements that organise international politics' (1998, 6). It was not until the year 2000 that—with the concept of legalisation—a first attempt was undertaken to tackle this issue and to disaggregate and systematise differences in the design of international institutions. As discussed in the previous chapter, this concept introduced a helpful heuristic tool in comparing different institutions with respect to their structural arrangements, however, without attempting to establish a single, coherent theory to explain these differences. Rather, each scholar using the concept of legalisation has been approaching the design question from his or her own theoretical perspective—namely power-based or realist, domestic politics-based, and functionalist theories. Each of these approaches captures a different aspect of a complex reality and none of these three approaches are theoretically 'pure' in the sense that they all blend in elements of the other two in order to at least partially off-set their own specific deficiencies. The differences in the explanations given by the three approaches for the variance in legalisation result directly from the theories' diverging views on the emergence and on the role of international institutions. For this reason, the separate discussion of each of the three design theories will be preceded by a brief account of each theory's perspective on the emergence of international institutions. As the following discussion will show, these three design theories have attracted unequal scholarly interest, with the functionalist approach being the most developed of all three. This study seeks to contribute to the further development of the functionalist strand by subjecting some of its core hypotheses to a systematic test and providing some tentative suggestions on how its specific limitations can best be addressed.

3.1.1 Power-based theories on institutional design

Classical realists were highly sceptical about the relevance of international law and—by extension—international institutions. Stanley Hoffmann, for example, concludes that 'in the clash between inadequate law and supreme political interests, law bows—and lawyers are reduced to serve either as a chorus of lamenters with their fists raised at the sky and state or as a clique of national justifiers in the most sophisticatedly subservient or sinuous fashion' (1968, 31). In a very similar vain, Hans Morgenthau argues that '[g]overnments [...] are always anxious to shake off restraining influence which international law might have upon their international politics' (1953, 214). Other realists do not necessarily deny the relevance of international institutions but see them primarily as a tool of which powerful states may avail themselves to further their state power and egoistic self-interest (e.g.Carr 1946). Neo-realist scholars adopt a similar perspective on the emergence of international institutions or regimes. Stephen Krasner (1985), for instance, explains the United States' decision to create and work through multilateral institutions such as the United Nations or the World Bank—rather than relying entirely on pure unilateralism—as a strategy chosen in order to confer legitimacy to and thus to strengthen the United States' post-war supremacy. The self-interest of a powerful state in a particular policy area may or may not be in harmony with the interest of other states, but given its power, it can make other states endorse an international institution even when it does not generate joint cooperative gains and Pareto improvements associated with mixed-motive games, but produces clear winners and losers as it is the case with zero-sum games and may even establish a Pareto sub-optimal solution (Krasner 1991, 364). Powerful states can impose regimes (Krasner 1993, 140; Young 1983, 100) through the use of coercion, and their ability to make side payments or by changing the overall regulatory environment in such ways that states, which had originally be reluctant to join an international institution because of its negative consequences, opt to join in order to avoid an even larger backlash (Gruber 2000).

National interests and the distribution of power do not only influence the creation of international institutions but also their design. A handful of scholars have so far embarked on this line of inquiry—namely Miles Kahler (2000), James McCall Smith (2000) and Beth Simmons (2002). Their realist design theories all assume that states' design preferences vary with their relative power. These theories all agree that great asymmetries in power lead to lower levels of legalisation, but they differ considerably in the causal mechanism they provide to explain varying design preferences. These differences result in part from the different ways these studies employ to measure a state's relative power. The majority of realist design theories conceptualise power in terms of resources or size as measured in terms of GDP, military capacities or population. These studies maintain that weaker states favour higher degrees of legalisation—especially with respect to delegation to third parties in dispute resolution—as a means to constrain the behaviour of more powerful parties (Alter 1998b, ; McCall Smith 2000). However, if one follows Miles Kahler's (2000) example and conceptualises power in terms of legal resources, a very different picture emerges. In his study of the Asia-Pacific Economic Cooperation (APEC) forum, Kahler shows how developing states with poorly developed legal systems and resources are often sceptical or even hostile to high degrees of legalisation as they fear to be outmanoeuvred by states with much more abundant and sophisticated legal resources. Strong states may also favour higher degrees of legalisation if they assume that the so-designed international institution will primarily serve their interests—an assumption, which at times has proven unwarranted. For instance, the United States advocated *binding* WTO dispute settlement procedures assuming that the dispute settlement body would never find US trade policies to be in beach with WTO rules. In sum, power-based theories on institutional design are still far from presenting a coherent picture of the relevant explanatory variables and the causal mechanisms linking them to different levels of legalisation. Furthermore, these theories are ill-suited to explain the design of international institutions when the creation of these institutions cannot primarily be attributed to the self-interested assertion of a powerful state but may be better attributed to the emergence of a shared norm, or of a 'principled and shared understanding of desirable forms of social behaviour' (Kratochwil and Ruggie 1986, 764). Of the cases dis-

cussed in part two of this study, the one on conflict diamonds presents the most compelling example where none of the powerful states had an immediate self-interest in the creation of an international institution designed to tackle this problem, but still promoted the creation of the Kimberley Process (see below chapter 6).

3.1.2 Domestic politics-based theories of institutional design

In contrast to realist and functionalist approaches, domestic politics-based theories do not conceive the state as a unitary actor. Rather, they disaggregate the state into competing interest groups and vote-maximising politicians. From this perspective, international institutions are created when they serve the interest of a number of influential domestic groups in various countries, as does, for instance, the World Trade Organisation for competitive export industries. In terms of institutional design, domestic-politics approaches stipulate that interest groups, who benefit from a certain international institution, will lobby for higher degrees of legalisation, as more legalised institutions insure them against a policy reversal under a less inclined future government. Only when these international institutions are designed in ways that insulate them from tomorrow's exercise of authority can they continue to generate benefits for the domestic interest groups that pressed for their creation (Moe 1990b, 124). In this respect, international institutions with high levels of legalisation serve as a mechanism to reduce political uncertainty as it allows governments to tie their hands, thus, increasing the credibility of their commitment vis-à-vis their domestic audience. To what extent a government follows this logic depends heavily on whether one assumes a government to be loyal to its enacting constituency or not. If one adopts the assumption that vote-maximising governments fare best when they continue throughout their tenure to serve the interest of the constituency that brought them to power it follows that governments will prefer high degrees of legalisation for international institutions that are in the interest of their domestic enacting constituency. This line of argument was first developed by political scientists with respect to domestic institutions (Horn 1995, ; Levy and Spiller 1996, ; Moe 1990b, ; 1991), but has been later adopted by international relations scholars as well—often by

substituting the term 'political uncertainty' with 'domestic uncertainty'. Judith Goldstein (1996) describes in her study of the Canada-US Free Trade Agreement how the US executive sought to insulate this pro-free trade agreement from protectionist forces within the US Congress by endowing the agreement with binding arbitration arrangements. Frederick Abbott (2000) makes a similar case with respect to the North American Free Trade Association (NAFTA). He argues that the high levels of legalisation adopted in this agreement were primarily motivated by governments' desire to signal their sincere and irreversible commitment to free trade vis-à-vis investors. Not only in trade but also in human rights agreements have governments preferred high levels of legalisation in order to enhance the credibility of their commitment in the eyes of their domestic constituencies (Lutz and Sikkink 2000). In contrast, other international relations scholars adopt a different understanding of political uncertainty and consequently reach very different conclusions regarding its influence on the formation of design preferences. They assume that a vote-maximising government seeks to serve whichever domestic interest group holds the upper hand, and not necessarily the one that elected the incumbent government to power. This perspective is primarily concerned about the loss of sovereignty associated with highly legalised international institutions hindering governments to adapt to changing external circumstances which may tip the 'balance of power' among domestic interest groups. Rosendorff and Milner (2001) show how states seek to reduce the level of a so-defined political uncertainty by including escape clauses in trade agreements which allow them to adjust their policy in case of exogenous and unanticipated change, such as price shocks, which significantly affect the domestic level of support for an international institution.

In the context of international institutions in the area of illicit flows the domestic politics approach encounters some particular—though not insurmountable—challenges, which are resulting from the fundamental assumptions of this approach. This approach presupposes the existence of organised interest groups lobbying for their competing interests through established political channels—an assumption which is only partly valid in the context of illicit flows. Most important in that respect is the weak degree of organisa-

tion of many victims of illicit flows, which prevents them from lobbying forcefully for their interests. In the case of human trafficking, for instance, victims find it difficult to lobby for their interests due to language barriers, their severely constrained financial resources, and their uncertain legal status in the country to which they were trafficked. However, important differences exist between the victims of different types of illicit flows. For instance, victims of cyber crime, in contrast, tend to be companies with considerable financial and legal resources at their disposal and thus considerable lobbying power. Lobbying typically also lacks on the side of criminals. Those targeted by a certain policy might be better organised than many of their victims, but they lack the legitimacy to defend their interests through the same channels as do, for instance, trade unions and environmental groups. However, also here important differences need to be taken into account, as many policies seek to curb illicit flows not primarily by targeting illicit organisations directly but by imposing tighter regulations on licit industry sectors, which have access to regular lobbying channels.

3.1.3 Functionalist theories of institutional design

The functionalist or neo-liberal strand within international relations and the realist approach have in common that they both assume states to be rational egoists. In contrast to the latter, the former is conceived as being primarily concerned about maximising their relative rather than absolute gains, which opens greater scope for cooperation. States create international institutions if they share a common interest—be it of identical or complementary nature—which can only be attained through international cooperation (Keohane 1984, 6; 1989b, 2). Only under these conditions can international institutions facilitate a Pareto efficient outcome which leaves none of the participating states worse off. In this sense, the existence of international institutions is explained as serving the function of increasing overall efficiency gains. This same logic is also adopted by scholars who seek to explain not so much the *emergence* but the *design* of international institutions. They maintain that each design option presents certain costs and benefits. Which design option helps to generate the greatest net benefits depends primarily on the

specificities of the policy problem states seek to solve through an international institution. Form follows function is the overriding idea shared by functionalist design theorists. A first step along this argumentative route was undertaken by Charles Lipson (1991), Kenneth Abbott and Duncan Snidal (1998) and later by James Morrow (2000) who explore under which conditions states favour informal versus formal arrangements to govern their cooperation. Directly related to the concept of legalisation is Abbot and Snidal's article of 2000. In this article, they show how international institutions with high degrees of legalisation, on the one hand, require more time and resources in the negotiations phase (*ex ante* transaction costs) but, on the other hand, have the positive effect of increasing the credibility of a government's commitment in the eyes of other parties and of reducing the implementation costs (*ex post* transaction costs) associated with an agreement (in a similar vein Keohane, Moravcsik, and Slaughter 2000). Thus, states face certain trade-offs when deciding what kind of institutional design they want to adopt. Which design is optimal depends mainly on the dynamics of the policy field, in which states seek to institutionalise cooperation. Institutions with high levels of legalisation have been found to be best suited for problems that require cooperation over an extended period of time and where time-inconsistency is an issue. When, in contrast, the policy issue is plagued with considerable environmental uncertainty, the optimal institutional design requires lower levels of legalisation in order to be able to adapt quickly to changed circumstances (Abbott and Snidal 2000). Closely related is the rational design theory developed by Koremenos, Lipson and Snidal (2001), which shares the assumption that international institutions are purposefully designed by rational actors in order to best deal with the policy problem these actors face. Although they do not directly adopt the dependent variables used by legalisation scholars—obligation, precision and delegation—Koremenos et al's own five variables—membership, scope, centralisation, control, and flexibility—show a considerable overlap with the former. Also their independent variables—distribution problems, enforcement problems, number of actors, and uncertainty—fall squarely within the functionalist tradition. Overall, the functionalist approach to institutional design has attracted the greatest attention from IR scholars

and has seen a more coherent development than power-based and domestic politics-based design theories.

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Both the power-based and the domestic politics approach to institutional design are raising interesting questions. However, at the current stage, both approaches are still struggling with producing a consistent interpretation of their key variable—power in the case of the former and political uncertainty in the case of the latter—with the consequence that scholars associated with one and the same approach reach very different conclusions regarding the causal mechanisms at work or deduce mutually contradicting hypotheses. While not denying the potentials of these two approaches, this study seeks to contribute less to the early stage of theory development and rather to the stage of theory refinement by testing the institutional design theory that has so far developed the most coherent set of hypotheses—the functionalist strand of institutional design theory. As will become clear throughout the remainder of this study, despite its strong bracing in the functionalist line of reasoning considerations raised by the other two approaches are always lurking around the corner. For instance, in the functionalist explanation questions about varying levels of domestic opposition to different international initiatives emerge as 'indirect costs' in the concept of asset specificity—as will be introduced in detail below. State power is not directly included as a variable in this study's theoretical framework, but this question will be taken up in the concluding part of this study and proposed as a promising explanation for those cases where the explanatory power of the functionalist framework adopted here proved to be little satisfying.

The remainder of this study focuses on best developed approach within the camp of functionalist design theories—namely transaction cost economics (TCE) or relational contracting theory. As will be elaborated in the next subchapter, TCE shares the functionalist assumption that the nature of the problem on which cooperation is sought affects the design of institutions and erects upon this assumption a theory to explain the variance found in structural arrangements to facilitate inter-firm cooperation. The term

'transaction cost' has enjoyed great popularity among international relations scholars—especially within the neo-liberal camp—right from the beginning when economists coined this term as a key explanation for the existence of firms (Williamson 1975, ; 1985). Robert Keohane, for example, famously referred to transaction costs as one of the reasons why states create international institutions and why these institutions endure (1984, 101f.). The term has been no less popular among scholars who focus specifically on the *design* of international institutions (e.g. Abbott and Snidal 2000). However, most IR scholars content themselves with using the term 'transaction costs' without engaging fully in the theory behind it. This study, in contrast, seeks to explore the explanatory power that can be derived from transposing the integral theory associated with transaction costs from the world of inter-*firm* to that of inter-*state*[16] cooperation. It does so, by building upon the pioneering work undertaken by a handful of IR scholars—first and foremost David Lake (1996, ; 1999, ; 2000) and Beth and Robert Yarborough (1990, ; 1992), but also Michael Lipson (2004) and Katja Weber (1997, ; 2000)—who have all engaged in such a transfer beforehand, although in different contexts and with varying degrees of adherence to the original TCE theory.

3.2 The transaction cost economics approach

With the publication of his seminal book *Markets and Hierarchies* (1975) Oliver E. Williamson established the conceptual foundations of what became known as transaction cost economics, an influential and still growing branch of new institutional economics. Williamson took up the question originally introduced by Coase (1937) of why certain transactions are not carried out in the market—as neo-classical economics would suggest—but rather under the hierarchical structure of firms. The market versus hierarchy dichotomy was later complemented by studies which conceptualised governance structures as arrayed along a continuum with market and hierarchy forming the two ex-

[16] Although focusing primarily on states as main actors, this study does not deny the important role a variety of non-state actors play in the creation and implementation of international agreements. See discussion on this point under 1.3.

tremes. This concept allowed the inclusion of a variety of intermediary modes of governance such as franchise agreements, joint-ventures, reciprocal trading and other forms of relational and long-term contracts. When choosing an institutional arrangement to govern their transaction, parties face a trade-off between reducing the risk of cheating, which is high in the market place, and avoiding the bureaucratic inflexibility plaguing hierarchies. Transaction cost economics seeks to explain this institutional choice with reference to specific constellations of the transaction at hand.

The first section of this sub-chapter will introduce the core tenets and assumptions of transaction costs economics. The second and third section will shed more light on how transaction cost economists characterise governance structures and transactions.

3.2.1 Core tenets and assumptions

The core tenet of the classical TCE model states that firms adopt for each transaction a governance structure that helps them minimise the transaction costs resulting from the specific contractual problems caused by the transaction at hand. These costs are exacerbated by the innate imperfection of human nature.

3.2.1.1 Transaction cost minimisation

The basic unit of analysis of Williamson's model is the individual transaction defined as a good or service that is being transferred from one economic actor to another. Associated with every transaction is the 'transfer, capture and protection of rights' (Barzel 1997, 4), which involves certain costs—transaction costs. Williamson distinguishes between *ex ante* and *ex post* transaction costs (Williamson 1986, 139). *Ex ante* costs cover the partner selection process and the negotiation and writing of contracts. *Ex post* costs include the costs of executing and policing contracts, the re-negotiation of contracts as a result of gaps, errors, omissions, and unanticipated disturbances, and finally the costs of settling contractual disputes.

The assumption of transaction cost minimisation has attracted criticism for various reasons. Some scholars object to this assumption because transaction costs are difficult to observe and to measure (Masten, Meehan, and Snyder 1991). Most importantly, they are generally interdependent with the usually much higher production costs and cannot logically be distinguished from each other (Milgrom and Roberts 1992, 34). Sub-optimal governance structures not only cause high transaction costs but also make transacting partners reluctant to undertake efficiency increasing investments, thus foregoing a potential saving in production costs (Dyer 1996). Only if all parties are ensured that the governance structure protects their investments from ex post expropriation from other parties are they willing to invest in a co-operative project[17]. In this sense, Dietrich (1993) is right in pointing out that transactions do not only produce *costs* but also *revenues* and that both are affected by the governance structure adopted. TCE is thus not exclusively about the minimisation of transaction costs, in a narrow sense, but about choosing a governance mode to achieve a broader objective, like profit maximisation for a firm or social welfare maximisation for a national economy (Rao 2003, 23).

This study builds upon this broader understanding of transaction costs by assuming that states seek to design international institutions in such ways that the problem for which they want to establish international cooperation is solved in the most efficient and effective way.

3.2.1.2 Imperfection of human beings

The second assumption of the TCE model relates to the innate imperfection of human beings. Williamson considers two forms of human fallibility to be of central importance: cognitive limitations or 'bounded rationality' and opportunism. The first concept refers to Chester Barnard's (1938) and Herbert Simon's (1976) analysis of human decision-making which ascribes it to the middle ground between passion, feelings and instincts

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[17] An often cited example of an efficiency enhancing cooperative project that failed to materialize due to parties' inability to agree on appropriate governance structures is the Fisher Body case (Klein, Crawford, and Alchian 1978).

on the one hand and reason and calculation on the other. Simon posits that humans intend to behave rationally yet that the 'capacity of the human mind for formulating and solving complex problems is very small compared with the size of the problems whose solution is required for objectively rational behaviour in the real word—or even for a reasonable approximation to such objective rationality' (Simon 1957, 198). Opportunism, the second of Williamson's behavioural concepts, is understood as 'self-interest seeking with guile' (Williamson 1985, 47), which includes 'the incomplete or distorted disclosure of information, especially calculated efforts to mislead, distort, disguise, obfuscate or otherwise confuse' (Williamson 1998, 703).

Bounded rationality and opportunism form the background of various forms of contractual hazards—namely incomplete contracts which can be exploited by opportunistic parties. Transacting parties seek to design organisational arrangements in ways that mitigate these hazards and by doing so maximise the efficiency of their transaction (Williamson 1996, 5).

3.2.2 The spectrum of governance structures

Just as scholars of international relations characterise international institutions on the spectrum ranging from soft to hard law, so do transaction cost economists range transactions on a continuum between markets and hierarchies.

Markets are an 'arena in which autonomous parties engage in exchange' (Williamson 1996, 378). All agents are driven by strong incentives as complete contracts allow all parties to reliably appropriate the (positive or negative) net receipts resulting from their efforts and decisions. In spot markets the exchange happens instantaneously and prices serve as perfect statistics. All parties adapt individually and immediately to this signal in a process which is 'automatic, elastic and responsive' (Coase 1937, 387). There is often no need for written contracts as such exchanges typically involve well-specified commodities. Parties retain full autonomy and their interests are fully independent of those

of their transacting partners. The risk of cheating is mitigated through fully specified oral or written contracts and their enforcement by an independent third party—courts.

In contrast, hierarchies, or formal organisations, are characterised by governance structures that seek to mitigate opportunism and cheating through mechanisms where the interests of the transacting parties are pooled. Within a single firm, this is achieved by ensuring that 'the parties to an internal exchange are less able to appropriate subgroup gains at the expense of the overall organisation' (Williamson 1975, 29). This strengthens parties' common interest in the long-term success of their cooperative undertaking but does so at the expense of incentive intensity of the individual party. Insufficient incentive intensity is compensated by administrative fiat. Since the authoritative control of a firm over its divisions would be undermined if parties to an internal exchange could appeal to an external body this possibility is usually ruled out, and internal mechanisms or dispute settlement are created.

Each design option along the market-hierarchy spectrum thus presents its specific mix of 'costs and competencies' (Williamson 1991, 79). Which particular governance structure is to be chosen depends on the specific hazards posed by the transaction at hand.

3.2.3 Transaction characteristics

In his earlier works, Williamson categorised transactions along three principal dimensions: asset specificity, uncertainty and frequency (Williamson 1975, ; Williamson 1985). During the last thirty years, a great number of economists have built upon this foundation, tested and redefined the explanatory variables. The third variable, frequency—understood as the number of transactions parties exchange over time (Williamson 1985, 60)—has attracted the least attention. Williamson himself often neglects this variable in his empirical and theoretical studies. The few empirical studies that do analyse frequency as an independent variable reach inconclusive findings (Anderson and Schmittlein 1984, ; John and Weitz 1988, ; Klein, Frazer, and Roth 1990, ; Maltz 1993). Boerner and Marcher (2001) therefore conclude that this variable is both theoretically and em-

pirically underdeveloped. For this reason, frequency will be omitted as an explanatory variable from this study.

The second variable, uncertainty, has been included in the research of most TCE scholars. However, the influence of uncertainty on governance structures has again been found to be inconclusive in empirical studies. Shelanski and Klein (1995) argue convincingly that this inconsistency can mainly be attributed to the fact that these studies conceptualised uncertainty in very different ways, leading to opposite effects on the desirable level of integration. The findings become more consistent when we distinguish between two kinds of uncertainty—behavioural and environmental uncertainty—which often occur in conjunction.

The first independent variable, asset specificity (Williamson 1975) or relation-specific investments (Klein, Crawford, and Alchian 1978), has enjoyed the widest attention and strongest confirmation in theoretical and empirical studies on TCE. These three explanatory variables, asset specificity, behavioural and environmental uncertainty, will be explained in more detail in the following sub-sections.

3.2.3.1 Asset specificity

Asset specificity refers to transactions involving 'a specialised investment that cannot be redeployed to alternative uses or by alternative users except at a loss of productive value' (Williamson 1996, 377). Asset specificity can be seen as a relationship-specific investment that usually affects both contracting parties giving both of them an incentive to continue the relationship until the transaction has reached its due completion. There are two components of relation specific costs: one-time sunk costs (e.g. investment into productive equipment) and costs for foregone opportunities caused by the premature termination of a longer-term transaction (e.g. an annual supply contract).

Transaction specific costs—once-off investments and opportunity costs—are not necessarily identical for two contracting parties. In many typical business transactions only

one party faces them. This is for example the case when a supplier A makes an investment into a new plant, in order to satisfy new requirements by a particular customer B. In this case, A faces an investment, which needs to repay over a potentially long time, whereas B does not face any investment. Transaction costs economics argues that in these situations, the optimal governance structure is the one, which fits the party facing the highest asset specific costs.

Even if parties face the same level of transaction specific investments, they might attach different levels of significance to them. This is most obvious when organisations of different sizes transact, and an investment of an amount X is negligible for party A but substantial for party B. In analogy to the case of unequal transaction specific costs, the optimal governance structure is the one, which fits the party attaching the highest significance to these investments.

Opportunity costs occur if a longer-term contract is terminated prematurely and are subject to the *ex post* bargaining process. The size and distribution of the *ex ante* investments and the *ex post* net-benefits influence the bargaining position of parties during in contract negotiations and during its lifetime. The bargaining power of actors can also be understood as their propensity to shirk from their contractual obligations. Actors with little to lose from the cooperation have a higher incentive to shirk and potentially exert additional benefits from their counterparts. The relative power in the ex post bargaining process favours the party with the smaller investments and/or smaller ongoing net benefits from the transaction. The outcome of this ex post bargaining process is uncertain and plagued by opportunism (Eggertsson 1990, 172).

Scholars associated with new institutional economics have demonstrated that the presence of uncertainty and transaction specific costs and consequently the prospect of an uncertain *ex post* bargaining over the quasi-rents generated in the relation affect the *ex ante* incentives of the actors (Klein, Crawford, and Alchian 1978, ; Zingales 1998). These *ex ante* incentive effects are likely to frustrate the closing of a contract between two parties unless strong governance structures are created to overcome the problems related

with asset specificity. In the presence of moderate degrees of asset specificity, long-term contracts and reciprocal trading arrangements may suffice as additional safeguards. If, however, asset specificity is high parties may only be willing to undertake the necessary investments if they are unified under a common roof of ownership, i.e. in a formal organisation. This association between high degrees of asset specificity and higher levels of integration has been confirmed by a large body of empirical literature (e.g. Anderson and Schmittlein 1984, ; Masten, Meehan, and Snyder 1991, ; Monteverde and Teece 1982).

3.2.3.2 Behavioural uncertainty

One form of uncertainty that TCE studies have found to impact the choice of governance structures is behavioural uncertainty. Whereas asset specificity determines the *propensity* of actors to shirk, this second TCE variable refers to the *opportunities* they have to do so. Behavioural uncertainty largely depends on how easy it is for one party to monitor the performance of the other. While it might be relatively easy for a firm to monitor the performance of its sales force, it faces much greater difficulties in doing so with respect to its public relations division, because the number and tone of articles written about a company is affected by many more intervening variables and because of the often large time-lag between public relations work and the appearance of press clippings. Appealing to courts does not remedy this problem, as it is most likely that courts face the same difficulties in assessing the performance level of the party accused of shirking. More efficient solutions are achieved when parties include secondary rules regarding monitoring and dispute settlement procedures. In the presence of very high levels of behavioural uncertainty, the parties may even settle for a solution that incorporates the function in question, e.g. public relations, under the roof of one and the same company, as internal monitoring and auditing is more effective and information asymmetries can be better equalised. TCE therefore predicts a move towards hierarchical governance structures in the presence of high levels of behavioural uncertainty. Empirical studies on the influence of environmental uncertainty on integration find supporting evidence for this hypothesis, especially in conjuncture with asset specificity of non-trivial degrees (Anderson and

Schmittlein 1984, ; Gulati and Singh 1998, ; Morrill and Morrill 2003, ; Widener and Selto 1999).

3.2.3.3 Environmental uncertainty

The concept of environmental uncertainty refers to situations where both the range of possible outcomes and/or their probability distribution are unknown (c.f. Knight 1921, ; Williamson 1975, 31). Both human infallibility and *force majeure* are at the source of uncertainty in transactions. Given bounded rationality, parties are unable to foresee all contingencies and thus to include provisions on how to react to each of them. This bounded rationality assumption is, however, not indispensable for the TCE model. Even if we dropped the bounded rationality assumption, contracts related to complex transactions will most likely still be plagued by omissions. This results from the fact that an extensive search for information and the inclusion of provisions for every contingency in the contract is costly. These costs can easily exceed the expected value of the damage caused by an occurrence the initial contract did not foresee. For this reason, even fully rational actors would still not necessarily draft complete contracts.

High levels of uncertainty increase the need for flexibility and expeditious, decentralised decision-making, something the market is more apt to provide than hierarchies. Empirical studies examining this type of uncertainty typically found a negative relationship between environmental uncertainty, such as technological change, and tighter integration (Balakrishnan and Wernerfelt 1986, ; Walker and Weber 1984).

3.3 Transferring transaction cost economics from inter-firm to inter-state cooperation

This study employs the explanatory variables with the strongest support by the abundant body of empirical studies on transaction cost economics in micro-economic settings—asset specificity, behavioural uncertainty and environmental uncertainty. As will be discussed below, these variables are no strangers to the world of international relations—at least in spirit if not always in terminology. The goal of this concluding subchapter is to

show how these three core independent variables of the TCE model have appeared in IR literature and how they can be operationalised to assess international policy problems in the area of illicit flows. This discussion will result in an analytical framework in the form of a checklist that will later be used for the assessment of the problem constellations underlying the four cases studies in greater detail in part two of this study. Before evaluating the three core variables, the first section of this sub-chapter compares the world of inter-*firm* to that of inter-*state* relations.

3.3.1 Similarities and differences between micro-economic settings and international affairs

After the brief overview in the second sub-chapter of the origins and key concepts of transaction cost economics, this section explores the potentials and limits of transferring TCE from the world of inter-firm to that of inter-state cooperation. Such a transfer can only yield valuable insights if the two worlds are found to be similar enough in the aspects relevant to the theory. This study argues that this is indeed the case but that important differences do exist and need to be catered for.

3.3.1.1 Similarities between micro-economic settings and international affairs

In several important aspects, cooperation between states is comparable to transfers between firms. In both cases, resources and efforts are purposefully pooled in pursuit of a joint goal (Lake 1999, 5), which can be of identical or complementary nature. This is very close to Helen Milner's definition of international cooperation as a 'goal-directed behaviour that seeks to create *mutual gains* through policy adjustment' (1997, 8, emphasis in original). In both cases, transacting parties establish governance structures that facilitate their cooperation and maximise the overall value of the transaction. For this reason, Koremenos argues that international institutions are 'essentially contracts between states' (Koremenos 2001, 291).

The rationality of states can be assumed to be equally bounded as the rationality of firms (Allison and Zelikow 1999, ; Hart, Stern, and Sundelius 1997, ; Janis 1983, ; Jervis 1975, ; Steinbruner 1974, ; Vertzberger 1990). Even so-called rational actor models within IR do not assume that parties possess complete information and can foresee all eventualities (Keohane 1984, 110-116). As the bounded rationality assumption of TCE does not imply any systematic misperception or bias, it is fully compatible with rational and functionalist theories on the design of international institutions (Lake 1999, 41). The assumption of opportunistic behaviour is not a stranger to IR either. One does not need to buy into the classical realist assumption that human nature—and by extension also a state—is 'wicked and ... [as always giving] vent to the malignity that is in their minds when opportunity offers'(Machiavelli 1970). Also neo-liberal institutionalists acknowledge that states may yield to moral hazard, when self-interested incentives are structured in ways that induce states to actions which detract from the efficiency of the cooperative undertaking. It is for this very reason, that scholars associated with the functionalist school of thought emphasise the importance of institutions which are capable of reshaping incentive structures so as to align the self-interest of each participating state with a common goal.

The core tenet of TCE, that transacting parties align governance structures to problem constellations, resonates directly with the logic developed by functionalist theories on institutional design. There exists also a strong overlap between the set of explanatory variables developed in TCE and those used in functionalist design theories, both in those that refer directly to TCE (e.g. Lake 1996, ; Lake 1999, ; Weber 1997) and those that do not. This aspect will be discussed in greater detail in the following sub-sections.

3.3.1.2 Differences between micro-economic settings and international affairs

This discussion of similarities between inter-firm and inter-state cooperation should not conceal that important differences exist as well. Two aspects related to the dependent variables seem most relevant: the range of viable design options and the reliance on external dispute settlement and enforcement bodies.

First, the full range of design options can be widely observed in the micro-economic settings, whereas in international affairs, the distribution of realised institutional designs is heavily biased towards the lower end of the spectrum. In international affairs, we can observe many transactions which are equivalent to spot market transactions such as the forging of informal ad-hoc coalitions in the run-up to a vote in the United Nations General Assembly. In this case, states retain full sovereignty over their decision, and the coalition dissolves the moment the vote is cast. This situation captures the essence of IR's understanding of anarchy, where no central authority exists and no party 'is entitled to command; none is required to obey' (Waltz 1979, 88).

The perfect IR analogy to hierarchies or internal organisations as found in the business world would be the confederation or fusion of two or more states or the occupation or annexation of one state by another is, however, very rarely observed. For this reason, Lake (1996, ; 1999) defines a less far-reaching form of integration, empires, as the upper end of his anarchy-hierarchy spectrum. In the case of empires, one state 'cedes substantial rights of residual control directly to the other' (Lake 1996, 8), however without losing its autonomy altogether. This limitation of the range of realised design options is only of gradual not fundamental nature, and should therefore not prevent the application of TCE in the context of international affairs.

A second important difference between the micro-economic setting and the context of international affairs resides in the fact that in the case of the former a court order exists which provides at least a minimum of legal certainty. The court order plays an important role in solving inter-firm disputes as it provides access to a 'forum external of the original setting of the dispute [and that] remedies will be provided as prescribed in some body of authoritative learning' (Galanter 1981, 1). In international affairs, no direct equivalent to such a court order exists. However, this difference is again more relative than absolute. For one, the absence of a central entity vested with the authority and capability to enforce decisions comparable to that of courts and the police in domestic settings, does not imply a complete absence of enforcement structures. States can specify

how potential disputes are to be resolved, for example by calling upon a pre-existing court or dispute settlement body, as many treaties do with respect to the International Court of Justice. Alternatively, they may establish a new body or mechanism specifically for the settling of potential disputes arising in the context of the transaction at hand, as it was for example the case with the Dispute Settlement Body created in the Uruguay Round of the World Trade Organisation. These strategies do not solve the problem of enforcement altogether, but mitigate it through the provision of 'penalties' in the form of authorised tit-for-tat measures or reputational costs.

The difference between micro-economic settings and international affairs in enforcement matters is also for a second reason not absolute. As critics of classical contract law have pointed out, even in the intra-firm world the court order can fail in important respects (Galanter 1981, ; Llewellyn 1931, ; Williamson 1996). First, in many countries of the developing world an efficient court order is inexistent, thus requiring economic actors to develop their own substitute mechanisms (e.g.McMillan and Woodruff 1999). Second, even when a well functioning court order does exist, taking a case to court might be too expensive compared to the damage caused by the breach of contract. Third, court ruling might be considered too unpredictable in complex transactions that necessarily involve incomplete contracts. For these reasons, economic actors may opt for self-created enforcement mechanisms outside the legal framework provided by domestic courts and police. In sum, also with respect to enforcement mechanisms do differences between inter-firm and inter-state cooperation not present an insurmountable obstacle to the gainful transfer of TCE to international affairs.

3.3.2 Asset specificity

3.3.2.1 Asset specificity in international relations

Only a handful of international relations scholars incorporate the concept of asset specificity explicitly in their studies. In security affairs, Lake (1996, ; 1999) and Weber (1997, ; 2000) refer to asset specificity as investments in specialised military equipment or

know-how, or in strategically important locations undertaken in a security cooperation framework. Once state X has, for example, adopted a certain technology in order to increase its troops' interoperability with troops of state Y its dependence on the success of the cooperation increases significantly as this investment would lose most of its value in the case of a breakdown of the coalition with Y. Beth and Robert Yarbrough adapt the concept of asset specificity to the context of international trade and find that investment in trade relations can alter 'the pattern of production and investment in the participating economies' (1992, 25). One example of relationship-specific investments is the Soviet-European gas pipelines built in the 1970s and 1980s. The Europeans invested in building this pipeline in exchange for a promise by the Soviets to provide them with natural gas under pre-defined conditions. Once completed, the pipeline became susceptible for Soviet opportunism as the Soviets possessed the power to reduce the value of the European investment in the pipeline by reducing the export volume of gas.

Many other IR scholars do not adopt the term 'asset specificity' but its essence. For example, Downs, Rocke and Barsoom's understanding of the cooperative depth of an agreement, defined as the 'extent to which [an agreement] requires states to depart from what they would have done in its absence' (1996, 383), captures the central idea of relationship-specific investments. This notion of 'depth' is very close to Raustiala's notion of 'substance', which he defines as 'the degree of deviation from the *status quo ante* that an agreement generally demands' (2004, 1). By definition, all measures that states adopt only in reaction to an international agreement lose substantially in value if other states do not comply with the agreement or when the agreement fails altogether. These investments can come in the form of physical investments like investments in certain types of interoperable weapon systems, in the renunciation of certain actions, like nuclear tests, but also in the form of aligning national legislation with the provisions of an international agreement and enforcing these provisions domestically. These costs represent investments insofar as they are undertaken in view of certain benefits the international agreement is expected to generate. These benefits can only be generated, and thus the investments be justified, when all other parties, or at least the major ones, honoured the

obligations they subscribed to with the agreement. If, for example, the Netherlands reduce their carbon dioxide emissions as prescribed by the Kyoto Protocol in the hope of a reduced risk of flooding but other parties fail to do so, it cannot reap the expected benefits from its action and its investments in the Protocol are in vain.

As is the case with asset-specific investments in business settings, so can in international affairs implementation costs and benefits generated by an agreement be distributed asymmetrically. For example, in the case of international measures to counter narcotics trafficking, Afghanistan faces significant costs in terms of a loss of opium as an important foreign exchange earner, while for Bolivia the predominant costs arise from unsettling a delicate political balance between coca growing peasants and the urban middle-class. Yet another group of countries with no domestic narcotics production may incur only minor costs when implementing the proposed solution but reap considerable benefits in terms of a reduction in drug addiction rates and in incidents of drug-related crime. This example also demonstrates that costs and benefits can be asymmetrically distributed between states, with some countries reaping net-benefits and others incurring net-costs. Mitchell and Keilbach (2001) refer to the former countries as 'downstream' states, as these states primarily suffer under the negative externalities created by the behaviour of other states. A second group of states may see the benefit they derive from an institution equalised by the costs they incur from implementing the requirements imposed by the institution. Finally, for some states the implementation costs may outweigh the benefits these states derive from an international institution, making them end up with net costs. This third group of states correspond with Mitchell and Keilbach's (2001) 'upstream' state.

In the presence of such an asymmetric distribution of costs and benefits the questions arises why a state would join an international institution if it incurred higher costs than benefits from doing so. Lloyd Gruber argues convincingly in his *Ruling the World* (2000) that—in contrast to neo-liberal assumptions—states do not only join an international institution because this institution helps them achieve a solution that presents an

efficiency improvement compared to the status quo. In other circumstances, states may rather feel compelled to join because the enacting coalition that created the international institution may possess what he calls 'go-it-alone power', i.e. the power to alter—intentionally or not—the status quo of non-parties in ways that make them worse off than before the institution was created. Even if, for example, a country like Luxembourg, had preferred to maintain the pre-1988 status quo where money laundering was not tabled on the international political agenda, it still preferred to join the Financial Action Task Force that was created to deal with this issue matter in an attempt to minimise the damage international cooperation on this important issue matter might have for its economy. Although the country faces higher costs in living up to its international obligations on money laundering than it derives direct benefits from this undertaking it still decided it was in the country's best interest to sign up for these efforts. States may also be coerced or incentivised to join an international collaborative project which is against their immediate interests through coercion, issue-linkages or side-payments (Keck 1993).

As upstream states have no genuine interest in the success of the cooperative project, it can be assumed that they will seize every opportunity to shirk from their obligations as long as such a behaviour is not detected and punished (Mitchell and Keilbach 2001). Under circumstances, where asset specificity is in this way asymmetrically distributed among the parties, the enacting coalition (i.e. the winners in the new institution) will seek to establish more elaborated supranational institutions so as to limit the losers' ability to defect at the first available opportunity (Gruber 2000, 82). We can therefore expect such an insistence on higher levels of legalisation—ceteris paribus—to be stronger, the greater both the absolute levels of asset-specific investments required by an agreement and the greater the asymmetry in the distribution of these investments.

3.3.2.2 Asset specificity in the context of international cooperation on illicit flows

For the purposes of the empirical part of this study, the asset specificity of an international policy problem will be assessed on an ordinal scale with the three levels 'low',

'moderate' and 'high'. In order to arrive at such an assessment, two factors need to be taken into consideration—the level of losses resulting from a potential collapse of a co-operative problem solution and the propensity of participating states to shirk from their obligations, thereby causing such a collapse.

- Potential loss

The asset specificity of a problem is positively correlated with the loss a state suffers if the agreed problem solution falls apart after that state fulfilled all its obligations. This loss consists of two components. For one, a country sees all the direct and indirect implementation costs it incurred in association with a given international institution turned into futile expenses. Additionally, a state may face opportunity costs as a result of the foregone benefits the collaborative project was meant to generate. This interplay between costs and benefits will be discussed in more detail based on the stylised cost-benefit structure depicted in Figure 3.1.

Figure 3.1 displays the relative distribution of costs and benefits among three states that an imaginary policy solution generates. Countries A and B both reap moderate benefits from an effective solution of the problem. However, country B faces moderate costs, while country A only bears a low level of costs. Since country B has to contribute more to solve the problem than does country A, country B will be more dissatisfied if the problem is not solved at the end despite its investments. Consequently, the potential loss resulting from a collapse of the created institution is higher for country B than for country A.

The solution of the problem generates higher benefits for country C than for country A, even though their costs are the same. For this reason, the potential loss in terms of opportunity costs is higher for country C than it is for country A. Depending on how different countries value the non-realisation of benefits relative to the expense of futile investments, countries B and C might associate an identical level of loss with the break-

down of an establish policy solution[18]. However, even in this case, their common assessment of their loss will be higher than that of country A.

The falling line L_1 connecting country C and B suggests that all countries lying on this path may attribute the same level of loss to a potential *ex post* collapse of the problem solution. The falling line L_2 going through country A also depicts the possible locations of countries that share the same level of loss, but their potential loss is lower than that of countries located on line L_1.

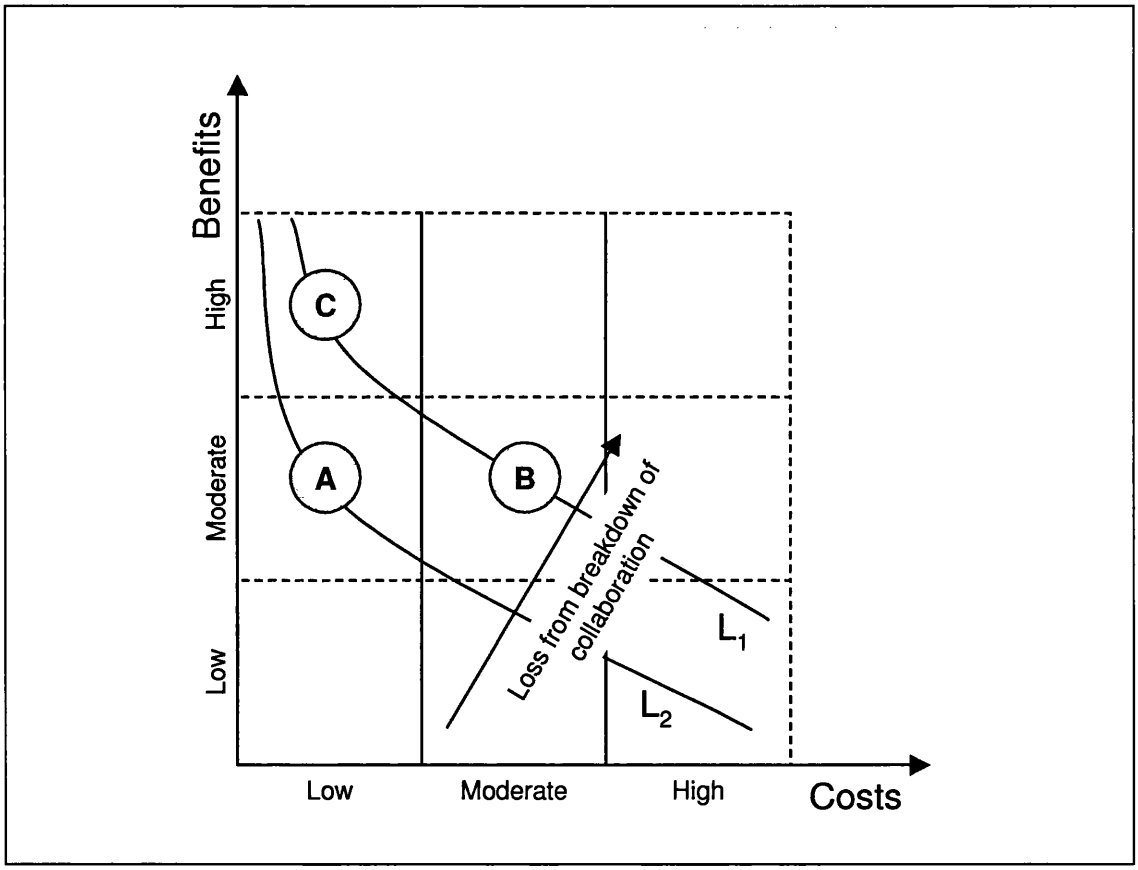

Figure 3.1 The loss from the breakdown of an international collaboration for three different countries as a function of costs and benefits associated with the problem solution.

[18] Public choice literature suggests that it is most plausible to assume that states are risk-averse, i.e. that they attach greater importance to the loss of value of an investment they have made than to the non-realisation of an expected benefit, even if the two types of losses are the same in monetary terms (Olson 1971).

For the purposes of assessing the costs and benefits associated with the solution of an international policy problem, it is important to note that costs are not necessarily monetary. In many cases, international cooperation on illicit flows requires a state to criminalise a type of behaviour which it would not have criminalised or not prosecuted seriously in the absence of an international institution addressing this issue matter. This invokes ideological costs or those inflicted by a local electorate which opposes a change in values. There are various reasons, located in the societal, political and economic domain, why a state has not criminalised certain types of behaviour, which others have. First, the international institution may address a certain type of behaviour that is deemed acceptable or at least tolerable in some countries but criminalised in others, as for example capital punishment.[19] Second, and closely related to the first point, even when states do share a common understanding that a certain type of behaviour is socially undesirable, it does not automatically follow that they frame the problem in the same way. Policy problems can typically be understood in very different terms, which directly influences the choice of policy measures deemed as most appropriate for dealing with the issue at hand (Barry et al 1996, ; Burchell et al 1991, ; Smandych 1999). Whereas the United States has a long history of perceiving drug addiction primarily from through a criminal justice prism, the United Kingdom and many other European countries have long viewed it primarily as a medical problem rather than a crime (Nadelmann 1990, ; Walker 1992, 270). Third, even when states agree that a certain type of behaviour is both socially undesirable and best tackled with criminal law enforcement instruments, they may still differ in the priority they attach to solving this problem. It is commonly agreed that scarce policing resources should be targeted against criminal activities that cause the greatest social harm, but the selection of these targets is inevitably of political rather than technical nature (Sheptycki 2003, 53). Difficult trade-offs are also involved when the criminalisation and prosecution of a certain type of behaviour negatively affects the country's

[19] Despite the current popularity of the universal value debate (e.g. Nussbaum and Sen 1993) it should not be forgotten that most types of behaviour have been subject to very different societal attitudes across time and societies (e.g. Baker 2003). As has been pointed out elsewhere, the concept of 'crime' lacks objective reality, and must primarily be seen as a construct of criminal law.

economy or directly the government's revenue base. The former scenario may occur when an international institution bans certain services or products which present an important underpinning of a country's economy or when it imposes tightened administrative requirements on a key industry, thus damaging its competitive advantage when other states do not follow suit and adopt the same standards. A historic example of the latter scenario is provided by McCoy (1992) who reports that the colonial government of British Malaya derived 53 percent of total tax income from taxes on opium sales at the end of the nineteenth century. If the economic effects are strong enough they might also have political repercussions—shaking up a government, in the milder case, or even destabilising a country in the worse scenario.

- Propensity to shirk

An international problem solution is thought to fall apart when a sufficient number of countries shirk from their obligations. This takes us to the second element of asset specificity: the propensity of participating states to shirk from their obligations under a given international institution. This depends again on the cost-benefit constellation a given solution creates.

Shirking is, *ceteris paribus*, the more attractive the greater the contribution an individual state has to make towards a certain international policy solution, i.e. the greater its direct and indirect implementation costs. Concurrently, shirking is the less attractive the higher the benefits a country expects to gain from an effective problem solution. This assumption is justified even if we assume states to be egoist utility maximisers and the policy solution to establish pure public goods. As long as we do not perceive states as necessarily short sighted, we can assume that—keeping costs constant—states' propensity to shirk decreases with increasing benefits because they are aware that their own non-compliance aggravates the risk of collapse of the collaborative solution and consequently their opportunity costs. Figure 3.2 illustrates this argument, again depicting the relative distribution of costs and benefits a certain policy solution creates for the three countries A, B and C.

Country A faces a moderate level of costs, while benefiting little from an international institution. Country B reaps the same low level of benefits as country A, but it contributes less to the common solution. In this constellation, country A is more likely to shirk from its obligations than country B, as the costs it incurs are more likely to outweigh the benefits it can reap. Its incentive to shirk is also larger than that of country C, which bears also a moderate amount of costs, but gains moderately in return. Depending on how B and C value potentially foregone benefits relative to potentially futile investments, their propensity to shirk from their obligations may be the same[20]. In any event, the propensity to shirk of both B and C is lower than that of country A. This relationship is demonstrated by line S_1 connecting countries B and C and line S_2 going through country A.

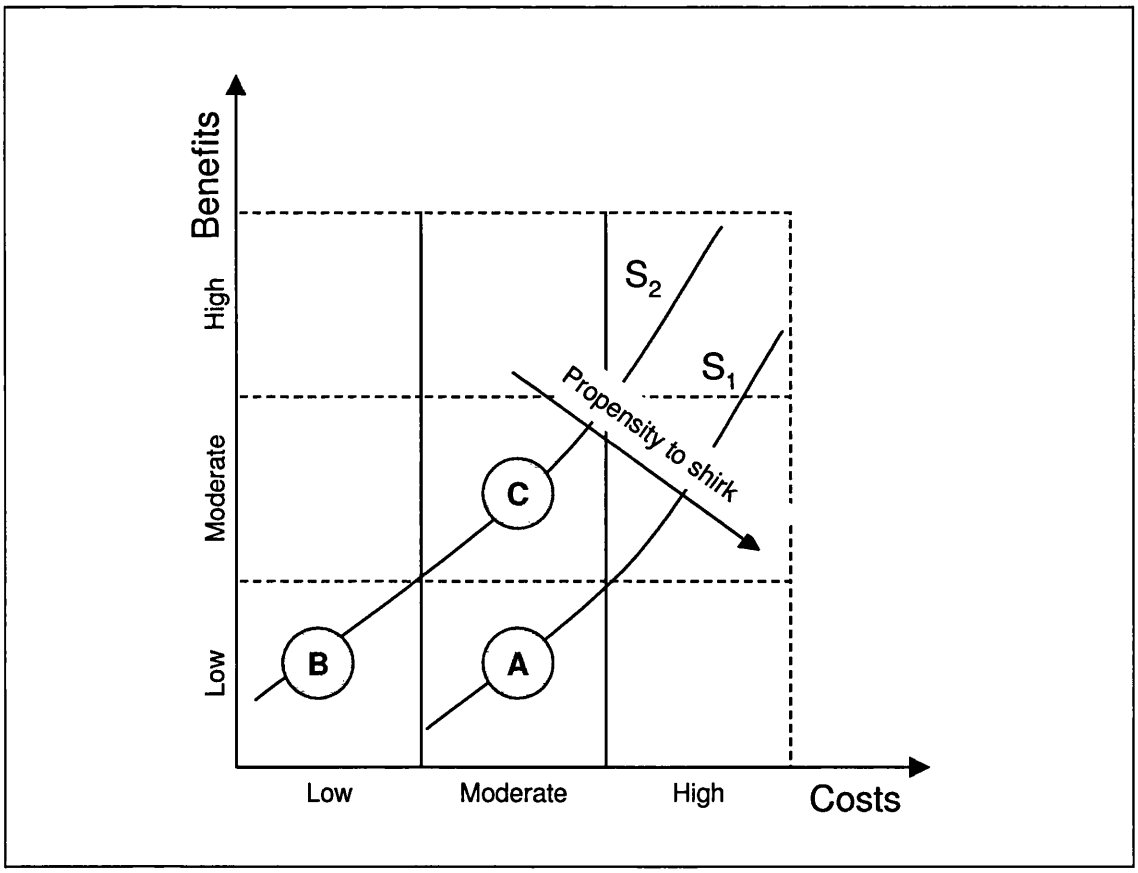

Figure 3.2 Propensity to shirk for three different countries as a function of costs and benefits associated with a problem solution.

[20] The risk aversion assumption mentioned in the previous footnote is equally valid with respect to states' considerations on whether or not to shirk.

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In sum, each country ascribes a particular level of asset specificity to a policy problem, based on the size of the potential loss it incurs in case of a breakdown of an established problem solution and based on the propensity of other participating states to shirk from their obligations. Based on the TCE framework, this study hypothesises that a match between an international institution's substantive elements and its design is only achieved when the adopted degree of legalisation is high enough to cater for the highest level of asset specificity a participating state faces.

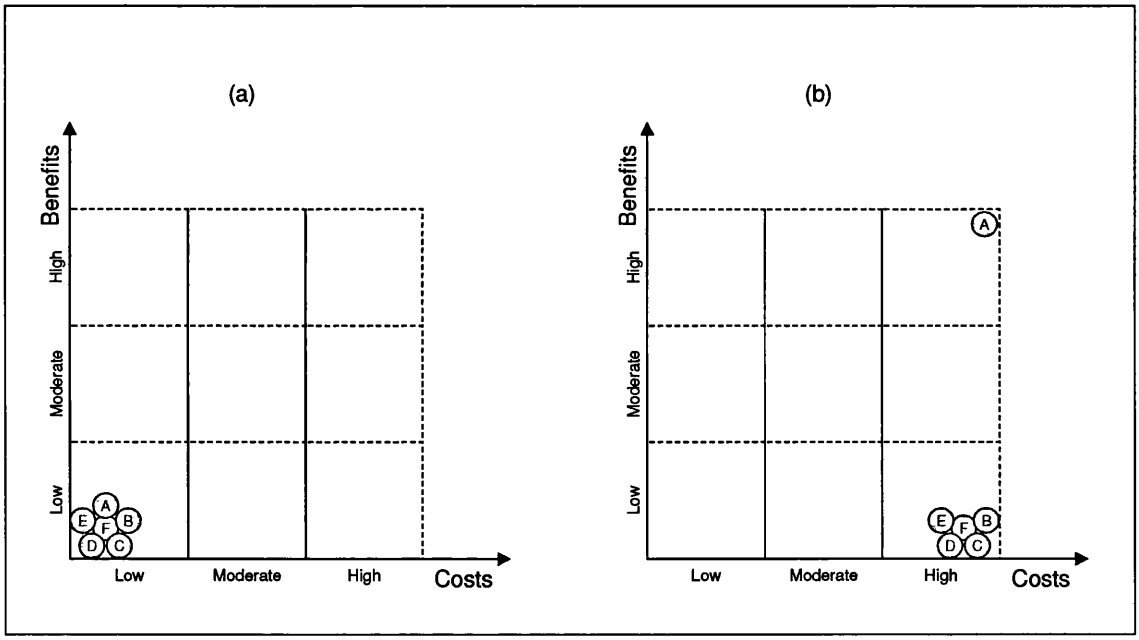

Figure 3.3 A scenario of a cost-benefits distribution for six countries, where the propensity to shirk is low overall and countries face a low potential loss in case of an ex post termination of the agreement; and a scenario of a cost-benefit distribution for six countries, where one country faces high potential losses and others a high propensity to shirk.

From this hypothesis, we can derive the following two extreme scenarios. Figure Figure 3.3 (a) depicts a situation where no participating state faces a significant incentive to shirk; nor is any of these states strongly concerned about protecting the collaborative project from a breakdown, as this institution does not generate any substantial benefits. Given the low level of asset specificity we can expect the participating states to endow

the international institution with only weak legalisation. The other extreme is represented in Figure 3.3 (b). In this constellation, state A would incur high losses from an *ex post* breakdown of an international institution it invested in. Given all other states' strong incentive to shirk from their obligations, country A will insist on high levels of legalisation in order protect the institution from collapse.

3.3.3 Behavioural uncertainty

The second explanatory variable of the TCE model, behavioural uncertainty, refers to parties' ability to shirk surreptitiously from their contractual obligations. The first subsection shows how international relations scholars have so far incorporated this variable in their research. In the second sub-chapter, this variable will be operationalised in the context of international cooperation on illicit flows to enable the assessment of particular public policy problems in part two of this thesis.

3.3.3.1 Behavioural uncertainty in international relations

This second variable of the transaction cost economics model, behavioural uncertainty, is no stranger to IR either. Some scholars even use the same term (e.g. Koremenos, Lipson, and Snidal 2001), while others refer to the concept under different terms, as for example 'actor uncertainty' (Abbott and Snidal 2004, 65f.) or simply 'uncertainty' (Weber 1997, 331f.). The central issue here is the question of the observability of behaviour. Detecting non-compliance is considerably easier in some issues (e.g. nuclear test ban) than in others (e.g. development of biological weapons), because of the availability of certain technologies that facilitate detection. In other issue areas like human rights or dumping in international trade, monitoring is facilitated by the fact that individuals or firms are directly affected by a state's behaviour. In these cases, states can rely on civil society groups like non-governmental organisations or private interest groups and firms to serve as 'fire alarms' (McCubbins and Schwartz 1984, ; but also Raustiala 2000) i.e. to sound the alarm when a state's behaviour is in breach of international obligations it has endorsed formally.

Behavioural uncertainty is of particular importance in the presence of moderate to high levels of asset specificity. When a state has made major investments in the provision of an international public good or it expects high benefits from the agreement, it will be particularly concerned about the possibility that others might be cheating and consequently undermining the agreement. It will therefore be keener on establishing institutions that are strong enough to detect and to discourage shirking. We could expect that, when asset specificity is of a nontrivial degree, states favour higher levels of legalisation when behavioural uncertainty is high. This expectation largely corresponds with Koremenos et al's (2001) conjecture 1, which states that centralisation, i.e. the delegation of functions to an international institution, increases with this type of uncertainty. A similar logic, however, with a slightly different twist, is presented by Abbott and Snidal (2004, 65ff.). They argue that highly legalised institutions are not only good in countering hazards arising from behavioural uncertainty because they provide for monitoring and punishment mechanisms, but also because they serve as screening devices. A state can assume that when another state is willing to accept a 'substantively meaningful and highly legalised agreement' it is indeed sincere in its commitment to cooperate (Abbott and Snidal 2004, 65).

When it is more difficult or costly for one state to monitor the performance of another, behavioural uncertainty may not affect both parties to the same extent. Williamson refers to this situation as a case of 'information impactedness' (Williamson 1975, 31). In analogy to the asymmetry in asset-specific investments discussed above, we can expect, ceteris paribus, those states which face greater difficulties in obtaining information about other parties' behaviour to favour higher degrees of legalisation compared to those states which can easily monitor the performance of others.

3.3.3.2 Behavioural uncertainty in the context of international institutions on illicit flows

International law enforcement agreements typically require the criminalisation and prosecution of a certain type of behaviour. Certain elements of the associated obligations

are easier to observe than others. Many international institutions on illicit flows necessitate an amendment of the domestic penal code or of other laws, such as the commercial code. A state's legislative adaptations can therefore serve as a first indicator for compliance. As laws are publicly available, it appears almost trivial for states to determine whether other parties have brought their laws in line with an international law enforcement agreement. However, as Andrew Ashwood puts it, 'it would be foolish to think that the criminal law as stated in the statutes and the textbooks reflects the way in which it is enforced in actual social situations' (2003, 12). The passing of legislation does not ensure that the targeted type of crime is effectively prosecuted, as not all legislation is equally thoroughly implemented. Three elements are of particular importance when assessing the seriousness of a state's efforts to honour its commitments.

First, insufficient implementation may result from a country's poor policing and prosecuting capabilities. This study refers to this first element of behavioural uncertainty as '*government incapacity*' thereby assuming that the more the solution of an international policy problem requires the meticulous cooperation of states with weak domestic law enforcement institutions the greater the behavioural uncertainty associated with the cooperative undertaking.

The level of behavioural uncertainty can be mitigated by societal groups with strong interests in the implementation of an international agreement. As mentioned above, in certain cases these groups are well positioned to monitor state behaviour tightly and to alert other signatories to the non-compliance of certain parties. Societal groups, however, can only assume this function effectively if they are well organised and operating within the law. Typically, international agreements which generate sizeable benefits for multinational companies have a lower level of uncertainty than agreements which affect weakly-organised individuals, such as drug addicts, or illegal organisations such as criminal gangs. The willingness of victims to report non-compliance to law enforcement authorities also varies depending on the social stigmatisation associated with their behaviour and the risk of harassment by authorities. This second element of behavioural

uncertainty is capture with the term *'reliance on governmental monitoring'*. It is hypothesised here that the greater the relative reliance on governmental monitoring, i.e. the weaker the monitoring performed by non-state actors, the greater the degree of behavioural uncertainty.

The overall transparency of the affected industry is a third indicator for the behavioural uncertainty associated with a policy area. Important differences exist between institutions which target primarily an illicit sector (e.g. trafficking in narcotic drugs) and institutions which impose certain standards on a licit sector (e.g. banking) The former, by its very nature, seeks to maintain the highest possible degree of opacity. But also within the licit sector, industries differ in their degrees of transparency. In industries where business is conducted on the basis of a handshake and little written documentation is stored (e.g. diamond trade), the actions of regulated subjects are much more difficult to track than in strongly regulated industries where a tradition of accurate written reporting exists (e.g. financial services). This third element of behavioural uncertainty will be referred to under the term *'industry opacity'*, whereby it is hypothesised that behavioural uncertainty associated with a certain international institution increases the greater the opacity of the targeted industry.

In each of the four case studies presented in the second part of this study, the degree of behavioural uncertainty will thus be assessed based on the three elements government incapacity, reliance on governmental monitoring, and industry opacity.

3.3.4 Environmental uncertainty

The discussion of the third and final explanatory variable of the TCE model, environmental uncertainty, follows the same structure already used with respect to the first two. It will thus first give a quick overview of how IR scholars have employed this variable in their field of study. Finally, the section concludes with positioning environmental uncertainty in the context of illicit flows.

3.3.4.1 Environmental uncertainty in international relations

This third TCE variable has also received considerable attention from IR scholars interested in institutional design. Koremenos, Lipson and Snidal (2001, 778) refer to this variable as 'uncertainty about the state of the world'. Also Abbott and Snidal's 'technical uncertainty' captures the same idea, as they define it as 'doubts or partial ignorance of the existence and nature of a problem, as well as appropriate solutions' (2004, 63). Again other scholars discuss essentially the same ideas under the term 'scientific uncertainty' (Rosendorff and Milner 2001, ; Shelton 2000).

As mentioned in the previous sub-chapter, economic empirical studies have found a negative relationship between environmental uncertainty, such as technological change, and tighter integration. They explain this correlation arguing that high levels of environmental uncertainty increase the need for flexibility and expeditious, decentralised decision-making, which can only be attained at low levels of legalisation. A similar argument is also presented in the literature on international institutions. When dealing with complex problems, such as global warming for example, cause-effect relationships may be poorly understood, making it difficult to forecast the effectiveness of certain policy measures. Under these circumstances, policymakers may prefer international agreements that are flexible enough to allow for renegotiation and adaptation when new evidence suggests more effective ways of dealing with the problem (Abbott and Snidal 2000, 442). Shelton, for example, maintains that '[l]egally binding norms may be inappropriate when the issue or the effective response is not yet clearly identified, due to scientific uncertainty or other causes, but there is an urgent requirement to take some action' (2000, 13). This same idea is echoed almost verbally by Rosendorff and Milner (2001, 832). Two of Koremenos et al's (2001) conjectures point in the same direction. They hypothesise that states are keener to retain autonomy and flexibility in their decision-making, i.e. are more reluctant to be bound by highly legalised institutions, with increasing environmental uncertainty. Abbott and Snidal (2000), finally, argue with direct reference to the concept of legalisation that weakly legalised international institutions present an optimal design for dealing with issues plagued with high levels of environ-

mental uncertainty. This study adopts the same line of reasoning and hypothesises that, *ceteris paribus*, problems characterised by high levels of environmental uncertainty require international institutions the design of which remains at the lower end of the legalisation spectrum.

3.3.4.2 Environmental uncertainty in the context of international institutions on illicit flows

In the context of international law enforcement, environmental uncertainty can arise from two major sources. First, environmental uncertainty is high when states have little previous experience in tackling the targeted type of problem through international cooperation. They may therefore feel unsure about the relative effectiveness of various possible instruments and prefer first to gain some experience prior to enshrining a particular approach in hard law. By first designing an institution with only soft legalisation, states offer themselves an opportunity for individual and collective learning with respect to dealing with a poorly-understood policy problem (Koremenos 2001). This first element of environmental uncertainty is referred to as '*novelty of policy issue*', whereby it is hypothesised that, ceteris paribus, the greater the novelty of a policy issue, the greater the environmental uncertainty associated with that issue, and the lower the expected level of legalisation enshrined in the international institutions created to tackle this problem.

Second, environmental uncertainty in the context of international law enforcement depends on the *process innovativeness* associated with the targeted type of crime. Innovation may either relate to the development of new types of criminal activities, such as hacking into bank accounts, or to process-related adaptations, such as the dissemination of child pornography over the internet instead of or in addition to video tapes. Another type of process innovation relates to the displacement of criminal activities either to less tightly-regulated sectors or to states with lax legislation and/or law enforcement capacities. Both forms of innovativeness—product innovation and process innovation—are hypothesised to be positively correlated with environmental uncertainty and consequently associated with soft legalisation.

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In sum, a vast body of literature both directly on transaction cost economics and on institutional design in international relations provides solid evidence that high levels of asset specificity and behavioural uncertainty lead to harder legalisation as an attempt to reduce moral hazard whereas high levels of environmental uncertainty induce cooperating parties to prefer institutions with softer legalisation. Table 3.1 summarises the criteria for the assessment of the constellation of public policy problems in the area of illicit flows.

Problem attribute	Low	High
1. Asset specificity		
A. Potential loss	▪ Problem solution requires negligible financial or human investments (direct costs). ▪ Problem solution has negligible or even positive unintended consequences for the country's socio-economic and political stability (indirect costs). ▪ The net benefits of the problem solution are low.	▪ Problem solution requires the country to invest significant amounts of financial or human resources. ▪ Problem solution has significant negative unintended consequences for the country's socio-economic stability. ▪ The solution of the problem generates high net benefits.
B. Propensity to shirk	▪ All cooperating countries face the same and low potential losses caused by the breakdown of a collaborative problem solution.	▪ The problem solution causes high negative net benefits for some states, while others face substantial potential losses in case of the breakdown of the collaborative problem solution
2. Behavioural uncertainty		
A. Governance incapacity	▪ Countries to be observed have proven that they can manage comparable tasks without difficulty.	▪ Affected countries are weak and are likely to be overwhelmed by problem solution. ▪ Countries have a track record of low accuracy in their reporting.
B. Reliance on governmental monitoring	▪ Problem and its solution affects certain organised non-governmental actors significantly which can serve as fire alarms ▪ Affected groups are well organised.	▪ Problem and its solution do not affect any single societal group significantly. ▪ Affected groups not well organised. ▪ Affected groups have no societal legitimacy
C. Industry opacity	▪ Industry transactions are well documented. ▪ Industry transactions are historically tracked by government agencies.	▪ Industry transactions are conducted on the basis of a handshake. ▪ Industry transactions have not historically been tracked by government agencies.

3. Environmental uncertainty		
A. Novelty of policy issue	▪ The cause and effect relationship of the problem and potential solutions are well understood. ▪ Countries have a long and solid track record in regulating or cooperating in the concerning problem area. ▪ Well proven strategies exist to deal with unexpected natural factors. ▪ The future development of consumption patterns and technology can be forecasted accurately.	▪ The cause and effect relationship of the problem and potential solutions are not well understood. ▪ Countries have little experience in regulating or cooperating in the concerning problem area. ▪ Problem solution is affected by uncontrollable natural factors. ▪ Problem solution seeks to regulate goods or services the demand for which is prone to swings to technological progress, or changes in taste or fashion.
B. Innovativeness		
a. Product innovation	▪ Problem solution seeks to regulate goods or services the alternatives to which cannot be developed without significant investment and delay. ▪ Problem solution seeks to regulate goods or services the potential alternatives to which would not need to be regulated in a similar fashion.	▪ Problem solution seeks to regulate goods or services to which alternatives can be developed in short time and without high costs. ▪ Problem solution seeks to regulate goods or services the potential alternatives to which would require regulation in a similar fashion.
b. Process innovation	▪ Problem solution seeks to regulate goods or services which cannot be produced, shipped and sold in locations or channels, which are not already in use, or a switch between which cannot occur without significant investment and delay.	▪ Problem solution seeks to regulate goods or services which are produced, shipped and sold in locations or channels, which can be switched in short time and without high costs. ▪

Table 3.1 Overview of the criteria for the assessment of the constellation of public policy problems in the area of illicit flows.

4 Narcotic drugs: The UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances

The world market for illicit drugs[21] is a substantial part of the world economy. According to the UN International Drug Control Programme, it was worth around US$400 billion in 1996, or 8 percent of world trade (Braithwaite and Drahos 2000, 366). The production and consumption of narcotic drugs is not a new phenomenon, however. Narcotic drugs have been consumed for curative, religious and recreational purposes throughout history (UNODC 2004b, 25). This continuity contrasts sharply with the changing societal attitudes towards the consumption of such psychoactive substances. Whereas drugs were fully legal in some societies and at some times in history, in other societies and at other times they were subject to various forms of state control, ranging from the taxation of the trading in narcotics to the imposition of the death penalty for the consumption of such substances. This first of the four cases studied here presents the emergence of what Ethan Nadelmann (1990) called the 'global drug prohibition regime' with a special focus on the latest of its three main pillars: the United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (1988 UN Convention or Vienna Convention). The first sub-chapter provides an overview of the nature and scope of the narcotic phenomenon, and the major multilateral agreements concluded to tackle the problems arising from it. After having prepared the grounds in this way, the discussion will move on in the second sub-chapter to the analysis of the constellation of the problem underlying the Vienna Convention. This analysis is guided by the three transac-

[21] The terms 'narcotic drugs' and 'narcotics' and 'illicit drugs' will here be used interchangeably as generic terms for substances, natural or synthetic, which are included in Schedules I and II of the Single Convention on Narcotic Drugs of 1961 and the 1972 Protocol Amending the Single Convention. This definition is based on article 1 litera n of the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The assignment of a drug to one of the four Schedules defined by the Single Convention is based on scientific criteria related to a substance's dependence-producing nature and negative health impact. However, Boaz (1991) is right in pointing out that this logic is not followed through, as otherwise also alcohol and tobacco would have to be included in the definition of drugs.

tion cost economics variables introduced in the previous chapter, namely asset specificity, behavioural uncertainty and environmental uncertainty. This analysis suggests a high level of legalisation as the optimal design for an institution created to tackle a so-disposed problem. The third sub-chapter assesses the institutional design of the 1988 UN Convention along the three dimensions introduced by the concept of legalisation. Finally, the actual design outcome is compared with the design expectations formulated in the preceding sub-chapter. With the Vienna Convention reaching high degrees of obligation, precision and delegation, this comparison finds a close match between the expected and the real design and thus supporting evidence for the explanatory power of the transaction cost economics framework tested in this study.

4.1 Narcotic drugs as an international policy problem

This first section provides an overview of the nature and scope of the production, distribution and consumption of narcotics and establishes why it is seen by policymakers as a problem that requires international responses. The most important multilateral agreements seeking to mitigate the narcotics problem are presented in a cursory way in a second section. This overview is followed by a more detailed presentation of the United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, upon which the remainder of this chapter will focus.

4.1.1 Scope and nature of the international policy problem

Narcotics present a very challenging policy field for international cooperation, as it is a uniquely multifaceted problem that affects different states in very different ways and to different extents. As it will be argued below, the problems associated with the existence of narcotic substances can be looked at from three main perspectives: health, crime and security. Depending on which dimension of the problem the policy-maker focuses on, different policy instruments present themselves as the most appropriate one to tackle the problem. Furthermore, policy-makers have divergent perspectives on the issue depending on whether their country is primarily a drug producing, transit or consuming

country[22], on the prevalence of the problem in their society and on the type of drug that presents the greatest problem. This section seeks to shed light on the major dimensions of the problem and on the global consumption and production patterns underlying it.

4.1.1.1 Narcotics—a policy problem with many dimensions

The production and consumption of narcotic drugs give rise to a number of problems that can be categorised along three[23] dimensions: health, crime and security, which will be discussed in turn in the following paragraph.

- Health

The use of narcotics can be traced back to the early history of mankind (Inglis 1975, ; Whitaker 1987). The chewing of dried coca leaves in South America dates back over 2,000 years (Connor 1991), and archaeological testimonies also demonstrate the many century old tradition of *cannabis sativa* (Indian Hemp) and *papaver somniferum* (white poppy) consumption. Technological advances in the field of chemistry and pharmacology exacerbated the health hazards associated with the consumption of these substances considerably. Though not without its own problems, the consumption of unrefined plant material still presents a minor health risk as the concentration of the active agents in these plants is generally low, thus making overdosing physically difficult. This changed dramatically, when in the 19th century pharmaceutical companies developed procedures to isolate the psychoactive substances of opium poppy (morphine) and coca (alkaloids) and to process them to heroin and cocaine on a commercial basis (Braithwaite and Drahos 2000, 361f.). The administration of heroin with the newly developed hypodermic syringe further increased the risk of addiction. Further advances in pharmacology facilitated the development of synthetic drugs such as amphetamines, barbiturates and lyser-

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[22] However, this distinction between drug consuming, trafficking and producing countries is becoming increasingly blurred, as will be discussed later.

[23] The environmental dimension, though important, will not be subject of a detailed discussion here. On this topic see Bentham (1998) and Thoumi (2003).

gic acid diethylamide (LSD) in the mid- and late 20th century. The World Health Organisation estimates that approximately 200,000 people died as a consequence of drug abuse in 2002, equivalent to 0.4 percent of all deaths worldwide (UNODC 2004b). In the United States alone, approximately 20,000 people die annually of causes related to drug abuse (Fuller 1996). When measured in terms of disability-adjusted life years (DALYs), drug abuse accounts for the loss of 11.2 million years of healthy life (UNODC 2004b). Of particular concern is the risk of HIV infections resulting from the use of contaminated injection equipment to which the approximately 13 million injecting drug users are exposed. Such drug-related health problems can strain public health care and lead to a loss of productivity of the affected country's work force. According to figures provided by the US Executive Office of the President (2001), the United States spent US$14.9 billion on drug-related health care in 2000 and incurred a drug-related productivity loss of US$110.5 billion that year.

Central to the health dimension of narcotics is the notion of addiction, as the very occasional consumption of these drugs does not lead to any significant medical problems. The term addiction is, however, problematic as no established consensus exists on its precise meaning. Disagreement primarily relates to whether the term should be limited to physical dependence[24] only or be broadened so as to include psychic dependence[25], as well. This disagreement is of lesser relevance with respect to heroin and cocaine (in particular in the form of crack cocaine), since it is not disputed that the chronic consumption of these substances is addictive. The lack of scientific consensus is most pronounced with respect to the use of cannabis (Bentham 1998, 203). Upon the recommendation of the World Health Organisation (WHO) and despite the lack of evidence for its physical dependence-producing effects, cannabis was assigned to the same category of substance as heroin in Schedule IV of the 1961 Single Convention.

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[24] Defined by Bentham as "an alteration of the central nervous system that results in painful symptoms when the drug is withdrawn" (1998, 21).

[25] Defined as the "emotional desire, craving or compulsion to obtain and take the drug" (Bentham 1998, 21).

- Crime

Also the second dimension, drug-related crime, is surrounded by a considerable degree of controversy. It is generally noted that widespread drug consumption causes social harm in the form of high levels of crime, either as crime committed, first, under the influence of drugs or, second, in order to finance the addiction (UNODC 2004b). High levels of violent crime can result from clashes between different drug producer and trafficker gangs, as well as between such gangs and law enforcement agents. Corruption presents an important secondary form of crime related to the drug industry, whereby gangs involved in the business use parts of their massive profits to influence the political establishment.

However, especially accounts of the first mentioned form of drug-related crime were often manipulated and instrumentalised by groups lobbying for a criminalisation of drugs (Nadelmann 1990). In the United States of the late nineteenth and early twentieth century, for example, the call for cocaine restriction was bolstered up with widely publicised accounts of 'coke-crazed negros raping white women' (Eddy, Sabogal, and Walden 1988, 46) and other 'sensationalist, albeit largely unsubstantiated, reports of the horrid crimes ostensibly committed under the influence of a particular drug' (Nadelmann 1990, 507). The association between drugs and crime is much more robust when looking at the second aspect—criminal acts to procure finances to purchase drugs. Narcotic drugs are reported to play a role in more than half of all cases of street crime committed in the United States (Perl 1992, 68). In the United Kingdom, about fifty percent of all cases of theft and burglary are driven by the need of addicts to finance their expensive addiction, which is estimated to cost a hard drug addict an average of approximately £33,000 annually (Clutterbuck 1995, 3). This association between drugs and crime is also reflected in law enforcement statistics. According to Barry McCaffrey, the then director of the White House Office of National Drug Control Policy, drug-related offences account for two thirds of the 100,000 people in the federal prison system, while a total of 250,000 US Americans are serving time for drug law violations (Fuller 1996). These crimes may

however not be so much the result of narcotic drugs themselves but rather of their illegal status. The Swiss experience with the controlled administration of regular doses of heroin to chronic addicts supports this view, as the crime rates among the participants of this scheme fell by 60 percent (Joyce 1999, 104).

Another type of crime—corruption—affects in contrast not just drug consuming, but also drug producing and trafficking countries—with drug producing countries being hit hardest. A strong association between drugs and high levels of corruption exist, even if a clear causal relationship is difficult to establish (Thoumi 2003, 170ff.). As the revenues generated by the illicit drugs industry[26] are disproportionally large compared with the salaries of public officials of all levels, the industry often succeeds in buying the latter's toleration of their operations. Peter Smith, for instance, compares the income of Mexican cocaine traffickers with the financial capacities of the judiciary and concludes that 'Mexico's *nouveaux riches* traffickers can afford to spend a s much as US$500 million per year on bribery—more than twice the total budget of the attorney general's office' (Smith 1999b, 204). This has far-reaching consequences. Colombia's criminal justice system in the 1980s, for example, was reported to be undermined by corruption to such a point that it was virtually incapable of enforcing any serious constraints on the drug industry (Bentham 1998, 32). Rensselaer W. Lee III noted in the mid-1980s that '[d]rug barons today are a major political force in countries such as Bolivia, Colombia and Peru, carving out states within states in coca-producing regions' (1985/86, 142f.). The drug cartels directed their corruptive power or seduction not just towards government officials but at times also towards the general public in an effort to 'win their hearts and minds' and in some cases even their vote[27]. For instance, Pablo Escobar, the head of the Medellín drug cartel, is reported to have constructed more public housing in Medellín than the government (Bentham 1998, 34; Thoumi 1999, 130). In 1995, it was revealed that the Cali

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[26] The Kerry Commission Report of 1989 estimated that the Colombian drug cartels generated incomes of US$ 8 billion annually (Bentham 1998).

[27] Pablo Escobar, the head of the Medellín cartel's production operations ran successfully for Congress in 1984, and the cartel's co-founder, Carlos Lehder, created a less successful political movement with strong nationalistic overtones (Thoumi 1999).

cartel had supported the previous year's presidential campaign of the winner, Ernesto Samper, with a contribution of US$6 million (Guáqueta 2003, 77). Also, in the 1980s the government of Laos was considered to be heavily involved in the production and export of opium, or at least to condone it (Bentham 1998).

- Security

The narcotics industry is a good example for how the definitions of crime and security threats overlap. The drugs industry often complements its 'carrot policy' (bribes) towards public officials with a 'big stick' in the form of targeted assassination of public figures who oppose the drug trade and the killing of police and military personnel deployed in the fight against drugs. In 1984, for example, the Medellín cartel killed Rodrigo Lara Bonilla, the Colombian justice minister and many other public figures, including elected politicians, presidential candidates[28], cabinet ministers, judges and journalists (Thoumi 1999, ; 2003). The Medellín cartel also offered a bounty for the head of each policemen (Thoumi 1999, 134), which contributed to over 3,000 military and police personnel being killed or wounded during the second half of the 1980s (Bagley 1988, ; Office of the President of the Republic 1989). Simultaneously, the drug industry has sometimes pursued the strategy of creating general chaos through the detonation of bombs in police headquarters, but also at random public places—a strategy that became associated with the label narco-terrorism. This notion also refers to the links that often emerged between the drug industry on the one hand and paramilitary groups and guerrillas on the other. From the 1980s onwards, the *Fuerzas Armadas Revolucionarias de Colombia* (FARC), one of the two leftwing guerrilla groups operating in Colombia, embraced the drug industry as an important source of income. The FARC first started to raise funds by taxing coca growers and drug traffickers operating in the region controlled by them (King 1997, 68). The guerrilla group later—especially after the conflict with the Colombian government intensified in the 1990s—expanded its activities in this field and began to acquire

[28] The 1989 presidential campaign established a sad record with three candidates being assassinated (Thoumi 1999).

plots, process coca leaf into cocaine, and develop contacts of its own with regional mafia networks (Guáqueta 2003, 80). Estimates on how much revenue FARC has been able to generate this way vary considerably. King (1997, 68) reports that FARC's drug-related income mounted to an estimated US$269m in 1994, Becker (2004) puts the number at an annual total of approximately US$470m, and Guáqueta (2003, 81) at approximately US$530m. According to Guáqueta, these drug revenues accounted for approximately 48 percent of FARC's total income. The illegal rightwing paramilitary *Autodefensas Unidas de Colombia* (AUC) relies even more extensively on the drug business, which covers approximately 70 percent of its income (Guáqueta 2003, 82), although the absolute numbers on net drug-income put forward by other sources vary between US$20m-200m. In May 2005 alone, the Colombian police seized eleven tons of cocaine, with an estimated street market value of €650m, that the AUC allegedly tried to ship to the United States or to Europe (NZZ 2005a). In her study on Colombia and Peru, Felbab-Brown (2004) finds conclusive evidence that drug-related income strengthened the position of the guerrilla groups and paramilitaries in both countries, which in turn led to an intensification of the militarised intrastate conflicts. This sometimes almost symbiotic relation between the drug industry and guerrilla groups has generated some speculations about the ideological and political motives of these groups compared to their economic incentives. The Colombian government has also at times been eager to exploit this link for its own purposes, depicting the fighters as driven by material self-enrichment alone. This strategy has proven a successful tool to de-legitimise these groups in the view of Colombian population as well as the international community[29] and to mobilise US American support for its fight against narco-terrorism.

These conflicts often had and still have important repercussions on the international level, leading to a securitisation of the drug problem also in countries that are not directly affected by this form of drug-related violence. At the height of the Colombian drug

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[29] The FARC, ELN and the paramilitary AUC were classified as international terrorist groups in 2002 (Guáqueta 2003, 81).

cartels' power and at the apex of the Cold War, Charles Range, chairman of the US House Select Committee on Narcotics Abuse and Control, expressed his concerns that just as America was fearing a domino effect in the spread of communism, the takeover of drug barons of one South American state might spark a domino effect of other states falling into criminal hands. He stated that '[if Colombia falls [to the drug cartels], the other, smaller, less stable nations in the region would become targets. It is conceivable that we would one day find ourselves an island of democracy in a sea of narcopolitical rule, a prospect as bad as being surrounded by communist regimes' (quoted in Andreas and Bertram 1992, 170). In a similar vein, William J. Bennett, then head of the Office of National Drug Control Policy, declared in 1989 that '[t]he source of the most dangerous drugs threatening our nation is principally international. Few foreign threats are more costly to the US economy. None does more damage to our national values and institutions and destroys more American lives. While most international threats are potential, the damage and violence caused by the drug trade are actual and pervasive. Drugs are a major threat to our national security' (quoted in Bentham 1998, 35).

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International negotiations on narcotics-related issues have traditionally been hampered by the fact that countries differ from each other with respect to the relative emphasis they put on the health, crime and security dimension of the problem and, consequently, the policy instruments they consider most appropriate.

do not approach the fight against illegal drugs from the same dimension. Policy instruments proposed and advocated by countries depend on which dimension they consider most important. For instance, the Colombian government, although heavily dependent on US support, repeatedly stressed the point that their fight was primarily targeted against narco-terrorism, in which it saw the 'principal threat against [our] democracy' rather than against drug trafficking itself (Bagley 1992, ; President Cesar Gaviria of Colombia quoted in Block 1992, 40). This view is in a sharp contrast to some European countries, first and foremost Switzerland and the Netherlands, which shifted the focus

away from predominant crime and security concerns associated with the 'war on drugs' and towards more health-oriented policies.

4.1.1.2 Patterns and trends in consumption, production and trafficking

Differences in countries' preferred anti-drug policies largely result from the fact that they vary considerably with respect to their exposure to drugs production, trafficking and consumption. It is therefore important to understand the global pattern of drug consumption, production and trafficking, which will be illustrated below.

- Consumption

The history of drug consumption is marked by great fluctuations both in terms of substances consumed and levels of consumption, with important geographical differences. The United Nations Office on Drugs and Crime estimates that approximately 185 million people, i.e. 4.7 percent of the global population between the age of 15 and 64, consume drugs (UNODC 2004b). More than eighty percent of drug users consume cannabis, followed by amphetamine-type stimulants, opiates (including heroin) and finally cocaine. In terms of health impact, the proportions shift considerably. Cannabis dominates the demand for treatment services only in Africa. On the global level, opiates remain the most serious problem drug, requiring most attention in Asia, Europe and Oceania. In South-East Asia, methamphetamine has overtaken opiates in the last decade as the main problem drug. The Americas are still marked by a strong prevalence of cocaine, but in the United States heroin now accounts for more drug treatment than does cocaine (UNODC 2004b, 32). This regional consumption patterns are depicted in Figure 4.1.

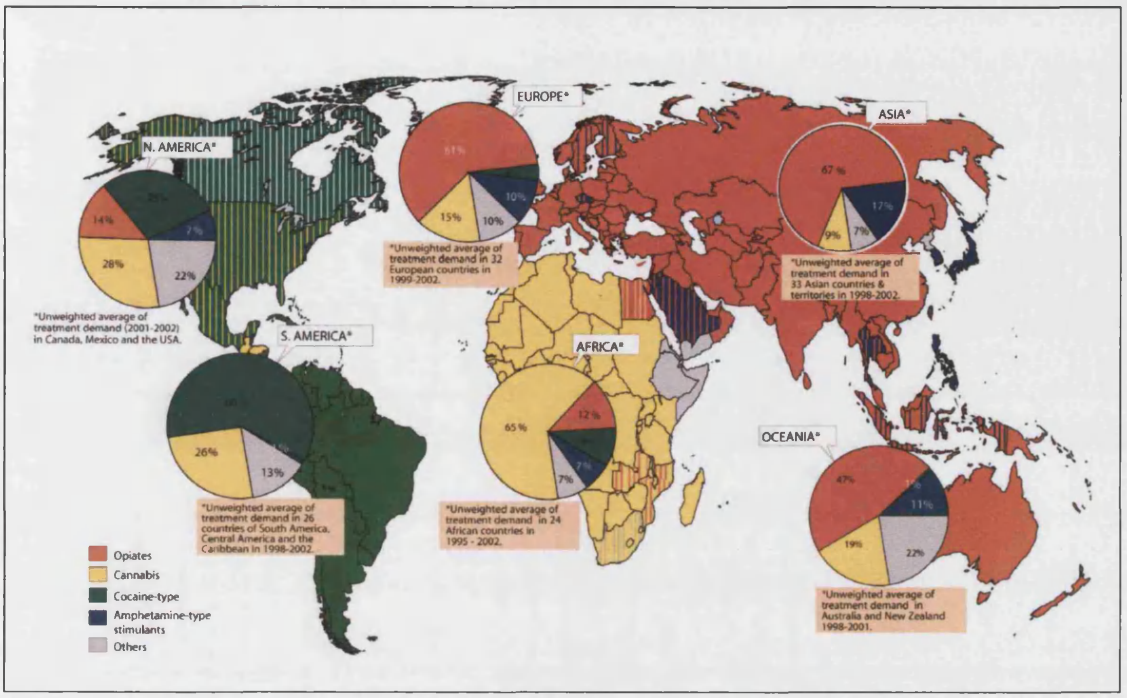

Figure 4.1 Global drug consumption patterns. Source: UNODC 2004 page 61

The number of drug users increased in the last few years by less then three percent (UNODC 2003), but growth rates of different types of narcotics vary significantly across world regions. The global trend within the two most important problem drugs is slightly positive, with the consumption of heroin largely stabilised and that of cocaine declining. In contrast, the consumption of the most widely used narcotic, cannabis, is still on the rise, and amphetamines and ecstasy both experienced strong growth rates. The trend towards a convergence in the levels of drug consumption is continuing, with many developing countries reporting rising levels of consumption in contrast to stabilised or even declining consumption in many developed countries. A second converging trend also exists with respect to the type of drugs consumed in the Americas and in Western Europe, with opiates growing in popularity in the Americas and cocaine becoming more commonly used in Western Europe.

- Production

Most of the drugs are not produced in the country of end-consumption. The global production of illicit *opium* has remained largely stable since the early 1990s. However,

shifts did occur with respect to the distribution of cultivation, leading to a growing concentration of opium production in Afghanistan. This mountainous, poor country accounts now for 75 percent of the global opium production (UNODC 2004b, 31); followed by Myanmar (17 percent) and Laos (2.5 percent). These three countries together cover 95 percent of the world supply in opium poppy. Although large-scale opium production is a rather recent phenomenon in Latin America, it has now reached a level where Mexico and Colombia can cover most of the US demand in this drug. In 2003, Mexico was the fourth largest opium producer, with a share of 1.7 percent of the total world production. Low levels of illicit opium poppy cultivation take place in many regions and countries, such as Vietnam, Russia, Ukraine, Central Asia, Caucasus region, Egypt, Peru and Thailand (UNODC 2004b, 59, 61).

The illicit cultivation of *coca* has been in decline since it peaked in 1999 (UNODC 2004b, 17). The geographical concentration in the production of coca leaf is also very high but shows a slightly different pattern than in the case of opium—in two respects. First, unlike opium poppy, coca is only grown in one region of the world—in the Andes, specifically in Bolivia, Colombia and Peru. Second the distribution among these three countries is less skewed than in the case of opium. Colombia produces approximately 67 percent of the global cocaine output, whereas Peru covers 24 percent and Bolivia 9 percent (UNODC 2004b, 95).

The production of *cannabis* displays a very different pattern, as the plant is grown throughout the world. In the decade between 1992 and 2002, the United Nations Drug and Crime Office identified 142 countries as cultivating cannabis. The importance of domestic supply is considerably greater with respect to cannabis herb than with any other drug. All cannabis herb seized in Canada in 2004, for example, originated from domestic sources (UNODC 2005c). The United States, the world's largest cannabis market, relies to two thirds on domestically produced cannabis herbs, with the rest being imported from Mexico and Canada (UNODC 2004b, 125). Also in Europe, cannabis is grown to meet domestic demand but still needs to be complemented with imports

mainly from Albania. Production of cannabis resin, in contrast, is slightly more concentrated. In Western Europe, the world's largest cannabis resin market, about 80 percent of the cannabis resin that was seized is estimated to originate in Morocco (UNODC 2004b, 125). The second and third most cited source of cannabis resin were Pakistan and Afghanistan, respectively. Other important suppliers of cannabis resin are India, Lebanon, Albania, the Central Asian countries (notably Kazakhstan and Kyrgyzstan), Nepal, a number of African countries and the Russian Federation. Jamaica is the only country in the Americas that is a significant supplier of this derivative from the cannabis plant.

The global production of *amphetamine*-type stimulants (ATS) has increased over the last decade. Production is dominated by methamphetamine (with 410 tons per annum), followed by ecstasy (113 tons) and amphetamine (UNODC 2004b, 159). Laboratories based in European countries dominate the production of amphetamines, whereby a marked shift of production from Western to Eastern Europe occurred in the mid-1990s. The United States are by far the leading producer of metamphetamines, as can be extrapolated from the number of reported methamphetamine laboratory detections in 2002. Canada, China, Mexico, Myanmar and the Philippines followed far behind.

- Trafficking

A third type of countries play an important role in international drug trading by being transhipment points between producer and consumer countries. For instance, non-drug producing Ecuador funnels a third of Colombia's cocaine, especially through its port of Guayaquil (The Economist 2005). A large part of that continues to Mexico, which is the immediate origin of about 70 percent of all US drug imports (Fuller 1996).

Seventy to eighty percent of the heroin consumed in Western Europe in 1990 was estimated to reach its destination via the Balkan route, through Turkey, Bulgaria, Romania, and ex-Yugoslavia (Bentham 1998). Nordic countries, notably Finland are supplied with central Asian opiates through St. Petersburg and the Baltic countries. Minor quantities

are trafficked via Russia and Belarus to Poland for shipment to Germany (UNODC 2004b, 71).

In Africa, Nigeria emerged in the 1980s as a major transhipment centre for heroin from Southwest and Southeast Asia to Europe (MacDonald and Zagaris 1992, 10). However, several other African countries, including Togo, Ghana, Gambia, the Republic of South Africa, Zimbabwe, Swaziland, Tanzania, Kenya, and Uganda, reported that South American cocaine was being transhipped via their territory to Europe. Between 1992 and 2002, 52 African countries reported seizures of cocaine, up from 24 countries in the ten years between 1980 and 1990. South Africa and Nigeria were the largest transhipment centres, as measured by the amount of cocaine seized, with Nigeria building up an ever increasing lead in front of South Africa.

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As the discussion above demonstrates, most drugs are not produced domestically but imported often from distant places. We see a strong movement from East to West with respect to heroin (Afghanistan to Europe), from South to North (cocaine) and a movement from North to South (synthetic drugs) (Bassiouni and Thony 1999, 911). Especially with the rise of synthetic drugs, the division between the drug consuming developed and the drug producing developing world is becoming increasingly blurred. International trafficking constitutes the crucial link between the drug producing and drug consuming countries. Given the globally highly mobile nature of illicit drugs trade, 'some states have long since lost the ability to respond to drug use within their society on a purely unilateral basis' (Bassiouni and Thony 1999, 923). For this reason, states started to search for cooperative solution to a commonly shared problem. Out of this need for cooperation, a number of international agreements were reached, as will be discussed in detail in the next section.

4.1.2 International initiatives

Given the global dimension of the narcotics problem, states realised at a very early stage the importance of international cooperation. Before embarking on detailed discussion of the most recent global agreement on drugs, i.e. the Vienna Convention of 1988, it is important to understand the institutional history upon which this convention was able to build. This paragraph therefore provides a broad overview of the most important global international anti-drug initiatives that predated the Vienna Convention. The discussion of these international agreements proceeds in chronological order.

The first international attempt to address narcotics was undertaken at an international conference held in Shanghai in 1909, where thirteen powers concerned with the Far East discussed measures to curb opium addiction, which had reached alarming levels especially in China (Senate Special Committee on Illegal Drugs 2003, 446). It is believed that at its apex dependency on opium smoking affected 25 million Chinese—a level never reached by any country ever before or since (UNODC 2004b, 26). This epidemic level of addiction was largely the result of a successful market expansion of the British East India Company that begun to export opium on a large scale from British India to China in the 19th century. Chinese attempts to prohibit the importation and consumption of opium contributed to the outbreak of the so-called Opium Wars (1839-42 and 1856-1858). For the British, who considered opium as a legitimate international commodity and an integral part of international trade, the prohibition of opium imports represented an unacceptable move against their free-trade interests. Strengthened by the two victories over China, the British imposed their demand for unrestricted opium imports to the Middle Kingdom. However, under growing domestic pressure from anti-opium activists the position of the British government slowly started to shift at the wake of the 20th century. With the strong support of the United States, the Shanghai Opium Conference was summoned and concluded with a call on all governments to ban opium smoking and to ban or carefully regulate opium use in other ways.

The Shanghai Conference prepared the grounds for the Hague Convention of 1912. This convention regulated the trade in, and abuse of, opium, cocaine and morphine. It represents the first truly multilateral agreement on drug control (Bassiouni and Thony 1999, 913) and the beginning of a global coordination or tentative homogenisation of domestic drug control policies on the basis of multilateral treaties and international obligations. The scope of international drug control was expanded in the 1925 Geneva Convention of the League of Nations. It covered a wider range of drugs, including for the first time cannabis, and attempted to move beyond the Hague Convention's focus on domestic controls toward transnational control mechanisms. For this purpose, the Geneva Convention established an eight-member Permanent Central Opium Board (PCOB) in charge of monitoring an import certification system created by the same convention to control the international drug trade by limiting the amount each country could legally import. The last anti-drug treaty to be concluded under the auspices of the League of Nation was the 1936 Convention for the Suppression of Illicit Traffic in Dangerous Drugs (198 LNTS 229). This convention established drugs trafficking for the first time as a *criminal* offence, calling upon governments to punish people involved in this activity regardless of their nationality and of the country where they committed this crime.

The post World War II international drug control framework rests predominantly upon three United Nations Conventions, which are mutually supportive and complementary. They enjoy almost universal support, and form the legal basis of what Nadelmann called the 'global drug prohibition regime' (1990, 503).

The first pillar, the Single Convention on Narcotic Drugs of 30 March 1961 (the Single Convention, henceforth), primarily sought to consolidate in a single treaty the drug treaties and protocols that the UN had taken over from the League of Nations. It entered into force on 13 December 1964, and, by June 2005, 180 states had become party to the convention. The Single Convention continued the earlier treaties' focus on the supply of narcotic drugs, and seeks to establish mechanisms that limit world production of plant-based narcotics exclusively to the amount needed for medical and scientific purposes

(Bassiouni and Thony 1999, 920). The Single Convention has been criticised for ignoring the demand side of the problem, i.e. the drug addicts. This weakness was partly rectified with the 1972 Protocol Amending the Single Convention on Narcotic Drugs (hereafter the 1972 Protocol), which not only sought to strengthen efforts to prevent illicit production but also highlighted the need for treatment and rehabilitation of drug addicts (Bassiouni and Thony 1999, 921).

The second pillar of the UN drugs treaty framework is the Convention on Psychotropic Substances. This convention mainly expands the goals and strategies set up in the 1961 Convention to cover thirty-two synthetic substances with psychoactive effect, such as amphetamine-type stimulants, sedative-hypnotics, tranquilisers, and hallucinogens. This expansion was a reaction to the growing abuse of this type of substances in the 1960s, most prominently of LSD. 175 States have become party to the Convention on Psychotropic Substances after its adoption in 1971.

The third and final cornerstone of the UN's anti-drug policy is the Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention or 1988 Drug Convention) of 1988. This convention will be discussed in greater detail below.

In addition to the multilateral agreements of the UN a great number of regional and bilateral agreements have been set up to strengthen international drug control. Because of this tight net of drug control policies this issue area has been described as the 'flagship of transnational law enforcement' (Bewley-Taylor 1999, ; Rolley 1992).

4.1.3 The 1988 UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances

The third and most recently established pillar of the UN drug control regime is the Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances. It was adopted on 19 December 1988 in Vienna and signed by forty-four states on the following

day. Since the opening for signature, a total of 170 states have ratified the Vienna Convention, with Laos to become the most recent party to the convention in December 2004 (UNODC 2005a). With 170 parties as of June 2005, the convention is among the international treaties with the most extended membership base.

As the name of this convention suggest, it is primarily focused on trafficking. The Vienna convention presents a first corrective step away from the UN's traditional emphasise on the supply side of the problem and follows a General Assembly call for greater attention to the 'various aspects of the [drug] problem as a whole, and in particular, those not envisaged in existing international instruments' (A/RES/39/141 of 14 December 1984). Robin Rolley notes that the Vienna convention presents a 'significant improvement over previous treaties' (1992, 418f.), resulting from its broader perspective, from the level of support the convention received during its drafting stage and from the strengthening of enforcement measures. The convention seeks to enhance international cooperation against illicit drug trafficking in three ways. The Vienna Convention seeks first to harmonise the definition and scope of drug offences; second to improve and strengthen international cooperation and coordination among the relevant authorities, such as customs and police agencies, and judicial bodies; and finally to provide the relevant authorities with the legal means effectively to interdict illicit trafficking (Bassiouni and Thony 1999, 922). The substantively most important articles of the 34 article-long treaty, are articles 3 and 5, 6, and 7, which regard the following four legal matters: offence and sanctions, confiscation, extradition, and mutual legal assistance (Rolley 1992).

Article 3 of the Vienna Convention obliges signatories to criminalise under their domestic law a list of offences, should these offences be committed internationally. These offences include the production, transport, delivery and sale of narcotic drugs and psychotropic substances contrary to the Single Convention and its amending protocol and the 1971 Drug Convention. Article 3 also lists a number of offences that are to be criminalised but subject to the signatory's constitutional principles and basic concepts of its legal system. These offences include the possession of equipment or materials or substances

that are to be used for the illicit production of narcotic drugs (paragraph 1 letter c ii) and the possession of narcotic drugs for personal consumption (paragraph 2). Article 3 also requires parties to make anybody who commits any of the listed offences liable to sanctions, whereby treatment and rehabilitation measures may be adopted as alternatives to conviction and punishment in relation to certain offences. The overall goal of article 3 is thus to level out existing differences between legal systems. This is of great importance, as extradition usually requires that the offence for which a state asks another state to extradite a suspected person also constitutes an offence under the law of the state under the jurisdiction of which that person is at the time of that request.

The confiscation measures spelled out in article 5 of the Vienna Convention are path-breaking, as they present the first steps towards the logic of 'taking profits out of drug-related crimes' and thus towards the establishment of an international anti-money laundering regime. These provisions will be discussed in greater detail in the next chapter.

Article 6 of the 1988 Drugs Convention seeks to establish all offences listed under article 3 as extraditable offences, while article 7 asks signatories to provide one another with the 'widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offences established in' the treaty.

Several commentators have compared the 1988 Drug Convention with other international agreements and reached the conclusion that the Vienna Convention imposes 'relatively extensive obligations to provide mutual legal assistance' (Donnelly 1992, 291), 'contains the most comprehensive provisions for international penal cooperation' (Bassiouni and Thony 1999, 927), and represents 'significant progress in establishing an international system of control over narcotic drugs and psychotropic substances' (Rolley 1992, 425).

4.2 Problem constellation

The above discussion introduced the drug phenomenon and how it affects different states in very different ways. It the also provided a brief overview of international initiatives launched to tackle the problems associated with illicit drugs, and a more detailed account of the 1988 Drugs Convention. The grounds are now prepared to move to the focused analysis of the specific hazards international cooperation against the trafficking in illicit drugs is confronted with. This second subchapter examines the underlying problem constellation based on the three transaction cost economics variables introduced in chapter 3—namely asset specificity, behavioural uncertainty and environmental uncertainty. This assessment will find high levels of both asset specificity and behavioural uncertainty and only low levels of environmental uncertainty being associated with international anti-drugs cooperation. Consequently, an international institution established to deal with this problem can be expected to be best equipped to cater for the specific cooperative hazards when incorporating high levels of legalisation.

4.2.1 Asset specificity

As developed above, asset specificity refers to investments parties make into a cooperative undertaking but which substantially lose their value in case the cooperation breaks down. In the context of international relations, asset specificity involves two elements: first, the likelihood that a cooperative project collapses due to widespread shirking, and second, the damage such a breakdown causes to cooperating parties. Both elements depend on the costs and benefits that result for states from a given cooperative project, here the 1988 Drugs Convention, whereby both costs and benefits can differ from state to state. The qualitative analysis of the asset specificity resulting from the implementation of the Vienna Convention takes as a baseline the costs and benefits that would occur if all parties implemented the Convention full-heartedly. The examination of the first TCE variable starts with an analysis of the costs followed by one of the benefits, and concludes by combining the two in order to assess the risk of shirking and the potential damage such behaviour would cause to other participating states.

4.2.1.1 Costs

The following cost analysis distinguishes between costs that arise for states *directly* from implementing the requirements spelled out in the Vienna Convention and *indirect* costs of economic or political nature, which can be seen as unintended side-effects of those policy measures.

- Direct costs

The Vienna Convention was largely compatible with pre-existing legal systems in North America and Western Europe, thus requiring only minor changes in the legislation of these countries (Bentham 1998, ; Donnelly 1992). But for a number of other countries the convention meant that they had to adjust their narcotics policies to the higher standards prevailing in such states as the United States (Bewley-Taylor 1999). One aspect of these 'higher standards' is the amount of government revenues assigned for law enforcement. The US government, for example, dedicates approximately 0.22 percent of the country's GDP (European Monitoring Centre for Drugs and Drug Addiction 2003) for its war on drugs, which is considerably more than any other state does. Almost ten percent of the total US anti-drug budget is spent on international programmes, first and foremost on interdiction in Colombia, Peru and Bolivia (Fuller 1996). Not surprisingly given the high level of public spending of the US on anti-drugs policies, one of the main motives behind the United States' strong promotion of the Vienna Convention was therefore to ease its own regulatory burden by urging other states, in particular raw-material producing and transhipment countries, to increase their efforts to combat illegal drugs (McAllister 2000). In some countries, like Colombia, the adoption of the Vienna Convention was indeed followed by a significant increase in public anti-drug expenditures after the adoption of the convention. López estimates that Colombia's anti-drug expenditures rose from 0.6 percent of total public expenditures in the 1980s to 1.5 percent in 1993 (cited in Thoumi 2003, 195). Levels of public spending on anti-drug policies remain, however, disparate, with the average EU country spending approximately 0.05 percent of its GDP on drug-related policies—relative to its GDP less than a

fourth of the US expenditures (European Monitoring Centre for Drugs and Drug Addiction 2003).

- Indirect costs

The through implementation of the Vienna Convention also resulted in indirect costs, mainly of social, economic, and political nature. As the following discussion will show, these costs can be considerable—especially for drug-producing countries.

Social costs can arise from the prohibitionist orientation of the Vienna Convention. The prohibition on personal drug use as stipulated in article 3 paragraph 2 clashed with the traditional socio-cultural use of opium in countries like Laos, Myanmar and India, of coca in Andean region and of cannabis in the Horn of Africa and other parts of the world (McAllister 2000). In these countries, the consumption of drugs was not seen as a problem but is part of the normal social life people enjoy, comparable to the public attitude towards the moderate consumption of alcohol in Western countries. For instance, a public opinion survey conducted in Bolivia in 1994 indicated that 72.6 percent of the population were in favour of a depenalisation of coca (Atkins 1997). However, the social costs resulting from diverging attitudes towards the consumption of plant-based drugs was slightly mitigated by the recognition that some traditional forms of consumption might be licit in countries where there is historic evidence of such use (article 14).

More important than the social costs are the economic costs some countries face from prosecuting the cultivation opium poppy, coca bush or cannabis plant as demanded by article 3 paragraph 1 (a i). In a handful of countries the illicit drug sector provides an important source of income and employment, in particular to its socially marginalised segments. These economic benefits are derived from the double fact that the cultivation of narcotic plants is possible in very unfavourable conditions and that no other crop is

financially as rewarding[30]. According to Bewley-Taylor (1999), the gross income generated by a coca grower in Peru's Upper Huallaga Valley exceeded the income of a coffee producer by a factor of ten and that of a rice farmer even by a factor of 21. Several studies have assessed the profitability of coca farming in Bolivia's Chopare region and estimated that it is between four to nineteen times more profitable than the next most profitable crop (Atkins 1997). For some poor countries, like Afghanistan and Bolivia, the cultivation of opium poppies and coca bushes respectively presents one of the rare cases where they enjoy an absolute competitive advantage in the world market. The opium yields are more than three times higher in Afghanistan than in South-East Asia (UNODC 2004b) (45 kg/ha compared to 14 kg/ha), and nowhere is the concentration of the psychoactive substance alkaloid higher than in coca grown in the Chapare (Clutterbuck 1995). Consequently, opium poppy cultivation in Afghanistan and coca cultivation in Bolivia form strong pillars of the national economy. According to the UNODC World Drug Report of 2005, almost ten percent of the Afghan population are believed to have been involved in the cultivation of opium poppy in 2004—a sector that is estimated to have generated an aggregate income of approximately US$600 million in 2004, or an equivalent of 13 percent of the country's GDP (down from 22 percent in 2003). According to estimates of the National Crime Intelligence Service of the United Kingdom (cited in Kopp 2003), the production and trafficking of coca accounted for 6 to 19 percent of Bolivia's gross domestic product in the peak years of the early 1980s, and still around 2 percent of its GDP in 2003 (UNODC 2004b). At the same time, the drug industry also employed between 6.7 and 13.5 percent of the country's work force (Thoumi 2003, 154) and generated half of the country's inflow of foreign exchange. In Colombia, the drug industry generated 7 percent of the country's GDP at the industry's apex in the mid-1980s and still accounts for 2.5 percent of GDP (UNODC 2004b). In Morocco, the cultivation of cannabis herb and extraction of cannabis resin presents an important source of livelihood for almost 100,000 farm households (UNODC 2005c). The rigorous implementation of the 1988 Drug Convention's call to eradicate the cultivation of opium poppy, coca

[30] Although a significant share of the profit margin results from the illicit status of the product.

bush and cannabis herb and to prosecute those involved in the production and trafficking of the derived drugs would therefore result in severe economic consequences in these countries.

The undermining of this important economic pillar could have important political consequences, either in the form of foregone benefits or direct negative consequences. For instance, Bolivia's most senior drug lord, Roberto Suarez Gomez, reportedly offered the government to pay off two-thirds of the country's foreign debts of approximately US$3 billion at the time in exchange for legal impunity (Malamud-Goti 1992)—an offer the Bolivian government under heavy pressure from the United States had to decline. Furthermore, the implementation of a highly effective eradication campaign in the late 1990s contributed to an economic slowdown in Bolivia and fermented social discontent, which culminated in the overthrow of the country's pro-American president Gonzalo Sánchez de Lozada in 2003 (Felbab-Brown 2004, ; The Economist 2005). It is feared that a full-fletched eradication programme could have a similarly destabilising effect in Afghanistan. For instance, John Walsh, of the Washington Office on Latin America, a think-tank, concludes that '[i]f the Karzai government leads with a punitive approach like eradication before there are alternative livelihoods in place, that is a political disaster' (quoted in Webb-Vidal 2005, 10).

Finally, some states feared that international anti-drugs cooperation as envisaged by the Vienna Convention would result in significant political costs in the form of a loss in sovereignty. Especially Latin American states were wary that the US would misuse the Convention as a legitimisation of its interference in their domestic political life. This scepticism was based on the long and—as many Latin Americans would argue—infamous history the US Drug Enforcement Administration (DEA) and—to a lesser extent—the Central Intelligence Agency (CIA) have in the unilateral extraterritorial enforcement of US drug laws. One such incidence was the kidnapping of the Mexican national Dr Humberto Alvárez Machain on Mexican soil by the DEA in 1990s, an act which was motivated by US suspicion that Alvárez Machain was implicated in the murder of a DEA agent in 1988

(Smith 1995). Against this background, María Celia Toro argues that, from a Latin American perspective, the encroachment of US law enforcement agents 'represents as important a threat as losing the war against the traffickers themselves. It represents the loss of state control' (quoted in Smith 1992, 248).

To conclude, the indirect economic and political costs major drug producing states face as a result of the 1988 Convention can be assessed to be very significant and of greater importance than the direct costs of implementation.

4.2.1.2 Benefits

The benefits a country can derive from an effective global anti-drug regime depends on the degree to which it suffers under negative consequences of drug abuse and under drug-related violence, both of which vary significantly across countries.

Among the states with the highest prevalence of drug addiction—measured as the percentage of the population aged 15-64 abusing either opiates or cocaine—are the United States (3.1 percent), Spain (3.1 percent), Ireland (3.0), United Kingdom (2.8) and Iran (2.8) (UNODC 2004b). In contrast, low prevalence rates in cocaine and opiates are found in many African countries (e.g. Kenya, Namibia, Chad all around 0.2 percent), and some micro-states in West Europe (e.g. Liechtenstein (0.13 percent), San Marino (0.06 percent), Monaco (0.11 percent)). States with high prevalence rates place great hopes in international anti-drug cooperation as promoted by the Vienna Convention, since measures targeted against production and trafficking are expected to translate into a reduction in consumption.

Also the extent to which states suffer under drug-related violence varies considerably. The Colombian drug industry plays an important role in the ongoing conflict between the government, FARC and AUC—both in terms of providing funding and motivation for the rebel group and the paramilitaries (Felbab-Brown 2004). In contrast, the drug sector

in Bolivia, Afghanistan, Laos and Morocco is not found to be major source of conflict and violence.

4.2.1.3 Comparison of costs and benefits

This discussion of the cost and benefit structure allows for a distinction of four categories of countries.

Countries where the benefits of an effective global anti-drug regime outweigh the costs they incur from implementing the Convention form a first category. The United States, Spain and Ireland[31] can be seen as examples of this category, as these countries are all culturally opposed t the use of narcotic drugs, and all experience a high prevalence rate of problem drug users. At the same time, they do not derive a significant portion of their domestic product from the production and trafficking of illicit drugs. For these states, it is particularly important that compliance with the Vienna Convention is as high as possible since this allows them to shift part of their burden to drug-producing countries.

In contrast to this first category of states, countries like Afghanistan, Bolivia, Myanmar and Morocco form a second group, which faces high costs—mainly indirectly in the form of a loss in income and employment—from a rigours implementation of the 1988 Drug Convention. These costs are not offset by benefits they can expect to derive from the Convention, as they do not suffer under widespread drug abuse nor under drug-related violence.

The two remaining group of states take the middle ground, as the costs from implementing the Vienna Convention roughly equal the benefits they derive from a functioning agreement. Category three comprises states like Finland, which enjoy low rates of narcotic drug abuse and which have no economic stakes in the production or trafficking of these drugs. The final category is formed by states which suffer severely under drug

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[31] In all of these three countries, the prevalence of opiates and cocaine abuse among the population aged 15-64 years of age is over three percent (see also estimates in the same range presented in Thoumi 2003, 153f.).

abuse or drug-related crime but simultaneously benefit economically from the drug industry, as it is the case with Colombia and Mexico.

Figure 4.2 illustrates the position of these four categories of states in the cost-benefit diagram.

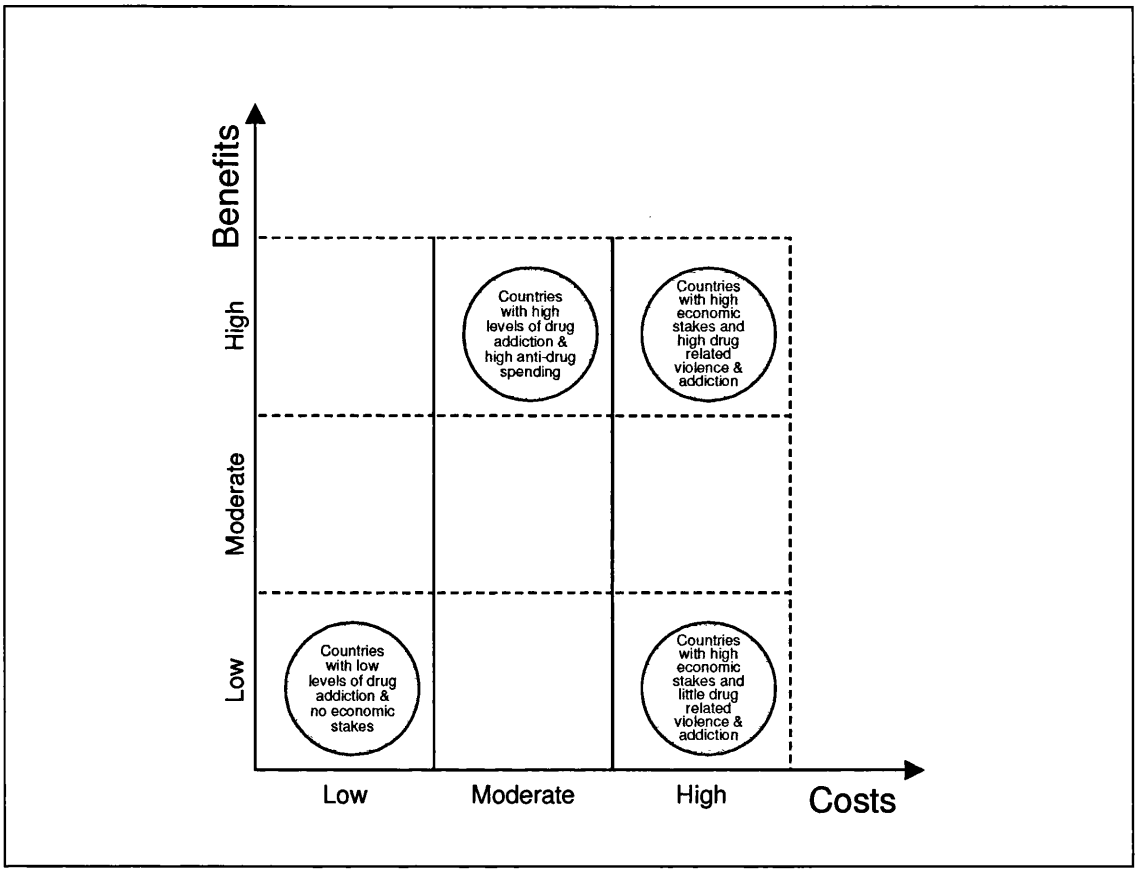

Figure 4.2 The distribution of costs and benefits amongst countries participating in the Vienna Convention.

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The above argumentation shows that the trade in illicit drugs affects different countries in very different ways. The distribution of the effects is very asymmetric, as some countries benefit from an effective international anti-drug institution, while others bear high costs. This creates strong incentives for the latter to shirk from the obligations created by the Vienna Convention, while the former are eager to prevent shirking as this would undermine the important benefits they expect to derive from a thorough implementation of

the Convention. As argued in chapter 3, this type of constellation calls for international agreements with a high level of legalisation, as only hard law can reduce the risk of shirking and thereby preserve the benefits some states expect to derive from the cooperation.

4.2.2 Behavioural uncertainty

The above discussion of asset specificity addressed the extent to which some states may have *incentives* to shirk from their obligations under the Vienna Convention and the damage such shirking would cause to others. The second transaction cost economics variable, behavioural uncertainty, examines in contrast the extent to which states have the *opportunity* to shirk from their treaty obligations without being detected. As discussed in chapter 3, this second TCE variable can be broken down in three aspects: governance incapacity, relative reliance on governmental monitoring and industry opacity. The following analysis will show that in the context of drug trafficking all three components contribute to a high level of behavioural uncertainty associated with international anti-drugs cooperation.

- Governance incapacity

This first element of behavioural uncertainty refers to the extent to which the success of an international agreement depends on the full cooperation of states with only weak governance capacities. The focus is hereby on *inadvertent* non-compliance rather than wilful non-compliance, which was already covered above.

Based on the World Bank's governance indicators dataset, we find that many of the key producers of narcotic drugs have difficulties in establishing the rule of law throughout their jurisdiction. All of the key states with respect to the production and trafficking in heroin and cocaine are below the median in terms of the perceived effectiveness and predictability of the judiciary, and the enforceability of contracts. Bolivia, Colombia,

Mexico, Pakistan and Peru all fall within the third best—or second worst—quartile of the distribution. Afghanistan, Myanmar and Laos even belong to the bottom decile.

This inability to impose the rule of law in general also affects these states' ability to effectively implement anti-drug policies. Consequently, the behavioural uncertainty stemming from governance incapacity can be considered as high in the case of international anti-drugs cooperation.

- Relative reliance on governmental monitoring

An important element in revealing states' insufficient compliance with an international agreement is the independent monitoring by private actors—either as individuals or as collectives. For instance, complaints by victims have proven to be a powerful tool in exposing human rights violations by states. In the case of drugs, this mechanism is much less effective, as the primary victims, i.e. the drug addicts, have no immediate incentives to expose their state's lax attitude towards the implementation of anti-drug policies. On the contrary, they benefit from less harassment by law enforcement bodies and lower street-level prices of drugs. Non-governmental organisations have established effective mechanisms to detect and expose non-compliance with international agreements covering a wide range of issues, as for instance Greenpeace on illicit whaling. With respect to narcotic drugs, NGOs are playing a much smaller role in the monitoring of compliance with the relevant agreements. This relatively weak role of NGOs may be attributed to the fact many NGOs are critical of the criminalisation approach enshrined by the UN anti-drugs regime, therefore not keen on denouncing one state's incomplete compliance with a convention. While the export industry has a strong incentive to monitor the compliance of other states with their free-trade obligations under the WTO and to lobby their governments to take actions against a non-complying state, the illicit drugs industry has no incentive to expose non-compliance as it only benefits from a state's laxity in anti-drugs matters. As private actors play a negligible role in the monitoring of states' anti-drug efforts, international cooperation on this issue has to rely strongly on self-reporting

by states, which increases the risk of surreptitious shirking and thus of behavioural uncertainty.

- Industry opacity

The third and final component of behavioural uncertainty is industry opacity, or the extent to which the industry that is to be regulated—here the production and trafficking in narcotic drugs—is based on well-documented, transparent procedures. Unlike the case of money laundering which will be examined in the next chapter where the key sector—i.e. banks—are legal and subject to heavy government regulation and supervision, the production of and trafficking in narcotic drugs is largely illegal. As a consequence, it can only exist thanks to a high degree of opacity and invisibility it has learned to develop. Industry opacity and consequently the behavioural uncertainty stemming from it is high with respect to narcotic drugs.

In sum, this analysis has revealed that it is relatively easy for states to disguise the fact that they are taking insufficient action against the production, trafficking and consumption of drugs. Consequently, states that would benefit from a well-functioning international anti-drugs institution will therefore want to endow this institution with high levels of legalisation, in particular with well-developed monitoring mechanisms, in order to expose and sanction non-compliance.

4.2.3 Environmental uncertainty

Environmental uncertainty as defined in chapter 3 refers to two separate aspects: first, the experience policy-makers can build upon when drafting a new international agreement and, second, the dynamism in and the innovativeness of the targeted criminal activity. These two aspects will be analysed in the following with respect to the 1988 Drugs Convention. In sum, the argument will show that the environmental uncertainty with international efforts to fight the illicit drug trade is low, as the novelty of the policy issue and the innovativeness of the problem are both relatively low.

4.2.3.1 Novelty of policy issue

Policy makers faced low levels of environmental uncertainty stemming from the first source when drafting the 1988 Drug Convention. As elaborated above, the international community had started to gain experience with international drug control from as early on as 1909, when the Shanghai Conference launched a century of ever-expanding and intensifying international cooperation in this field. In particular, the 1988 Drug Convention built directly on the Single Convention on Narcotic Drugs of 1961, the 1972 Protocol amending the Single Convention, the 1971 Convention on Psychotropic Substances, and the Comprehensive Multidisciplinary Outline of 1987. The environmental uncertainty stemming from insufficient experience in dealing with the problem was thus very low for the drafters of the Vienna Convention.

4.2.3.2 Innovativeness of criminal field

Environmental uncertainty can also result from innovativeness in the targeted criminal activity and can come in the form of product innovation and process innovation. Whereas the former remains rather low in the case of narcotic drugs, the latter reaches moderate levels. Taken together, these subcomponents lead to an overall low degree of environmental uncertainty associated with global anti-drugs policies.

- Product innovation

At least for the time being, product innovation—the first component of innovativeness—does not appear to be an acute problem with respect to narcotics, since all major drugs consumed at the time of the drafting of the Vienna Convention (and still today) had been developed several decades ago. Cocaine and heroin were both developed in the 19th century (Braithwaite and Drahos 2000, 362), while LSD was discovered in 1938, and today's 'party drug' ecstasy (Methylenedioxymethamphetamine or MDMA) in the 1960s (Clutterbuck 1995, 94). One other form of product innovation often referred to is the breeding of cannabis varieties with significantly increased potency resulting from higher concentrations of the plant's psychoactive substance THC (terahydrocannabinol). For instance,

John Walters (2002), the head of the US Office of National Drug Control Policy, warned parents against the marijuana misuse of their children, claiming that 'today's marijuana is different from that of a generation ago, with potency levels 10 to 20 times stronger than the marijuana with which they were familiar'. The UNODC confirms this trend towards a higher THC content both for the US, Canada and the Netherlands, although not to the extent Walters was referring to (UNODC 2005c). According to figures compiled by the University of Mississippi under the Cannabis Potency Monitoring Project Report, the average THC content rose from less than 2 percent in the 1970s to 6.3 percent in 2003 (referred to in UNODC 2005c).

Overall, it is, however, not so much the types of illicit drugs that have changed over time but rather their relative popularity among consumers. For instance, whereas the abuse of lysergic acid diethylamide (LSD) was quite popular in the 1960s, especially in the United States, the consumption of this hallucinogen is now stabilised at a very low level. Overall, product innovation can be considered to be low.

- Process innovation

Process innovation, the second component of innovativeness, relates to the measures undertaken by drug criminals in order to avoid the detection and disruption of their business. The drug industry is characterised by six types of process innovation: (1) diversification into other narcotics, (2) strategies to conceal cultivation, (3) diversion into new places of cultivation and processing, (4) diversion of trafficking routes, (5) development of new smuggling techniques, and (6) establishment of novel distribution channels.

In addition to the development of new types of psychoactive substances discussed above, drug producers may also seek to diversify their 'portfolio' by taking onboard established narcotics but which they have not themselves produced before. Such a development has been witnessed in Colombia, where the cultivation of opium has mainly been a reaction to massive US-led coca eradication programmes. The viability of this strategy is, however, curtailed by the climatic conditions certain plant-based drugs (in particular coca

bushes, to a lesser extent opium poppy) require. Coca plants are only grown in tropical climates, and the concentration of cocaine alkaloid—a substance found in some coca species from which cocaine is derived—is found to increase with the altitude at which coca plants are grown (US Department of Justice 1993), thus limiting the coca cultivation to a handful of Andean countries. Furthermore, coca plants cultivated from seed generally require between 12 and 24 months to reach a stage where their leaves can be harvested (US Department of Justice 1993), thus imposing a time-lag on a diversification strategy.

Narcotics farmers also take refuge in a second type of process innovation: concealment of cultivation. It has been reported, for example, that a growing number of coca growers seek to conceal coca cultivation by interspersing other crop such as maize. This strategy is effective against air surveillance, but not against ground surveys.

Geographic displacement of cultivation areas is a third element of process innovation in illicit narcotics. The underlying idea is that whenever some states intensify their anti-drug policies, the production of illicit drugs simply moves to states less committed to combating drugs. Bewley-Taylor (1999), for instance, establishes a link between the effective ban on opium cultivation by the Turkish government in 1972 and the increase in illegal poppy cultivation in Mexico. However, this so-called 'balloon effect' is not undisputed (Weitzman 2005). For example, the success of a recent eradication programme in Colombia was only partly offset by a moderate increase in Bolivia's coca cultivation, with outputs there still remaining far below the peak reached a decade ago (The Economist 2005). The displacement effect for the production of plant-based drugs is, like the diversification strategy mentioned above, limited by climate requirements and time-lags.

A fourth element of process innovation is the development of new trafficking routes. McCoy and Block (1992) report, for instance, how the crack-down on the traditional trafficking route Turkey-Marseilles-New York led to its break-up into more segments with an increased number of transhipment centres, thus making it more difficult to establish the link between the place of origin and the end-destination. Large scale drug trafficking

can however only be diverted to places that possess sufficient transport infrastructure and sufficient legitimate interaction (tourism or trade) with the end-destination, as a strong increase in shipments would otherwise arise suspicion.

Fifth, process innovation occurs related to the smuggling methods employed, both with respect to the mode of transport chosen by the smugglers and the way they seek to conceal illicit drugs. Whereas small private airplanes were the favoured mode of coca smuggling into the United States in the 1970s and 1980s, this strategy was largely abandoned following the implementation of the United States National Air Interdiction Strategy in 1988 and substituted with ground transport via Mexico and shipping by sea (Block 1992). One innovation in recent decades with respect to smuggling techniques has been the concealment of narcotics inside the body of the smuggler whereby he or she swallows the tightly sealed-off narcotics (Bentham 1998). Also with respect to maritime cargo concealment, drug traffickers have displayed a great deal of inventiveness. The Economist (2005) reported, for instance, a case in Peru where the police found 700kg of cocaine stuffed inside frozen giant squid that was ready for export. In other cases drugs were concealed in legal exports of a variety of products, such as planks of weed, carrots and even votive candles.

A final source of process innovation lays in the misuse of technological advances for facilitating the trafficking of narcotics. The International Narcotics Control Board, for example, warned that 'there is a real danger that the benefits of new technologies might be seriously undermined by criminals for illicit gain' (quoted in Capdevila 2002). The internet, in particular, seems to be prone to such misuse. British law enforcement authorities have identified more than 1,000 websites set up to sell various types of narcotics, including ecstasy, marijuana, cocaine, and heroin (Capdevila 2002).

Thus, producers face considerable difficulty diversifying into alternative types of narcotics, concealing cultivation, or dislocating to new places of cultivation and processing, while traffickers are more innovative in choosing trafficking routes, in developing of new

smuggling techniques, and in establishing novel distribution channels. In sum, process innovation is moderate.

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Combining both sources of environmental uncertainty—policy experience and innovativeness in the targeted criminal activity—we can reach the conclusion that this variable only attains low levels in the case of narcotic drugs. It is thus not a determining factor of the design deemed most appropriate in dealing with the problems arising from illicit drugs. Consequently, the level of environmental uncertainty associated with drug trafficking does not require a 'softening' of the hard law suggested by the high levels of asset specificity and behavioural uncertainty as the optimal design solution.

4.2.4 In sum: institutional preferences based on problem structure

Summarising the above analysis of this study's three explanatory variables—asset specificity, behavioural and environmental uncertainty—with respect to narcotic drugs, we find the first two to be of high degrees whereas the latter remains on a low level. Table 4.1 provides a summary of the assessment of the variables. The need for credibility therefore outweighs the need for flexibility, thus suggesting the adoption of hard law measures. The objective of the next sub-chapter is to assess the actual level of legalisation found in the 1988 Drug Convention and to compare it with the design expectations derived from the analysis presented in this chapter.

Problem attribute	Level	Argument
1. Asset specificity	**High**	
A. Potential loss	High	▪ Countries with high prevalence rate of drug abuse and/or drug-related violence hope that international institution will lead to tougher actions against production and trafficking by other states and will thereby reduce their own burden. ▪ Countries suffering under high levels of drug-related violence that international institution will lead to tougher actions against production and trafficking by other states will reduce their burden.
B. Propensity to shirk	High	▪ Consumption of some banned drugs is a well established and socially accepted tradition in some countries. ▪ Cultivation of plant-based narcotics is an important economic factor in some countries (income, employment, foreign exchange). ▪ Thorough eradication programmes could lead to political upheaval and/or undermine peace negotiations with rebel groups linked to the drugs industry.
2. Behavioural uncertainty	**High**	
A. Governance incapacity	High	▪ Many key states in narcotics production and trafficking have only weak governance capacities and are unable make the rule of law prevail throughout their jurisdiction.
B. Relative reliance on governmental monitoring	High	▪ Societal groups suffering from countries' failure to properly implement an agreement to fight illicit drugs (i.e. drug addicts) are weakly organised and do not have direct incentives to serve as effective fire alarms. ▪ NGOs play no important role in data collection and analysis.
C. Industry opacity	High	▪ Nature of the drugs industry requires clandestine operations and maximum opacity.
3. Environmental uncertainty	**Low**	
A. Experience	Low	▪ The negative effects of the drugs trade on public health and crime rates are well accepted and understood. ▪ Countries have been fighting illicit drugs for many centuries and have a good understanding of production, trafficking and distribution. ▪ International cooperation in this area dates back to the wake of the 20th century.
B. Innovativeness		
a. Product innovation	Low	▪ The range of substances classified as illicit drugs has been known for several decades.
b. Process innovation	Moderate	▪ Drug producers cannot easily diversify into alternative types of narcotics, conceal cultivation, or dislocate to new places of cultivation and processing. ▪ Traffickers have a moderate degree of flexibility in choosing trafficking routes, in developing of new smuggling techniques, and in establishing novel distribution channels.

Table 4.1 Summary of the assessment of the constellation of the problem of international illicit drugs production and trafficking.

4.3 Degree of legalisation

The above application of transaction cost economics to the problem of illicit drugs trade allowed us to formulate expectations about the degree of legalisation of the Vienna Convention, considered as best suited to cater for the specific contractual problems arising from this problem constellation. This final subchapter assesses the extent to which the actual design of the 1988 Drug Convention matches these design expectations. For this

purpose, it analyses the convention based on its letter and practice. This analysis is guided by the three dimensions of legalisation—obligation, precision, and delegation—introduced in chapter 2. Each of these dimensions will be analysed in turn before the concluding part compares the expected with the actual design of the Vienna Convention.

4.3.1 Obligation

As elaborated in sub-chapter 2.2.1, the extent to which an international institution imposes obligations on states is determined by three criteria. Firstly, the degree of obligation created depends on whether the core agreement of the institution is *legally* or only *politically* binding. Secondly, the level of obligation of an international institution can be attenuated through provisions that allow states officially to modify and sidestep the obligations they signed up for. Thirdly and finally, an international institution is considered to be more binding when it provides for procedures and remedies to deal with non-compliance. These three criteria will be analysed in greater detail with respect to the 1988 Drug Convention. It will be shown that the level of obligation enshrined in the Vienna Convention can be considered as high, as its legal bindingness and the tenacity of its obligations are high, while it features moderate compliance mechanisms.

4.3.1.1 Legal bindingness

Whether or not signatories intended to make an international agreement legally binding can be assessed based on two indicators: the language in which the agreement is formulated and the procedural provisions that are or are not included in the agreement (entry into force, accession, withdrawal, etc.) and that are followed domestically for the agreement to become effective.

The Vienna Convention was explicitly established to give legal force to the illicit trafficking recommendations which had been formulated in the Comprehensive Multidisciplinary Outline of Future Activities in Drug Abused Control (CMO) adopted at the International Conference on Drug Abuse and Illicit Trafficking held in Vienna in June 1987

(Bentham 1998). It displays all the formal characteristics of a legally binding treaty. It uses language that suggests a legally binding character, exemplified by words such as 'shall' and 'obligations'. It incorporates provisions on accession, entry into force, procedures for amending the convention, and denunciations which are absent in agreements that are not legally binding. Also the process through which signatories ratified the Convention indicates their intent to enter into a legally binding treaty. In the United States, this meant to obtain the advice and consent of the Senate, which was granted on 22 November 1989. The 1988 Drug Convention has also been registered with the UN secretariat and been published in the UN Treaty Series[32]. The convention thus displays all characteristics of a legally binding treaty.

4.3.1.2 Tenacity of obligation

Legally binding international agreements often incorporate provisions allowing parties to modify and weaken their commitments. Three such mechanisms exist: reservations, safeguard and escape clauses and withdrawal. All three instruments are relevant with respect to the Vienna Convention but, as will be argued, on balance, they do not weaken substantially the high level of tenacity enshrined in the Vienna Convention.

- Reservations

Unlike other legally binding conventions, the 1988 Drug Convention does not specify any provisions limiting the submission of reservations. This means that the rather unspecific article 19 letter c of the Vienna Convention on the Law of Treaties applies, which stipulates that 'a State may not submit a reservation which is incompatible with the object and purpose of the treaty'. In contrast, several articles of the convention contain provisions that explicitly permit parties to declare their intention not to be bound by some provisions. For instance, article 32 regarding the settlement of disputes between parties stipulates in paragraph 2 that any dispute that parties fail to solve peacefully on

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[32] The Vienna Convention was filed as Treaty Doc. No. 101-4 (1989).

their own shall be referred to the International Court of Justice. Paragraph 4 of that same article hollows out this obligation by explicitly allowing states to declare themselves not to be bound by article 32 paragraph 2. 34 of the total 172 parties have availed themselves of this opt-out. Such a disclaimer of the ICJ's authority is, however, common practice and found in most international treaties. Also the United States negated the ICJ's authority with a declaration presented with its ratification. Furthermore, the US deposited three reservations with respect to the Vienna Convention. In a first reservation the US emphasised the superiority of its constitution over the convention. In a second reservation the US avails itself of the option granted in article 6 paragraph 3 to make extradition to another party conditional on the existence of a bilateral extradition treaty in force with that party. Finally, the United States also emphasises its right under article 7 to deny extradition requests which prejudice the country's essential interests. Bolivia, for instance, formulated more far-reaching reservations when it declared 'the inapplicability to Bolivia of those provisions of [article 3 paragraph 2] which could be interpreted as establishing as a criminal offence the use, consumption, possession, purchase or cultivation of the coca leaf for personal consumption'. In its reservations the country emphasises the long-standing traditional use of coca leaf in wide parts of the Bolivian society.

- Safeguard and escape clauses

Three articles of the Vienna Convention contain specific safeguard provisions, which relativise the degree of obligation established by these articles. Article 2 paragraph 2 stipulates the inviolability of state sovereignty, and article 3 paragraph 2 letter c, article 3 paragraph 1 letter c, paragraph 2 and paragraph 10 the primacy national legal systems. Also, article 7 paragraph 15 limits the degree of obligation of its mutual legal assistance provisions by allowing parties to refuse such assistance 'if the requested Party considers that execution of the request is likely to prejudice its sovereignty, security, order public or other essential interests'. These safeguards are overall less far-reaching than found in most treaties.

- Withdrawal

Finally, as an option of last resort, parties can withdraw from international agreements and demonstrate this way that they no longer consider themselves to be bound by the obligations spelled out in that agreement. Also the Vienna Convention allows for denunciation but imposes heavier constraints on this option than do most international treaties. The convention requires under article 30 the elapse of one year, a period much longer than stipulated by most other conventions, before the denunciation submitted by a party takes effect.

4.3.1.3 Compliance mechanisms

With respect to the final aspect of obligation—the procedures and remedies for non-compliance—two aspects stand out as particularly relevant. First, international agreements that ensure that parties' behaviour is closely monitored are considered to have a higher level of obligation than those that do not. Second, non-compliance needs not only to be detected but also to entail consequences for the fallible party. It will be shown that the Vienna Convention possesses moderately strong compliance mechanisms.

- Monitoring

The monitoring mechanism enshrined in the Vienna Convention is one based on states' self-reporting. Article 20 paragraph 1 asks parties to provide the Commission on Narcotic Drugs of the Economic and Social Council of the United Nations (Commission) information on the working of the Convention in their territories. In particular, states have to provide the Commission with the texts of laws and regulations promulgated in order to give effect to the convention and also with particulars of cases of illicit traffic within their jurisdiction, which they consider important because of new trends disclosed, the quantities involved, the sources from which the substances are obtained, or the methods employed by persons so engaged. Paragraph 2 gives the Commission the authority to

outline the modalities of the provision of such information. This aspect will be discussed further under 4.3.3.

Thus, the Vienna Convention does establish a mechanism to monitor parties' compliance with the convention. This mechanism is not particularly strong, as it relies exclusively on self-reporting.

- Sanctions

Brewley-Taylor (1999) notes that the 1988 Drug Convention strengthened the enforcement mechanism established by the previous conventions. Article 22 of the Vienna Convention authorises the independent International Narcotics Control Board to suggest remedial measures against non-compliance. However, it does not specify what such remedial measures could be and what the consequences are in case these measures are not adopted. The most likely consequence is that the Board may recommend other parties to cease their (legal) drug exports to the non-complying state.

More important than material sanctions are in the context of the Vienna Convention the reputational cost associated with non-compliance. Bewley-Taylor argues that the reputational costs are particularly high in this policy area as the UN drug-control bodies enjoy the 'image of a benevolent movement whose mission it is to safeguard the well-being of *all* humankind' (1999, 172 emphasis in original), thus conferring upon them and their decisions and recommendations 'substantial moral influence and suasion'. In this respect, the UN anti-narcotics framework as established by the Vienna Convention represents what Donnelly (1992) referred to as a 'promotional regime'. However, the UN bodies' role in enforcing the international drug control regime goes beyond the promotion of international norms through public information, at least in an indirect, yet important, way.

In addition—and not established by the Vienna Convention—non-compliance with it gives rise to unilateral sanctions imposed by the United States. Pursuant to the Anti-

Drug Abuse Act of 1988, the US president is required to certify whether the world's major drug-producing and -transit countries are cooperating fully with the United States, or taking adequate steps on their own, to meet the goals and objectives established by in the 1988 Drug Convention. If a country is found wanting in its anti-drug efforts and 'decertified', it sees half of the assistance it receives from the US government being withheld until it meets the conditions necessary to be re-certified. Furthermore, decertification provokes the veto of the US representatives to international financial institutions against any loans the declassified country requests (Atkins 1997), and the cessation of previously agreed preferential tariff treatment (Perl 1992). This policy has provoked widespread international criticism not at least because the (de)certification decision is based as much on technical as on political considerations, whereby the latter come primarily in the form of an often invoked national interest waiver.

For this reason Brewley-Taylor reaches the conclusion that given '[t]he moral voluntarism of the UN ... combined with the unilateral pressure exerted by the Washington ..., the international regime becomes more coercive than promotional' (1999, 172).

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In sum, the Vienna Convention is of a legally binding nature, uses obligation-attenuating provisions only scarcely and establishes considerable mechanisms to detect and sanctions non-compliance. It thus establishes a comparably high degree of obligation.

4.3.2 Precision

The second design dimension, precision, refers to two aspects: the determinacy and the coherence of an international agreement. In the following, these two elements will be analysed for the 1988 Drug Convention. This assessment reaches the conclusion that the degree of precision enshrined in the Vienna Convention is moderate, with both determinacy and coherence being moderate.

- Determinacy

Most of the Convention's articles are formulated as 'standard-like' provisions (Abbott and Snidal 2000). While spelling out which acts should be criminalised and punished under domestic law, it grants states the discretion to determine the exact level of punishment for these offences. The Vienna Convention contains a number of ambiguous expressions such as 'as it deems appropriate' (article 21 letter d) but the overwhelming majority of articles are specific enough to distinguish clearly between compliance and non-compliance.

The term 'appropriate' is mentioned 30 times in the 95 paragraphs of the agreement excluding the preamble. For example, article 3 paragraph 4 letter c allows for exceptions 'in appropriate cases of a minor nature', and article 12 calls upon states to 'take the measures they deem appropriate to prevent diversion of substances'. In article 3 paragraph 6, the Convention uses the form 'shall endeavour to ensure' instead of 'shall ensure', which gives the impression that signatories were not all too serious about creating clear-cut obligations. In article 11 paragraph 1 the Convention asks states to take measures 'within their possibilities', which indicates that different standards exist for different countries, without specifying objective criteria to assess the capabilities of different signatories.

It will be of great relevance for the following section of this thesis that article 21 contains several unspecific terms. This article describes functions of the Commission, which 'is authorised to consider all matters pertaining to the aims of this Convention...'. Letter c posits that the Commission 'may call the attention of the Board to any matters which may be relevant to the functions of the Board', while the Convention does not specify under which circumstances such a referral is deemed justified or desirable. According to letter d, 'the Commission shall, on any matter referred to it by the Board under article 22, paragraph 1 b), *take such actions as it deems appropriate*', whereas the term appropriate is not further explained. Similar indeterminacies exist in article 22 which deals with the functions of the Board. Paragraph 1 letter a posits that 'if .... the Board has rea-

son to believe that the aims of this Convention in matters related to its competence are not being met, the Board may invite a Party or parties to furnish any relevant information', or in letter b '... the Board ... may call upon the Party concerned to adopt such remedial measures as shall seem under the circumstances to be necessary for the execution of the provisions of article 12, 13 and 16'.

However, the ambiguity of some parts of the agreement must not be over-emphasised. The 21 key terms used in the Convention are meticulously defined in article 1 and many articles spell out very precise obligations. For example, article 11 paragraph 10 letter a prescribes the type of information to be exchanged between states prior to the legal trafficking of narcotic substances. Bassiouni and Thony highlight that 'the 1988 Drug Convention contains the most comprehensive provisions for international penal cooperation. More particularly its provisions on extradition, mutual legal assistance, and money laundering are the most detailed of any other international criminal law convention' (1999, 927). Bentham argues that 'the legal definitions of drugs on the controlled substances list are often very narrow, both in order to enhance the strength of cases brought in the legal system, and in order not to unduly inhibit or discourage legitimate chemical and pharmacological research' (1998, 47).

- Coherence

Furthermore, the Convention in its entirety fulfils Franck's (1990) criterion for coherence, as its provisions relate to one another in a non-contradictory way, allowing for a coherent interpretation of an indefinite number of cases. The Convention, nonetheless, contains a few inconsistencies the cause of which is the desire of different states to incorporate their own interpretation of narcotics into the agreement. In article 3 paragraph 4, for example, letter a asks for punishment of drug offenders, whereas letter c allows for treatment and education. Letter a represents the view of those countries, which primarily view the criminal dimension of drug consumption, whereas letter c represent the view of certain European countries, which emphasise the public health side of the drugs problem.

4.3.3 Delegation

The overall degree of delegation incorporated in the 1988 Drug Convention is high. It does not create a new organisation to which it delegates tasks, but builds upon several anti-drug bodies that had previously been established within the UN framework, namely the UN Commission on Narcotic Drugs (CND), the UN Office for Drug Control and Crime Prevention (today called the Office on Drugs and Crime)[33] and the International Narcotics Control Board. The Convention explicitly reaffirms the UN's competence in the field of control of narcotic drugs and psychotropic substances in its preamble and increases the 'administrative' and 'policy' powers of the Commission on Narcotic Drugs and of International Narcotics Control Board, to an extent that they are now providing a 'basis for an eventual direct control system' (Bassiouni and Thony 1999, 917). One important source of independence of the UN drug control bodies lies in their success in shaping its image as neutral and benevolent bodies safeguarding mankind from the danger posed by drugs (Bewley-Taylor 1999). Donnelly (1992) notes how the UN drug control bodies have managed to establish themselves as the core of a global 'promotional regime' that promotes the globalisation of anti-drugs norms, thereby working quietly towards the expansion of its own narcotic drug control programme. Delegation to UN drug control bodies delivers a good illustration of the 'policy-bias' creating effect of delegation mentioned in chapter 2, as it 'played an important role in creating and perpetuating a US-style international drug control regime' (Bewley-Taylor 1999, 170), which is predominantly prohibitionist in its orientation.

A general feature of the delegation within the UN anti-drugs regime is that, while substantial issue areas are delegated to the drugs control bodies, the exact competencies of these bodies are not precisely formulated in the relevant international agreements. This

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[33] The name was changed on 1 October 2002. The UNODC also incorporates the UN International Drug Control Programme (UNDCP) and administers the Fund of the UNDCP. To avoid unnecessary confusion this, study uses the current name of this administrative body.

opens the door to a high level of delegation, as imprecise formulations give much room to these agencies to set their own agendas.

In the following, the degree of delegation to the three UN drug control bodies will be analysed, thereby distinguishing between centralisation, i.e. the scope of the activities delegated to each of these three bodies, and independence, i.e. these bodies' autonomy in decision-making. It will be shown that, in sum, the UN bodies enjoy a high degree of independence and centralisation, and consequently the degree of delegation can be assessed to be high.

- CND

The United Nations Commission on Narcotic Drugs (CND) was established as a functional commission by the Economic and Social Council (ECOSOC) in 1946. It assumes the role of the legislative body (Bassiouni and Thony 1999) within the UN's Drug Control framework which 'analyses the world drug situation and develops proposals to strengthen the international drug control system to combat the world drug problem' (UNODC 2004a). Article 21 of the Vienna Convention assigns the CND an important status, as it is not only mandated 'to review the operation of this Convention' (letter a) but also to 'make suggestions and general recommendations' (letter b). The CND's independence from the member states is not, however, full-fledged. On the one hand, the CND is a permanent institution and its fifty-three members are elected by the ECOSOC to serve in their personal capacity and not directly appointed by the member states as their representatives, which strengthens the CND's independence. Furthermore, members are appointed for a four-year term, a period long enough to allow for the emergence of an *esprit de corp*. On the other hand, the fact that members have to be selected so as to allow for an equitable geographical distribution among the major regions weakens the body's independence, as it reduces the probability that the interests of specific regions are overruled. Also, the independence-enhancing aspect of a reasonably long term of office is mitigated by the fact that CND members meet only once a year.

- UNODC

The Vienna-based Office on Drugs and Crime (UNODC) assumes the executive (Bassiouni and Thony 1999) function of the UN drug control system. Its mission is threefold. First, it strengthens the UN's and the member states' understanding of the drug problem through the compilation and analysis of statistics. It sends out reporting questionnaires to all parties and analyses and compiles their responses in the World Drug Report, which is published annually. Second, as part of its Legal Advisory Programme, the UNODC assists states in the drafting of anti-drugs legislation and in the training of judicial officials. Finally, through its 21 field offices the UNODC provides field-based technical support to member states for projects such as alternative crop development or illicit crop monitoring.

The UNODC enjoys a considerable degree of independence from member states. It possesses a permanent body of staff, comprising approximately 500 members worldwide, who are not delegated by member states but recruited through the UN. The UNODC also operates under the sole direction of a UN under-secretary general. The UNODC's independence is however potentially circumscribed by its direct reliance on voluntary financial contributions from governments, which account for approximately 90 per cent of its budget (UNODC 2004b, 3). The extent to which the UNODC's independence is in practice limited through this financing mechanism depends on the relative importance of individual states' contributions and on the extent to which large contributors use the threat of withholding their contributions as a tool for influencing the UNODC. The United States once reportedly threatened to avail itself of this tool, although not with respect to the UNODC but the WHO's Programme on Substance Abuse of the early 1990s. This programme commissioned the largest global study on cocaine ever conducted, which produced the controversial findings that the traditional consumption of coca leaf by the Andean population might serve positive functions. Following the release of this study, rumours circulated that the US had threatened to withdraw funding from this programme. No such incidents are, however, known with respect to the UNODC's work.

- INCB

The most far-reaching delegation is found in the International Narcotics Control Board (INCB or Board). The INCB is a permanent and quasi-judicial control organ responsible for promoting government compliance with the UN drug conventions. It was established by the Single Convention in 1968, but already had predecessors under the LoN anti-drug conventions. The Vienna Convention reaffirms and expands the Board's competences in articles 22 and 23. The Board plays a role both in the regulation of the licit manufacture and sale of drugs and in the fight against the illicit manufacturing and trafficking. With regard to the licit drugs industry, the Board endeavours to ensure that adequate supplies are available for medical and scientific uses, and that leakages from licit sources to illicit traffic do not occur. To this end, it administers an estimates system for narcotic drugs and a voluntary assessment system for psychotropic substances. In addition, the Board monitors international trade in drugs through the statistical returns system.

With respect to illicit manufacture and trafficking of drugs, the Board identifies where weaknesses in the national and international control systems exist and contributes to correcting the situation. Further, the Board is responsible for assessing chemicals used illicitly to manufacture drugs for possible international control. The Board also monitors government control over chemicals used in the illicit manufacture of drugs and assists them in preventing diversion of these chemicals into illicit traffic.

In this function, it is vested by article 22 of the Vienna Convention with the authority to invite parties, who are believed to reach insufficient compliance levels, to furnish additional information. Furthermore, it 'may call upon the Party concerned to adopt such remedial measures as shall seem under the circumstances to be necessary' (article 22 letter b).

The Board enjoys an unusually high level of independence from member states. As in the case of the CND, the thirteen members of the INCB are elected by the ECOSOC. Unlike the CND members, all INCB members serve in their personal capacity and are elected in

a secret ballot on the basis of their competence (Bassiouni and Thony 1999). The Board members are often recruited from academic and diplomatic circles. Three members are elected from a list of candidates put forward by the World Health Organisation and the remaining ten from a list nominated by governments. The INCB's independence from member states was, for example, demonstrated in May 2001, when the most powerful party, the US, was voted off the Board. Also, the term of INCB members is one year longer than that of CND members. The independence of the Board is further strengthened through its financial independence from member states—it is funded by the UN budget—and its decision-making procedures, which only require a two-thirds majority (article 22 paragraph 4) and not consensus.

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Overall, the international anti-drug institution based on the Vienna Convention reaches comparably high levels of delegation, as the three UN bodies assigned with the implementation and further development of the drug control framework assume significant functions and enjoy considerable independence.

4.3.4 In sum: institutional design

The above discussion has shown the Vienna Convention as an example of hard law. The Convention's level of obligation and delegation are high, while the level of precision is moderate. Table 4.2 summarises the key features of the Vienna Convention.

Indicator	Level	Argument
1. Obligation	**High**	
A. Legal bindingness		
a. Language	High	▪ Agreement text uses language that suggests a legally binding character, featuring forms such as 'shall' and 'obligations'.
b. Procedural provisions	High	▪ Agreement is registered under article 102 of the UN charter. ▪ Agreement was subjected to domestic ratification procedures.
B. Tenacity of obligation	High	▪ Agreement contains a moderate number of reservations, most of which are of moderate scope. ▪ Agreement contains fewer escape clauses than comparable international agreements. ▪ Parties can withdraw from the agreement one year after denunciation.

C. Compliance mechanisms		
a. Monitoring	Moderate	▪ States have to provide data requested by the Commission. ▪ No third party monitoring enshrined in agreement.
b. Enforcement	Moderate	▪ Consequences for non-compliance are not spelled out in the agreement. ▪ High reputational costs can result from non-compliance. ▪ Unilateral third party sanctioning not enshrined in text of the agreement but of great importance.
2. Precision	**Moderate**	
A. Determinacy	Moderate	▪ A moderate proportion of provisions leave room for interpretation, e.g. 30 out or 95 paragraphs contain the term 'appropriate'. ▪ Determinacy high compared to other international agreements.
B. Coherence	High	▪ Provisions relate to one another in a non-contradictory way. ▪ Provisions do not contradict other principles or rules of international law.
3. Delegation	**High**	
A. Independence		
a. Human resources	High	▪ CND members elected by ECOSOC, not directly appointed by member states, serving a four year term ▪ UNODC staff recruited through the UN ▪ Members of the INCB are experts, serving in their personal capacity and are elected by ECOSOC
b. Financial resources	Moderate	▪ UNODC relies on voluntary contributions of member states ▪ INBC funded through UN budget
c. Decision making	High	▪ INBC decision-making procedures require a two-thirds majority, no member possesses veto power ▪ Not all members represented in decision making bodies (CND 53 members, INBC 13 members)
B. Centralisation		
a. Rule making	High	▪ CND analyses the world drug situation and develops proposals for further development ▪ Delegation of competency to anti-drug agencies substantial and not precisely formulated, providing room for agencies to set their own agenda
b. Implementation	High	▪ UODC provides field-based technical support to member states for projects such as alternative crop development or illicit crop monitoring ▪ UNODC provides training and legal advise for states drafting anti-drugs legislation
c. Dispute resolution and enforcement	Moderate	▪ INCB invites parties, who are believed to reach insufficient compliance levels, to furnish additional information. ▪ INCB calls upon non-complying parties to adopt remedial measures, which it recommends

Table 4.2 Summary of the assessment of the degree of legalisation of the 1988 Vienna Convention.

4.4 Comparing expectations and reality

Sub-chapter 2 argued that the problems evolving around the production, trafficking and consumption of illicit drugs required an international policy response with high levels of legalisation in order to cater for the hazards arising from high levels of asset specificity and behavioural uncertainty. Some states are found to benefit significantly from an effective international anti-drugs institution while others have strong incentives to shirk from their obligation and many ways to conceal their non-compliance. The environmental uncertainty of the problem is assessed to be low, as countries possess a great

wealth of expertise in combating drugs, while the narcotics industry as a whole is not particularly innovative. Therefore, flexibility is not a major consideration so that the optimal design remains hard law as suggested by the first two TCE variables.

The actual institutional design incorporated in Vienna Convention matches this expectation we derived from the analysis of the underlying problem constellation. The agreement shows a high level of obligation, which is obvious from the intentions of the signatories reflected in the treaty's language and the ratification procedure. The convention was also registered under article 102 of the UN Charter. Signatories have only limited opportunities to evade from the obligations imposed by the agreement, as few escape clauses exist and withdrawal is lengthy. While no sanctions are outlined in the agreement itself, non-compliance is costly due to reputational costs and unilateral sanctions by the USA. Furthermore, the Vienna Convention has also a high level of precision and a high level of delegation. The convention draws upon three existing UN agencies to ensure compliance. These agencies have different, though in sum high level of centralisation and independence.

Thus, in case of the Vienna Convention, there is a strong match between the expected and the actual institutional design.

5 Money Laundering: The Financial Action Task Force and its Forty Recommendations

This chapter engages with a phenomenon that first gained prominence primarily as a result of spreading disillusionment with the international war on drugs: money laundering. Unknown as a legal concept until the 1980s, money laundering developed from 'one of the buzz phrases of crime in the 1990s' (Gold and Levi 1994, 7) into a veritable 'roar' in the 2000s (Beare 2001). The rise of money laundering reflects academics' and policymakers' growing interest in the financial factors motivating and facilitating crime and armed conflict (see next chapter). Great hope was raised that combating money laundering could serve as an effective and possibly self-financing tool to tackle the trafficking in illicit drugs and other forms of serious crime. Given the transnational dimension of money laundering activities, policymakers soon realised that they could only succeed in combating this phenomenon when coordinating their efforts, resulting in an ever increasing number of international agreements. The Financial Action Task Force (FATF), which was specifically created for this purpose, has become the core player in what has developed into a global anti-money laundering regime. This chapter seeks to explain the institutional design of the Forty Recommendations issued by the FATF, based on the particular constellation underlying the money laundering phenomenon. As in the preceding case study, this analysis of the problem constellation will be guided by the three transaction cost economics variables: asset specificity, behavioural uncertainty and environmental uncertainty. This analysis should allow us to generate expectations about the optimal institutional design to be enshrined in an international agreement established to tackle money laundering. However, the analysis of the problem constellation underlying money laundering presents us with an intriguing theoretical puzzle, as the two functional attributes that are found to be the central drivers, namely asset specificity and environmental uncertainty, give rise to contradictory expectations. On the one hand, the high level of asset specificity associated with anti-money laundering cooperation requires an agreement with strong credibility, and thus with high levels of legalisation. On

the other hand, the many significant environmental uncertainties with which efforts to combat money laundering are plagued suggest highly flexible agreements with low levels of legalisation as the optimal solution. The scrutiny of the actual design of the Forty Recommendations as published by the Financial Action Task Force in 2003 allows us to see how policy makers have dealt with this contradiction. Before embarking on the analysis of the problem constellation and the Forty Recommendations, a brief *tour d'horizon* establishing the reasons why policymakers perceived money laundering as a problem that needed to be tackled and presenting the major international initiatives they launched for this purpose seems indispensable in order to position the theoretical analysis in its wider context. This task will be tackled in the next sub-chapter.

5.1 Money laundering as an international policy problem

Prior to scrutinising money laundering from the functionalist perspective developed above, it is essential to understand the wider phenomenon. A first section therefore addresses the question why money laundering has been seen as a problem requiring and deserving international cooperation. The subsequent section provides an overview of the major international agreements that have been adopted for this purpose. The third section finally introduces the FATF's Forty Recommendations of 2003, which will be the focal point of the reminder of this chapter.

5.1.1 What is money laundering and why is it a problem?

Increasing professionalisation and diversification of organised crime over the last couple of decades has led to a surge in illicitly-acquired profits. As Stessens (2000) points out, the profits now exceed the levels necessary for reinvestment in criminal activities by far, thereby necessitating active financial management very much comparable to that of firms operating legally. Given the sheer volume of profits generated by the provision of illegal goods and services, organised crime groups find it increasingly difficult to use legal savings and investment instruments without attracting the interest and suspicion of law enforcement agencies. For this reason, they developed mechanisms to convert illicit

cash into other assets, whereby concealing the true ownership or source of the illegally acquired proceeds and creating the perception of legitimacy of source and ownership. These three elements—conversion, concealment and false legitimacy—form the quintessence of money laundering (Beare and Schneider 1990, ; FATF 2003a, ; President's Commission on Organized Crime 2001). This transformation of dirty money into clean money necessitates the co-operation of third persons associated with licit business sectors. The criminalisation of money laundering targets particularly this 'soft belly' of the laundering process (Sheptycki 2000, 150) as it aims at 'disrupting the co-operation provided by third persons in hiding the proceeds from crime and giving those proceeds a legitimate appearance'[34] (Stessens 2000, 6).

Estimates on the volume of money being laundered around the globe vary considerably. The number most commonly referred to is the one given by the International Monetary Fund (IMF) (Camdessus 1998). According to this source, aggregated money laundering flows account for two to five percent of the world's gross domestic product, thus ranging between US$600 billion to US$1.5 trillion per year. The lower end of the estimates circulating in the academic press and policy circles is US$500 billion (Schroeder 2001) whereas US$2.8 trillion per year mark the upper limit (Walker 1999). Two main reasons explain why these estimates span such a wide range. First, the clandestine nature of money laundering defies any systematic estimation of size (Reuter and Petrie 1999). Second, as will be discussed in greater detail below, the list of predicate[35] offences associated with the legal definition of money laundering is ever expanding, with the result that the distinction between licit and illicit finance, between organised crime, corporate crime and ordinary business (Sheptycki 2000, 136) is increasingly blurred. The US government estimates that approximately two thirds of the laundered proceeds are related to drugs trafficking.

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[34] See also definition by Interpol (Interpol 2005).

[35] The Forty Recommendations apply to the laundering of the proceeds of a number of criminal activities, which are listed in the glossary of the Forty Recommendations. These criminal activities are called predicate offences.

The monitoring of money laundering is becoming increasingly difficult. With the liberalisation of exchange controls in most advanced economies and growing economic integration, the world has witnessed an unprecedented surge in international capital flows. Capital outflows from the thirteen leading industrialised economies rose from US$52 billion in the late 1970s to approximately US$677 billion in 1995, which equals an increase of more than 1,200 percent. The explosion in foreign exchange transaction was similar, with an increase from US$600 billion per day in April 1989 to US$1.5 trillion per day in April 1998 (Council of Economic Advisors 2000, 205). This development has certainly been beneficial in terms of global economic growth. Simultaneously, however, it considerably impedes the monitoring of financial flows, as an increase in the overall volume of international transactions provides more opportunities for launderers to disguise illegal funds (Quirk 1996, 223f.).

Money launderers usually seek to conceal the true origin of the proceeds through a three-stage process (FATF 2003a, ; Zagaris 1992). During the first stage, the so-called placement stage, illicit cash proceeds are physically deposited into a bank account. Larger amounts of cash are often broken up into less conspicuous smaller sums. The purpose of the subsequent layering stage is to disassociate the 'dirty' money from its source. Money launderers seek to achieve this through a complex series of financial transactions such as the wiring of funds through a globally scattered network of bank accounts or the purchasing and selling of investment instruments. Finally, the launderer integrates the processed funds and inserts them into the legitimate economy in the form of, for example, investments in real estates, business ventures or luxury assets.

Money laundering is a transnational phenomenon, as dirty money is usually transferred across several borders throughout the three stages (FATF 2003a). The placement of the dirty money typically takes place in the same country where the illicit profits were generated. For the layering of the money, countries are selected that provide an adequate financial infrastructure and great stability. The integration of the money may involve still another set of countries deemed to provide attractive investment opportunities in a sta-

ble economic environment. This transnational dimension of money laundering is confirmed by law enforcement agencies which found that 80 percent of the money laundering operations detected in Canada (Beare and Schneider 1990, 304) and 90 percent of those detected in Belgium (Stessens 2000, 90) transcended the national border. The most prominent case of money laundering, the now infamous Bank of Commerce and Credit International (BCCI) involved no less than thirty-two countries, including the Bahamas and Cayman Islands, Canada, Colombia, Luxembourg, Nigeria the United Arab Emirates, the United States and the United Kingdom, in some money laundering operations (Robinson 1994, 276-290). The Antigua-based European Union Bank provides another illustrative example in case. This shell bank was founded by two Russians and allegedly involved in the laundering of illicit proceeds of Russian organised crime groups. Misleadingly carrying the name of the European Union, the bank was officially licensed by the government of Antigua, but had no physical presence in that country. The bank mainly consisted of a computer server, which was located in Washington DC, and an operator who was based in Canada (Blum et al. 1998). This single case involved no less than four countries, thus raising the difficult question of which jurisdiction is entitled to investigate and prosecute it.

The main goals governments seek to achieve with anti-laundering policies are twofold (Savona 1996). First, they consider the fight against money laundering as a strategy to combat crime by systematically confiscating its illicit proceeds and thus decreasing the financial incentives for engaging in criminal activities in the first place while also eliminating the financial means necessary to launch new criminal operations. Furthermore, law enforcement agencies hope to increase the detection rate of criminal organisations by tracing back the money trail. Given the very questionable success of the global 'war on drugs', this hope was particularly high with respect to the narcotics trafficking business. It was also hoped that by seizing the proceeds of crime this form of law enforcement could eventually become self-financing.

Second, governments seek to defend the transparency and integrity of the economic and financial system through anti-money laundering legislation. Legitimate money and investments cannot compete with the illicit sector, as the second is not subject to taxes and other forms of state control. Criminal money thus 'pollutes and infects' domestic and international financial systems, 'altering competition in the market place' (Savona 1996, 218). The particular challenge policymakers faced in their efforts to curb money laundering was to pursue this goal without hampering the free capital flows which are seen as essential to international economic growth (Helleiner 2002). Some authors, however, question the importance of this second argument. Simmons (2000), for example, points out that financial institutions do not derive any immediate economic benefits from the implementation of tough anti-money laundering measures while incurring substantial costs from doing so.

Given the increasingly transnational nature of money laundering, governments soon realised that they could only curb money laundering effectively through intensive international cooperation, which led to the adoption of a number of international agreements dealing with this issue. The next section provides a brief overview of the most important international initiatives launched to 'take profit out of crime'.

5.1.2 International initiatives dealing with money laundering

Money laundering is a rather recent legal concept, whose internationalisation is largely the result of a strong US-led campaign seeking to enlist law enforcement agencies from around the world for this new front against the narcotics industry (Sheptycki 2000, ; Simmons 2000, ; Zagaris 1992). It was only in 1982, that money laundering was for the first time officially referred to in a court ruling on the confiscation of laundered Colombian drug proceeds in the United States[36] (see Stessens 2000, 83). First legal attempts to curb money laundering were undertaken in 1986 with the passage of the Money Laun-

[36] United States v $4,255,625.39 (1982) 551F Supp 314.

dering Control Act, which criminalised the knowing participation in the laundering of money. The Money Laundering Prosecution Improvement Act of 1988 intensified and internationalised the US government's anti-money laundering efforts. Several provisions included on a last-minute basis at the behest of Senator John F. Kerry required the US government to undertake international negotiations aimed at expanding the access to information on cash transactions in US dollars wherever such transactions occurred worldwide. The Kerry Amendment provided the US president with the power to sanction recalcitrant and non-complying foreign banks by denying them access to the US financial market. However, this unilateral attempt to impose US currency transaction laws on foreign governments and to isolate those who were not complying was crowned with little success (Simmons 2000, 249; Zagaris 1992, 22). Zagaris (1992, 22) reports that the unenthusiastic Department of Treasury only managed to finalise a transaction reporting agreement with Venezuela. But this threat to use extraterritorial legal authority worked as an effective 'stick' compelling other states into supporting the multilateral anti-money laundering initiatives launched by the US.

A first such US initiative as the inclusion of anti-money laundering provisions in the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, which has been discussed in length in the previous chapter. This Convention constituted the first binding multilateral agreement to criminalise money laundering and the knowing participation of third parties in such activities (article 3 paragraph 1). The Vienna Convention addresses explicitly banking secrecy and stipulates that the reference to this principle should not justify a party's refusal to trace, identify, seize, and freeze criminal proceeds upon request by another party (article 5 and 6). The Convention's emphasis on law enforcement contrasts with the Basel Statement of Principles for the Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering[37], which was adopted only a few days prior to the Vienna Conven-

[37] Reprinted in Gilmore (2005).

tion, on 12 December 1988 by the then 12 members[38] of the Basel Committee on Banking Regulations and Supervisory Practices. The primary concern of this statement was to minimise the negative consequences for banks, for example in the form of a sudden loss of public confidence (Stessens 2000, 16), potentially resulting from an infiltration with dirty money (Sheptycki 2000, 150). The statement was deliberately formulated as a non-binding agreement spelling out the 'minimum standards for the quality of assets held in investment portfolios' (Sheptycki 2000, 150). It was drafted by representatives from the US Federal Reserve, the Federal Deposit Insurance Corporation, and the Comptroller of the Currency upon the request of the Basel Committee (Zagaris 1992, 35f.). The statement is based upon four key principles: customer identification ('know your customer'), compliance with domestic legislation, cooperation with law enforcement agencies, and information and training of banking staff so as to enable them to detect potential money laundering attempts. A special emphasis was later given to the first principle, which finally led to the adoption of a separate statement on Customer Due Diligence for Banks adopted in October 2001. The Basel Statement presents the first recognition by major banks worldwide of their responsibility in countering money laundering. It has also been endorsed by banking groups which are not members of the Basel Committee, such as the Offshore Group of Banking Supervisors, which consists of 19 members including major financial centres such as Hong Kong and Singapore, and other offshore financial centres such as Jersey, the Cayman Islands and Cyprus (Evans 1997a).

The negotiations in the run-up to the UN Drug Convention gave rise to the determination among some negotiators to go beyond the anti-money laundering measures stipulated in the Vienna Convention (Zagaris 1992). The binding Council of Europe Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds of Crime of 1990 (CoE Money Laundering Convention, CETS No. 141) is one such manifestation. The CoE Money Laundering Convention constitutes the first international binding agreement that focuses exclusively on money laundering (Stessens 2000, 23). It is also the first in-

[38] G-7 plus Belgium, Luxembourg, the Netherlands, Sweden, and Switzerland.

ternational legal instrument to extend the crime of money laundering beyond drug-related cases and to include the proceeds of all 'serious crime' (Preamble) (Sheptycki 2000, 150). Like the Vienna Convention, the CoE Money Laundering Convention contains both substantive criminal law provisions, and mechanisms for international co-operation in transnational cases of money laundering (Stessens 2000). In addition to the then 23 CoE member states, also Australia, Canada, Colombia and the United States participated in the elaboration of this Convention. The Convention entered into force on September 1, 1993, and has been ratified by a total of 47 states[39] by October 2005. It was complemented by the Council of Europe Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198), which was adopted on 16 May 2005 but has not entered into force at the time of writing.

The European Community also became active with respect to money laundering as it feared that money launderers could misuse the creation of a single financial market for their own purposes (Savona 1999). For this reason, the Council adopted the European Community Directive for the Prevention of the Use of the Financial System to Launder Suspect Funds (91/308/EEC) on June 10 1991. This Directive pursues three broad objectives. First, it seeks to criminalise money laundering throughout the European Community (article 2). It targets only proceeds derived from drug-related offences (as does the Vienna Convention), but encourages member states in the Preamble and in article 1 to extend the definition of money laundering offences so as to include the proceeds from other criminal activities. Second, articles 3 to 11 spell out a list of obligations of credit and financial institutions such as the 'know your customer'-maxim, reporting of suspicious transactions, and co-operation with law enforcement authorities. Third, the remaining articles (12-15) grant member states the right to amend the preceding provisions in accordance with their domestic circumstances. The directive was amended and

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[39] Despite participating in the drafting of the Convention, Canada, Colombia and the US have not yet ratified the Convention.

updated for a first time by directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001. It has been revised one more time since, and on 7 June 2005 the EU council of finance ministers reached an agreement on the text of a third anti-money laundering directive.

In the same year the Vienna Drug Convention was finalised, i.e. in 1988, the leaders of the G-7 (now G-8) countries put money laundering on the agenda of their summit in Toronto where they issued a statement of interest to cooperate in the fight against money laundering. One year later, this statement of intent led to the establishment of an institutionalised platform for international cooperation on money laundering—the Financial Action Task Force (FATF). The FATF was officially mandated 'to assess the results of co-operation already undertaken in order to prevent the utilisation of the banking system and financial institutions for the purpose of money laundering, and to consider additional preventative efforts in this field, including the adoption of legal and regulatory systems so as to enhance multilateral judicial assistance' (cite in Gilmore 1992, 3). This task force comprised originally representatives from all G-7 member states and from eight other interested countries[40]. To date, the FATF comprises a total of 30 member states[41] from every continent, plus Hong Kong and two regional organisations, namely the European Community and the Co-operation Council for the Arab States of the Gulf[42]. In January 2005, China was granted observer status and is working towards full membership. Also a potential future membership of India is currently under consideration (FATF 2005b). The FATF is an intergovernmental body whose secretariat is nested in the headquarters of the Organisation for Economic Cooperation and Development (OECD) in Paris, but it remains fully independent of the OECD and any other international organisation. The FATF published a first set of Recommendations on April 23, 1990 on how governments and financial institutions can contain and combat money

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[40] Australia, Austria, Belgium, Luxembourg, Netherlands, Spain, Sweden, Switzerland.

[41] Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, Kingdom of the Netherlands, New Zealand, Norway, Portugal, Russian Federation, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States.

[42] Representing Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates.

laundering. In 1996, the FATF released an updated and expanded version of the original Forty Recommendations. The revision did not result in any drastic changes but was deemed necessary in order to adjust to changes in money laundering practices, the broadened membership base of the FATF, and potential future threats. A second process of reviewing and updating the Recommendations was finalised on 10 June 2003. This latest version also addresses explicitly terrorist financing[43], an issue that was included into the FATF's mandate following the terrorist attacks on New York and Washington DC in September 2001.

The rest of this chapter focuses on the FATF's Forty Recommendations of 2003, as they enjoy widespread international endorsement and have been recognised by the International Monetary Fund and by the World Bank as the international standards for combating money laundering (FATF 2003c, iii). Joseph Myers, acting deputy assistant secretary of the US Department of Treasury reports that '130 jurisdictions—representing about 85 percent of world population and about 90 to 95 percent of global economic output—have made political commitments to implementing the Forty Recommendations' (2001, 9). The FATF Recommendations have furthermore exerted significant influence on other anti-money laundering initiatives. For instance, the European Council directive 91/308/EEC mentioned above adopted no less than fifteen of the Forty FATF Recommendations of 1990 (Stessens 2000, 18). In addition, based on the FATF model and with direct support from the FATF, eight so-called FATF-Style Regional Bodies (FSRBs) have been established: the Asia/Pacific Group Against Money Laundering (APG), the Caribbean Financial Action Task Force (CFATF), the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG), the GAFISUD (covering South America), the Inter-Governmental Action Group against Money Laundering (GIABA) (covering West Africa), Moneyval (covering Central and Eastern Europe); and most recently, the Eurasian

[43] The FATF formulated eight Recommendations which are entirely focused on terrorist financing and which are complementary to the Forty Recommendations (Special Recommendations on Terrorist Financing of 31 October 2001). On 22 October, 2004 the FATF adopted a ninth Recommendation on terrorist financing addressing the smuggling of bulk cash (Cassella 2004).

Group (EAG) in Central Asia and the Financial Action Task Force for the Middle East and North Africa (MENAFATF) (FATF 2005b).

5.1.3 Overview of the Forty Recommendations of the Financial Action Task Force

The Forty Recommendations of the FATF of 2003 seeks to strengthen governments' resolve and ability to crack down on money laundering activities in two major ways. First, they encourage international harmonisation of domestic anti-money laundering laws and practices. Second, the Recommendations call upon states to share information among each other and to cooperate in the investigation and prosecution of money laundering offences. As the FATF Recommendations of 2003 form the basis of the analysis undertaken in the reminder of this chapter, a brief overview over their core provisions seems indispensable. The following paragraphs briefly present the major provisions of each of the four parts in which the Forty Recommendations are structured.

- Legal Systems

The first set of Recommendations calls for a strengthening of legislative and enforcement techniques in line with the Vienna Convention and the UN Convention against Transnational Organised Crime of 2000 (Palermo Convention). Unlike the Vienna Convention, the FATF recommends the criminalisation of money laundering related to 'the widest range of predicate offences' (Recommendation 1, paragraph 2), and not just to drug related crime. The term 'predicate offences' refers to the fact that in most states with anti-money laundering legislation evidence of a previous serious crime is required before anti-money laundering provisions become applicable. Recommendation 1 spells out how states may define this range of predicate offences on a procedural basis but without dictating which substantive crimes have to be included in the definition. Consistent with the Vienna and the Palermo Convention, Recommendation 2 calls for a criminalisation of the participation in money laundering activities when the party involved knew or ought to have known that the money was the fruit of crime. The party's involvement in the predicate offence itself in not necessary to constitute a money launder-

ing offence. This provision departs from the *mens rea* principle, i.e. the requirement of intent, recklessness, or wilful blindness by an accused to be guilty of a crime, which historically formed the cornerstone of international law enforcement. Instead, mere recklessness or negligence on the part of the person or organisation involved in a financial transaction are considered a sufficient legal basis for a money laundering offence. Recommendation 3 spells out provisional measures and confiscation similar to those set forth in the Vienna and the Palermo Conventions.

- Financial Institutions and Non-Financial Businesses and Professions

Unlike the UN Drug Convention and the CoE Money Laundering Convention, the Forty Recommendations do not rely on criminal law alone. The primary addressee of the Recommendations laid out in part B is not the legislator but the private sector. By making the private sector a primary agent in the surveillance of money movement, the anti-money laundering regime presents a prototypical example of 'governance by distance' (Garland 1999). These provisions are inspired by a strategy of 'responsibilisation' (Sheptycki 2000), which seeks to shift the main responsibility for depriving criminals of the enjoyment of their illicit proceeds to the private financial sector. Through regulatory requirements such as 'customer due diligence' and record-keeping (Recommendation 5-12), as well as the reporting of suspicious transactions (Recommendation 13-16), the legislator imposes liability on the financial sector for cases where criminal liability seems neither possible nor desirable (Cuéllar 2004). The latest version of the Forty Recommendations extends the scope of addressees to non-financial businesses and professions such as casinos (Recommendation 12 letter a and Recommendation 24 letter a), real estate agents (Recommendation 12 letter b), dealers in precious metals and stones (Recommendation 12 letter c), lawyers, and notaries (Recommendation 12 letter d) and trusts and company service providers (Recommendation 12 letter e). This extension is a direct response to an increasing displacement of money laundering activities away from the banking sector into other financial and near-financial sectors (more on this under 5.2.3).

The Forty Recommendations of 2003 also pay for the first time special attention to the problem of capital flight by politically exposed persons. Recommendation 6 urges financial institutions to tighten due diligence measures in relation to this type of customers. Recommendation 6 targets primarily politically exposed persons of foreign countries, but the Interpretative Notes encourage countries to 'extend the requirements of Recommendation 6 to individuals who hold prominent public functions in their own country'.

- Institutional and other measures necessary to combat money laundering and terrorist financing

Recommendations 26 to 32 spell out the powers and resources authorities charged with the domestic enforcement of anti-money laundering provisions should be vested with. Recommendation 26 calls upon states to establish Financial Intelligence Units (FIUs) as national centres receiving and authorised to request, analyse and disseminate suspicious transaction reports (STR). In Europe, such FIUs were already established in response to the European Council directive 91/308/EEC. However, states have chosen different legal structures for these FIUs. Thony (1996) distinguishes between three different models of FIUs: police-centred (as the UK's Economic Crime Unit nested within the National Criminal Intelligence Service), juridical (as for example in Switzerland and Luxembourg) and administrative models (as the US Treasury Department's Financial Crimes Enforcement Network). The FATF Recommendations do not prescribe any particular model for FIUs. Thony (1996) suggests that the current diversity among FIUs may present an obstacle for effective cooperation. To overcome this risk, the European FIUs established a platform for cooperation, the so-called Egmont Group, in June 1995. The membership base of the Egmont Group has expended over the ten years of its existence and comprises now a total of 84 national FIUs. Recommendations 33 and 34 focus on measures to enhance the transparency of legal persons and arrangements. The inclusion of these provisions reflects the FATF's concern about an 'increasing use of legal persons to disguise the true ownership and control of illegal proceeds' (FATF 2003c, iii).

- International Cooperation

Recommendations 35 to 40 address the issues of mutual legal assistance and extradition and other forms of international co-operation. Recommendation 35 calls upon states to ratify and fully implement both the Vienna and the Palermo Convention, as the Recommendations of this fourth part strongly build upon the international law enforcement provisions of these two other conventions. Recommendation 35 also endorses other relevant international conventions such as the CoE Convention on Money Laundering of 1990 and the Inter-American Convention against Terrorism of 2002.

5.2 Problem constellation

After having established money laundering in its international politics context, the discussion will now move on to the analysis of the problem constellation underlying cooperative efforts to combat this problem. The argument will be based on the three transaction cost economics variables—asset specificity, behavioural uncertainty and environmental uncertainty—already introduced in chapter 3. This analysis will provide insights into the specific challenges faced by international agreements aimed at containing money laundering and their implications for the design of these international agreements. This analysis will find that the solution of the policy problems associated with money laundering is characterised by a high level of asset specificity, a moderate level of behavioural uncertainty and a high level of environmental uncertainty.

5.2.1 Asset specificity

In the context of international cooperation, asset specificity is best understood as the amount of sunk costs and benefits associated with the solution of an international policy problem, combined with the probability of participants shirking from their obligation and—by doing so—causing the failure of the cooperative effort. Consequently, the assessment of the level of asset specificity associated with anti-money laundering policies requires a discussion of the both the costs and benefits resulting for a country from the

implementation of the Forty Recommendations. We will find that the distribution of costs and benefits is markedly asymmetric. This creates strong incentives for some states to shirk from their obligations, which in turn inflicts substantial damage to other states who expected to derive substantial benefits from international cooperation in this issue area. In brief, the level of asset specificity associated with anti-money laundering efforts is high.

5.2.1.1 Costs

Two types of costs associated with the adoption and implementation of anti-money laundering measures can be discerned. First, the combat of money laundering results in the direct costs of law enforcement, part of which is borne by the government and part by the financial sector. Second, anti-money laundering measures may also involve indirect costs, most importantly in the form of a redirection of international financial flows with negative economic consequences for financial institutions and potentially of a country's overall economy. It will be shown that at least part of the countries involved in global anti-money laundering efforts face high direct and/or indirect costs.

- Direct costs

The direct costs associated with the Forty Recommendations are considerable. First, legislative costs arise as new laws need to be passed in order to create the domestic legal basis for the implantation of the provisions spelled out by the FATF. As already mentioned above, each revision of the Forty Recommendation led to a wave of amendments of national anti-money laundering legislation. For instance, the third EU money laundering directive is a direct response to the changes adopted in the Forty Recommendations of 2003. Second, and more importantly, the Forty Recommendations impose significant implementation costs that have to be covered by public agencies and the private sector. For instance, the British Treasury estimated that a medium sized non-financial firm (such as casinos, accountants, lawyers) might incur annual costs of approximately £17,600 as a result of meeting anti-money laundering requirements (H.M. Treasury

2003). The legal and accounting sector as a whole has to burden a total of £60-120m per year. Another source finds that the filing and handling of suspicious activity reports as stipulated by Recommendation 5, 13, 16 results in annual costs of £11 million for the UK government and £90 million for the private sector (Financial Times 2005). Recommendation 19 suggests that states should establish a system where 'banks and other financial institutions and intermediaries would report all domestic and international currency transactions above a fixed amount, to a national central agency'. This Recommendation echoes the stringent currency transaction reporting requirements of the United States (31 USC §5313), which have proven to involve significant costs for the private sector. Between 1970 and 1993, more than 50 million such Cash Transaction Reports (CTR) were filed in the US, with an exponentially increasing tendency (Wray 1994). In 1997 alone, over 12 million reports were submitted to the US Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) for scrutiny (FinCEN 1998). The FATF Report of 1990 estimates that each CTR entails US$17 in costs for the financial institutions, resulting in annual total costs of more than US$200 million from this particular anti-money laundering provision alone (FATF 1990, 14).

In context, the US Government Accountability Office (GAO) concluded that the sheer volume of filings made analysis difficult, expensive, and time-consuming (Wray 1994). Levi goes further and describes US currency-reporting requirements as an example of an 'over-trumpeted intelligence methodology' (1991, 35). He argues that the system has neither the capacity to input the data rapidly (within six months of receipt) nor the capacity of putting the information to sound operational use, except in a targeted investigation.

For states with less developed financial centres the implementation costs are also non-negligible. For instance, the head of the Ukrainian State Financial Monitoring Department, Serhiy Hurzhiy, estimated that the establishment of a national anti-money laundering system in line with the FATF Recommendations cost his government 'tens of millions of hryvnas' (i.e. several million British Pounds Sterling) (Kuksa 2004).

As these examples indicate, it can be assumed that the direct costs of implementing anti-money laundering measures increase with the number of financial transaction taking place within a jurisdiction. Thus, major financial centres such as London and New York can be expected to incur higher direct costs in implementing anti-money laundering measures than countries where the international financial sector is of minor or moderate importance, such as Bulgaria or Spain.

- Indirect costs

Even more important than the direct implementation costs associated with FATF Recommendations are the potential indirect costs, which may result from a redirection of international financial flows and loss in business for a country's financial sector with potentially severe repercussions on a country's economy as a whole.

Part of such a decline in the demand for banking services is fully indented by money laundering regulators, as the goal is specifically to eliminate 'dirty' money from the legal financial sector. If achieved properly, this goal alone would already have a strong impact on some financial centres. The US government estimates that approximately half of the global money laundering volume runs through US banks at one point or another (Schroeder 2001), and a total of £25 billion in illegal cash per year is believed to be laundered through British accounts (Severin 2004).

Although the redirection of assets of this magnitude would be felt by the financial industry of the affected countries, of still greater importance is the potential redirection of 'clean' money, which may for perfectly legal reasons seek out other centres with less cumbersome and costly administrative procedures. Given the high mobility of today's international capital flows, governments therefore fear that the unilateral adoption of tough anti-money laundering efforts may decrease the relative attractiveness of their country's financial centre for foreign capital. For example, the United Kingdom feared that its anti-money laundering legislation may threaten London's role as one of the world's largest financial centres (Zagaris 1992, 30). These indirect costs are difficult to

estimate, in particular for countries, which at present do not rely extensively on foreign capital but which seek to develop their financial sector to become an important pillar of their national economy. These countries may see their efforts to attract foreign capital hampered by the existing anti-money laundering regime, as it forces them to forgo one of their few competitive advantages: lower and more flexible regulatory standards. One illustrative example is the Seychelles. This archipelago drafted an Economic Development Act, which would have provided for immunity from criminal proceedings to foreign investors who placed more than US$10 million (Stessens 2000, 92). This plan was only withdrawn under heavy diplomatic pressure coordinated by the FATF (FATF 1996), barring the country from a potentially lucrative source of income. Other countries have seen an already existing pillar of their economy being attacked by international anti-money laundering efforts. For Nauru, a small island in the Indian Ocean, the registration of offshore banks and companies represented until very recently the only source of income other than phosphate mining from deposits which are now almost entirely exhausted (CIA 2004). Around 400 banks (U.S. Department of State 2001) were attracted to register in the only 21 square kilometre republic, thanks to the passage of financial secrecy laws which protected Nauruvian banks and companies against investigations and inquiries conducted by foreign law enforcement agencies. The country soon earned a reputation as a money laundering paradise, and its offshore banks were accused of having laundered about US$70 billion for Russian criminals. Consequently, Nauru came under increasing international pressure and, from December 2001 until October 2004, faced countermeasures imposed by the Financial Action Task Force (FATF 2005b). In 2004, Nauru yielded to this international pressure, abandoned its contested banking laws and withdrew the licenses of all banks but the country's central bank. However, this single remaining bank did not survive the massive macro-economic shock this legislative change created and collapsed only a few weeks later—leaving Nauru without any bank at all and close to bankruptcy (Mellor 2004).

A study by Deloitte Research Financial Services (2003) predicts a decline in offshore investments from European countries by 13.8 percent between 2001 and 2007 as a result

of tightening anti-money laundering and tax evasion legislation. One expected beneficiary of this backflow of money is the United Kingdom, which is already now the internationally leading financial centre in terms of its banks' external assets, not at least thanks to the City of London's status as a 'spontaneous offshore centre' (Palan 2003, 33). Overall, it can be expected that the global anti-money laundering system as erected by the FATF favours states with developed financial centres by favouring financial movements to or through these centres in order not to raise any suspicion.

5.2.1.2 Benefits

The process of money laundering itself does not create major public policy problems. Problems are created by the criminal activity that generates the funds to be laundered. Thus, the benefits a country can reach from an effective anti-money laundering regime depend primarily on the extent to which it suffers from predicate crimes covered by the Forty Recommendations. As mentioned above, the list of these crimes has been expanded with every new edition of the Forty Recommendations. While the FATF Recommendations of 1990 focused exclusively on proceeds generated through illicit drug trafficking, the 1996 Recommendations opened the scope by including all 'serious offences and/or on all offences that generate a significant amount of proceeds' as stated in the interpretative notes for Recommendation 4 of 1996. These offences were later specified in the glossary of the Recommendations of 2003. The categories of designated offences listed in this glossary range from illicit arms trafficking, to piracy and environmental crime. The scope of benefits resulting from the implementation of the Forty Recommendations expanded accordingly. Whereas the first version of the FATF Recommendations (1990) generated benefits mainly for Western countries which suffered under high levels of drug-related violence and drug abuse, the inclusion of corruption and bribery in the list of predicate offences in the 2003 Recommendations, as well as the special considerations given to 'politically exposed persons' (Recommendation 6 of 2003) helped to make anti-money laundering efforts also relevant to offences that were of particular concern to developing countries. The main beneficiaries of the Forty Recommendations are thus all

those states, which suffer considerably under any of the crimes listed under the designated categories of offences in the document's glossary.

Benefits for the financial institutions, although discussed in the academic literature (e.g. Savona 1996, ; Stessens 2000) and in policy circles (e.g. Gilmore 1999, 83 citing a former FATF President; McDowell 2001), should not be overestimated as 'it is not necessarily in the direct financial interest of financial institutions to adopt anti-money laundering behaviour' (Quirk 1996, 24). As will be discussed in the next paragraph, the implementation of such measures involves considerable costs without providing any immediate economic benefit for financial institutions.

5.2.1.3 Comparison of costs and benefits

The above discussion of cost and benefit structures allows the grouping of countries into three categories. A first category comprises states which suffer considerably under organised crime and which do not have financial centres of international standing. A prototypical example of this category is Colombia. For countries of this category, joining international agreements aimed at combating money laundering results in only low asset-specific costs. Countries which perceive organised crime as a moderate to high threat and in which the financial sector is of some but not of dominant economic importance form a second category. France, Germany, and the United States of America are representatives of this second category. The members of this category face moderate asset-specific costs, while facing the potential benefit of funds being transferred from off-shore to more mainstream financial centres. Finally, jurisdictions such as the Cayman Islands, the Bahamas, Switzerland and Luxembourg can be grouped together as examples of countries where the concern about the negative impact on anti-money laundering measures on their strong financial sector outweigh the perceived national value of a reduction in global crime. For these countries, joining the global fight against money laundering involves high relationship-specific costs. Figure 5.1 depicts these three groups of countries are depicted in the schematic cost-benefit diagram introduced in chapter 3.

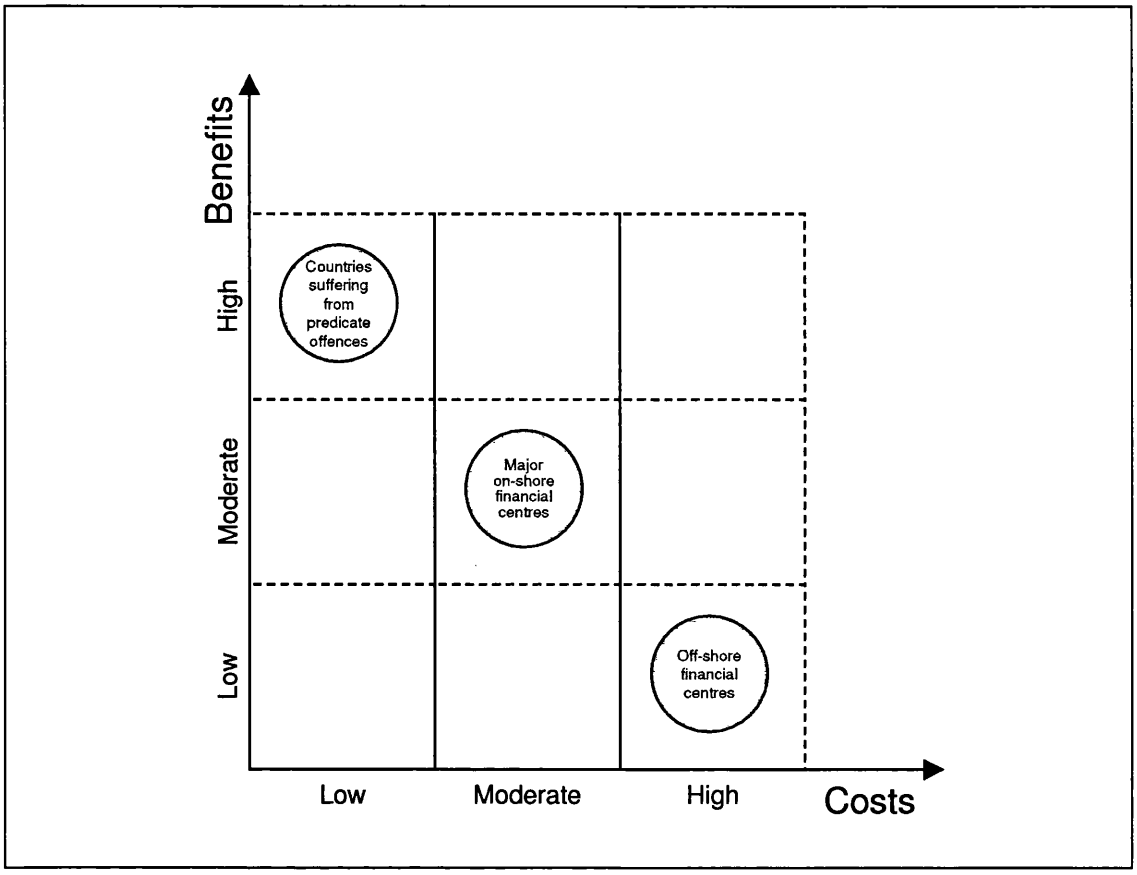

Figure 5.1 The distribution of costs and benefits among FATF member states and countries affected by the Forty Recommendations.

Figure 5.1 shows a strong asymmetry in the asset-specific costs countries face when subscribing to international efforts to combat money laundering. Since off-shore financial centres bear a high burden for fighting money laundering, while benefiting little, they have a high propensity to shirk from any obligations imposed by the Forty Recommendations. On the other hand, countries plagued by organised crime have a lot to lose if the anti-money laundering framework collapses due to excessive shirking by financial centres. Hence, these countries attach a very high asset-specificity to the problem of money laundering and will call for a legal framework that imposes precise and enforceable obligations on financial centres, so as to prevent shirking.

5.2.2 Behavioural uncertainty

Behavioural uncertainty refers to the extent to which states can detect when other parties shirk from obligations previously officially accepted. This second dimension of the

problem constellation is expected to be positively correlated with the degree of hardness policymakers enshrine in an international agreement as they seek to counterbalance their uncertainty about the behaviour of other parties with strong monitoring mechanisms.

As any typical international law enforcement agreement, the Forty Recommendations seek to pursue three main goals: first, the criminalisation of a particular type of behaviour—here money laundering—second, the prosecution of this behaviour and third, international cooperation among law enforcement agencies prosecuting this offence when it involves transnational elements. As legislation is publicly available, the first requirement is easy to observe for other states. There exist even publicly available databases that compile the relevant legislation of almost all states[44]. The passing of legislation, however, does not ensure that money laundering is effectively prosecuted. In order to better assess a country's sincerity with respect to combating money laundering, parties will have to take into account other action undertaken by a jurisdiction.

Behavioural uncertainty will again be operationalised along the three dimensions already introduced: first, the administrative incapacity of the key states involved, second, the relative reliance on governmental monitoring and self-reporting, and third, the level of the targeted industry's opacity. It will be argued that in the area of money laundering the monitoring of compliance by non-governmental organisations is low, just is industry opacity. The administrative capacities of countries to regulate the financial industry are varying, but with all major financial centres being very effective in maintaining the rule of law. Taken together, this subcomponents provide a mixed picture but, in sum, behavioural uncertainty associated with anti-money laundering measures can be judged to be of moderate degree.

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[44] E.g. UN International Money Laundering Information Network (IMoLin).

- Governance incapacity

The first dimension of behavioural uncertainty refers to states' capacity to implement the policies they have signed up for in an international agreement. It thus refers to inadvertent non-compliance in contrast to wilful non-compliance which is driven by high levels of asset-specific costs. The success of the international fight against money laundering rests on the proper implementation of international agreements by countries with important financial centres. Most of these centres are located in countries that rank very high in the World Bank's 2004 rule of law index. Luxembourg and Switzerland share the top 99 percentile rank, while the UK achieves a percentile rank of 93.7 and the US of 92.3. This strong concentration of the world's prime banking centres in countries with a strong rule of law record is not a coincidence. When entrusting money to a bank, individuals or organisations want to be assures that the financial institution will honour its contractual obligations and that they can appeal to an effective and predictable judiciary in case the bank fails to do so. This same preference for banking with stable financial institutions in trustworthy jurisdictions also applies to criminal individuals and organisations. Even if the trail of illicit proceeds often starts in countries with weak law enforcement capacities, criminals typically seek to their money to established financial centres in countries with greater governance capacities (CIA 2005b). Consequently, behavioural uncertainty stemming from governance incapacity is insignificant.

- Relative reliance on governmental monitoring

The extent to which international anti-money laundering efforts can rely on private actors as watchdogs is limited. The best-organised interests are those of banks, and other financial and non-financial institutions. However, they have little direct incentive to implement strict anti-money laundering policies, as such measures involve considerable costs without providing any immediate economic avail to them (Quirk 1996). Financial institutions may, however, be motivated to denounce complacent anti-money laundering efforts by their competitors. In reality, this peer pressure is not a major factor, as all major financial institutions share the understanding that their industry as a whole is to lose

from too rigid anti-money laundering legislation and too much public attention to this problem. This cooperative spirit is demonstrated in the efforts to ward off constraining legislation through the establishment of self-regulatory policies, such as the Wolfsberg Anti-Money Laundering Principles for Private Banking. These principles were adopted in October 2000 by twelve leading banks[45] as a proactive move towards self-regulation in order to avert possibly tougher governmental regulation and to reduce the legal uncertainty created by sometimes incongruent and ambiguous national anti-money laundering acts. In January 2002, the International Federation of Accountants (IFAC) followed this example and released its own anti-money laundering paper, addressing the profession's role and ethical obligations in the fight against money laundering.

All the leading banks are almost equally vulnerable to money laundering, whereby the extensive net of correspondence banking relations presents one major gateway. The Minority Staff of the Permanent Subcommitte on Investigations of the US Senate scrutinised this practice and found that three fourths of the banks surveyed had over one thousand correspondent banking relationships; and virtually all had accounts with offshore banks.

Those who benefit from an effective fight against money laundering are, in contrast, much less organised. This insufficient degree of organisation on the part of the beneficiaries can be attributed to their heterogeneity—ranging from people suffering under drug-related violence to those affected by environmental crime—and by the fact that the link between the negative consequences they feel and money laundering is obscure, complicated and often geographically far apart. Non-governmental organisations have so far played a negligible role in supervising private actors' and states' compliance with anti-money laundering rules. The sole exception is Transparency International (TI), an international non-governmental organisation devoted to combating corruption. This NGO was involved in the development of the Wolfsberg Principles mentioned above.

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[45] ABNB AMRO Bank, Santander Central Hispano, Bank of Tokyo-Mitsubishi, Barclays, Citigroup, Credit Suisse Group, Deutsche Bank, Goldman Sachs, HSBC, JP Morgan Chase, *Société Générale* and UBS.

However, TI's interest in the issue is only a rather recent phenomenon and not very sustained, which may be explained by the fact that corruption—Transparency International's core concern—was included in the list of predicate offences for money laundering only in the 2003 Recommendations. In any event, TI's role in the global move against money laundering is significantly weaker than that of NGOs working in other fields such as Global Witness and Partnership Africa Canada on conflict diamonds (see chapter 6), the International Action Network on Small Arms (IANSA) on the trafficking in small arms and light weapons (see chapter 7) or End Child Prostitution in Asian Tourism (ECPAT) and the Global Survival Network (GSN) on the trafficking in women and children for the commercial sex trade (Williams 2001).

- Industry opacity

Opacity in the core industries targeted by anti-money laundering measures, i.e. in financial institutions, is very low, since banks require a license before being allowed to open for business. The granting of such licenses is preconditioned upon a number of criteria such as minimum capital requirements, requirements regarding the education and experience of staff, record keeping etc. All these requirements reduce the opacity of the financial sector and enhance the regulator's ability to monitor banks' compliance with anti-money laundering provisions. However, as already mentioned, over the course of its existence, the FATF has expanded the scope of the industry targeted by the Forty Recommendations with every new revision of the Recommendations. The Forty Recommendations of 2003 explicitly cover 'designated non-financial businesses and professions', such as casinos, arts dealers, real estate agents, and lawyers. Some of these non-financial businesses and professions have been traditionally subject to regulatory oversight comparable to that found in the banking sector, as instance lawyers, while others—e.g. arts dealers—conduct their business with less transparency. The expansion of the targeted industry has led to an increase of industry opacity, but as the lion share of money laundering still occurs in the highly regulated and transparent financial sector

the overall degree of industry opacity associated with money laundering remains on a low level.

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As the above discussion highlighted, the three indicators of behavioural uncertainty point into different directions. One the one hand, the governance incapacity of states with important financial centres and industry opacity are both low, thereby leading to a low level of behavioural uncertainty. On the other hand, monitoring of compliance by interest groups is weak, which increases behavioural uncertainty. As an aggregate, the degree of behavioural uncertainty associated with international anti-money laundering measures can be described as moderate.

5.2.3 Environmental uncertainty

The concept of environmental uncertainty refers to both the novelty of the policy issue and the innovativeness of the field that an international institution seeks to regulate. The following section argues that in the case of money laundering, environmental uncertainty is high, with the novelty of the policy issue being moderate and the innovativeness of the industry high.

5.2.3.1 Novelty of policy issue

The first component of environmental uncertainty, i.e. the novelty of the policy issue, has only a moderate degree. When the latest version of the Forty Recommendations was released in 2003, the FATF could build upon over a decade-long history of combating money laundering and upon the experience gained with two previously published Forty Recommendations (of 1990 and 1996). However, the Forty Recommendations of 2003 addressed many new issues not covered or only partly covered in the two previous Forty Recommendations, as was already discussed under 5.1.3. The Recommendations of 2003 introduced significant change with respect to the predicate offences associated with money laundering. Whereas the first set of Recommendations limited the crimi-

nalisation to drug-related crime, Recommendation 4 of the 1996 edition asked states to 'extend the offence of drug money laundering to one based on serious crime'. The 2003 Recommendations expanded the scope of the criminalisation of money laundering even further by including a list of 'designated categories of offences' in its glossary. Also, as discussed in the preceding section, the Forty Recommendations of 2003 expanded the scope of the businesses to be regulated in response to the diversion of money laundering activities into less regulated sectors (Savona 1996). Another novelty of the latest version of the Forty Recommendation was the inclusion of a provision which imposes counter-measures against non-complying states (Recommendation 21, to be discussed under 5.3.1), and—in the aftermath of several financial scandals involving of the laundering of fortunes amassed by corrupt heads of state such as the former Nigerian leader Sani Abacha—provisions on the special diligence financial institutions must incorporate when dealing with 'politically exposed persons' (Recommendation 6). Most importantly, the 2003 Recommendations address the problem of terrorist financing, which was completely absent in the 1990 and 1996 Recommendations. The latest edition of the FATF Recommendations refers to this problem no less than 22 times, despite the fact that the FATF also adopted a separate set of nine (formerly eight) Recommendations on terrorist financing. All these changes in the Forty Recommendations of 2003 decrease the relevance of the policy experience gained with the previous versions of the Forty Recommendations, and thus increase the novelty of the so-expanded fight against money laundering and leading to an overall moderate degree of environmental uncertainty stemming from the novelty of the policy issue.

5.2.3.2 Innovativeness of criminal field

Environmental uncertainty related to the innovativeness of the criminal field is high, mostly resulting from the unlimited fungibility of money. Criminal organisations develop many creative ways to bypass any advances by law enforcement agencies against money laundering. Some of these techniques are very simple, whereas others are more sophisticated and take advantage of technological progress. The five most important forms of process innovativeness will be briefly described in the following paragraphs.

A first diversion strategy employed by criminal networks is to switch to countries with lax regulation or limited law enforcement capacities. Given the mobility of electronic money, such a geographic displacement of the laundering activity to remote offshore places like Nauru can be undertaken almost instantaneously and at no cost.

A second effective and low cost evasion strategy is the so-called 'smurfing' process (Molander, Mussington, and Wilson 1998, ; Savona 1996). In this case, a larger transaction is broken up into several smaller amounts which fall below the stipulated threshold of US$10,000—in the case of the USA—above which special reporting requirements would apply.

A third strategy to circumvent anti-money laundering measures that has gained recent popularity is the transfer of bulk cash (U.S. Department of State 2005, 14). Criminals who are engaged in cash-intensive activities in a country with strict anti-money laundering measures seek to smuggle cash in large quantities out of that country and into one where financial institutions are less likely to inquire about the money's origin. In response to this trend, the FATF issued a new standard that targets specifically physical cross-border transportations of currency or other monetary instruments (Special Recommendation 9).

A fourth strategy employed by criminals and terrorists to circumvent anti-money laundering measures is the utilisation of alternative remittance systems (ARS) (U.S. Department of State 2005). Such systems are traditionally rooted in Asia, particularly China, and the Middle East (Cao 2004), and are known by a variety of names, the most common of which is *hawala* or *hundi*. ARS involve a network of local ethnic 'bankers', who enjoy the trust of their local population. What makes the ARS system intransparent is that typically there is no financial transaction for each and every transaction between recipient clients and sender clients. The sender client provides cash to his or her ethnic banker, which informs his or her corresponding ethnic banker that a recipient will seek to obtain cash from him or her. No money flows between the two ethnic bankers as outstanding balances are settled by future transactions. ARS play a particularly important

role in countries with large immigrant populations, as they offer them a cost-effective and fast method for transferring funds to relatives in their countries of origin. Transfers through ARS are very flexible and involve little administrative paper work or are completely based on hand-shake agreements. Trust is the central component of alternative remittance systems, which is why they are typically confined to members of a common ethnic community. In many cases, the transfer through ARS does not involve the actual transfer of money but only the value of money (Cao 2004), which is recovered through subsequent arrangements, making it even harder to detect the misuse of these systems for money laundering purposes. Concerned about this form of AML circumvention, the FATF dedicated a considerable part of its most recent typologies exercise to the study of this phenomenon.

Other strategies to evade anti-money laundering measures involve the utilisation of technological advances, which presents a fifth source of environmental uncertainties in dealing with money laundering. Progress in information and communication technologies has allowed the creation of instantaneous payment systems. Zagaris and Ehlers report that within the United States, 'more than 465,000 wire transfers—valued at more than US$2 trillion—are handled daily' (2001, 2). The development of international computerised information processing networks, such as the Clearing House for International Payments System (CHIPS) or the World Society for Worldwide Interbank Financial Telecommunication (Swift), has facilitated and fastened the cross-border transfer of money stemming from licit as well as illicit sources. Under US regulation, banks are required to identify both the originator and the beneficiary of a wire transfer, but this identification trail is interrupted when money is wired through foreign banks which are not subject to such information requirements.

Regulators' efforts to curb money laundering are lagging behind even further with respect to cyberpayments (Porteous 2000, 184). Cyberpayments are an emerging new class of instruments and payment systems that facilitate the electronic transfer of financial value (Molander, Mussington, and Wilson 1998, 1). Such transactions may occur via

networks, such as the Internet, or via the use of stored value-type smart cards (e.g. MONDEX). Some cyberpayments systems use both techniques (Steel 2004). These new payment products are developed to replace cash for many retail and consumer-level transactions by providing transacting parties immediate, convenient, secure and potentially anonymous means by which to transfer financial value. These technological developments pose a substantial challenge for anti-money laundering agencies, as technology is now available 'which could permit these systems to combine the speed of the present bank-based wire transfer systems with the anonymity of currency' (Molander, Mussington, and Wilson 1998, 1). In particular the internet has been described as one of the biggest opportunities for money laundering because it is very difficult to trace web-based transactions and because they are increasingly secure thanks to advances in encryption software (Morris-Cotterill 2000).

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In sum, the environmental uncertainty associated with the fight against money laundering is high. On the one hand, the novelty of the policy field is moderate, as the scope of criminal activities associated with money laundering are expanding, albeit building on existing and well understood foundations. On the other hand, the scope for process innovation by money launderers is very extensive.

5.2.4 In sum: institutional preferences based on problem structure

Table 5.1 presents the summary of the assessment of the problem constellation underlying international anti-money laundering efforts. The high level of asset specificity found to be associated with money laundering and the moderate level of behavioural uncertainty suggest the adoption of international agreements with a high level of legalisation. This expectation is in direct conflict with the expectation derived from the third functional variable, environmental uncertainty. The high level of environmental uncertainty is best dealt with a flexible agreement with low levels of legalisation. Thus, the above-presented functionalist analysis of international cooperation on anti-money laundering

policy yields a contradictory solution for the design of an international institution dealing with this problem. It will be interesting to study how policymakers handled this dilemma when they established the Financial Action Task Force and drafted the Forty Recommendations. To what extent did they recognise this trade-off, and how did they seek to reconcile the need for credibility with the simultaneous need for flexibility? Shedding light on these questions will be the task of the following sub-chapter.

Problem attribute	Level	Argument
1. Asset specificity	**High**	
A. Potential loss	High	▪ Tough global money laundering policies can help countries affected by high levels of organised crime to fight criminal activities, while bearing little of the associated costs. ▪ Large financial centres may benefit from a universal anti money laundering regime, as funds are expected to abandon smaller off-shore financial centres.
B. Propensity to shirk	High	▪ Off-shore financial centres face high costs (reporting requirement and loss of income due to funds being shifted away to major financial centres), while gaining hardly any direct benefit from anti-money laundering measures.
2. Behavioural uncertainty	**Moderate**	
A. Governance incapacity	Low	▪ The most important financial centres are located in countries with strong governance capacity.
B. Relative reliance on governmental monitoring	High	▪ Banks affected by anti-money laundering regulation do not directly benefit from reporting non-compliance. ▪ The groups affected by criminal transactions underlying money laundering are insufficiently organised to monitor compliance with anti-money laundering provisions. ▪ NGOs less active in the area of money laundering than in the area of e.g. child trafficking, conflict diamonds or small arms trade.
C. Industry opacity	Low	▪ Record keeping requirements in the financial services industry are high. ▪ Expansion of the scope of targeted industries includes some non-financial professions with lower levels of transparency, but lion share of money laundering still occurs in relatively transparent sectors.
3. Environmental uncertainty	**High**	
A. Novelty	Moderate	▪ The scope of the most recent version of the Forty Recommendations has been substantially expanded, thereby increasing the novelty of the issue. However, this expansion builds directly upon the experience gained with previous versions of the Forty Recommendations.
B. Innovativeness		
a. Product innovation	High	▪ Criminals switch money as a carrier of value and rely on precious metals, gems or novel forms of wealth such as electronic money.
b. Process innovation	High	▪ Criminal can switch between financial centres quickly and with minimal costs ▪ Criminals develop new ways of international money transfers (ARS).

Table 5.1 Summary of the assessment of the constellation of the problem of international money laundering.

5.3 Degree of legalisation

This third and penultimate sub-chapter moves on to assess the degree of legalisation found in the most recent version of the Forty Recommendations of the Financial Action Task Force. As in the case study presented above, this analysis will be structured around the three dimensions obligation, precision and delegation already introduced in chapter 2. This assessment will allow us to see which of the contradictory expectations raised in the previous sub-chapter prevailed in the actual design of the agreement, specifically, whether the asset specificity-driven pull towards high levels of legalisation finally prevailed over the environmental uncertainty-driven pull into the opposite direction. Given the inconclusiveness of the TCE-based design expectations, this chapter will conclude by seeking to explain why the FATF adopted a moderate degree of legalisation.

5.3.1 Obligation

The first dimension of legalisation—obligation—can be assessed based on the three criteria already introduced in chapter 2. First, the question arises whether an international agreement is legally or only politically binding. Second, it needs to be established to what extent the obligations created by an agreement, in particular by a legally binding agreement, are attenuated by reservations, safeguards and withdrawal procedures. Third, the degree of obligation created by an agreement depends on the extent to which it establishes mechanisms to monitor and enforce compliance. These three aspects will guide the analysis of the Forty Recommendations of 2003 below.

5.3.1.1 Legal bindingness

The name of the core FATF agreement is very telling—'Forty Recommendations'—making it unambiguously clear that they are mere 'Recommendations' in the sense that they are legally non-binding. This non-bindingness is reflected in several aspects. Official terminology and clauses typically associated with legally binding treaties or conventions are missing (Aust 2000). The Recommendations are formulated with 'should' rather than 'shall', the term 'countries' substitutes 'parties', and the Recommendations

do not include any provisions on entry into force, reservations or denunciation. Furthermore, the Recommendations were adopted by the participating states without going through the procedures designated for the approval of treaties, such as the consent of parliaments. All these aspects support the legally non-binding character of the agreement, and suggest its categorisation as a memorandum of understanding (Aust 2000). Stessens posits that '[i]t was a deliberate choice not to cast the Recommendations into the mould of a treaty. This was to avoid elaborate ratification procedures and to allow for flexible adaptation of the Recommendations' (2000, 19; see also FATF 2004).

5.3.1.2 Tenacity of obligation

Despite their legal non-bindingness, the Forty Recommendations contain some provisions that can be seen as safeguards allowing states to deviate from certain provisions. The most important type of safeguard is the reference to the supremacy of the 'principles of domestic law' (Recommendation 1, 3 and 36). For example, the final sentence of Recommendation 3 relativises the suggested measures on confiscation by stating that they only have to be applied 'to the extent that such a requirement is consistent with the principles of their domestic law'. As the Forty Recommendations are not designed as a legally binding convention, states cannot attenuate the degree of obligation of these Recommendations through the deposit of any formal reservations, nor can they escape its reach through a formal withdrawal.

5.3.1.3 Compliance mechanisms

The Forty Recommendations compensate their legally non-binding design through a set of effective monitoring and enforcement mechanisms established to strengthen the credibility of the agreement and to enhance compliance.

- Monitoring

One element in this strategy is compliance supervision that is based on two pillars. All members of the FATF are required to go through an annual self-assessment exercise.

The information complied through this process is later analysed by the FATF in Paris, and used as a basis to determine the extent to which the country has implemented the Forty Recommendations. In addition, each member state is subject to a mutual evaluation process, which involves on-site visits conducted by a team of three or four selected experts from other member governments and the FATF secretariat (FATF 2005b). A third round of mutual evaluations started in the beginning of 2005 and will continue till mid-2008. In 2004, the FATF participating states agreed to make the summaries of these mutual evaluation reports available to the public through the FATF's website, but with the reviewed state retaining the right to oppose the publication of its own review. It remains to be seen whether this move towards greater transparency will strengthen non-state actors' role as anti-money laundering 'watchdogs'. As discussed above (5.2.2), only Transparency International has taken an active, although not sustained, interest in this issue.

- Sanctions

Over the course of its fifteen years of existence, the FATF has developed a strategy of gradual reinforcement of peer pressure against countries and territories whose anti-money laundering efforts have been found to be wanting. This approach evolved in praxis and is only partly enshrined in the Forty Recommendations (Recommendation 21). In 2000, the FATF developed the policy of 'black-listing' countries which were identified as so-called 'non-cooperative countries and territories' (NCCT) with detrimental rules and practices in place that impede international co-operation in the fight against money laundering. The FATF reviewed a total of 47 jurisdictions it suspected of being deficient in regard to their anti-money laundering policies. Based on a catalogue of 25 criteria, the FATF reviews conducted between June 2000 and September 2001 designated a total of 23 jurisdictions as NCCTs[46]. Being included in this black-list results in

[46] Bahamas, Cayman Islands, Cook Islands, Dominica, Egypt, Grenada, Guatemala, Hungary, Indonesia, Israel, Lebanon, Liechtenstein, Marshall Islands, Myanmar, Nauru, Nigeria, Niue, Panama, Philippines, Russia, St. Kitts and Nevis, St. Vincent and the Grenadines, and Ukraine.

negative direct and indirect consequences for the jurisdictions concerned. Recommendation 21 of the 2003 Recommendations stipulates that '[f]inancial institutions should give special attention to business relationships and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply the FATF Recommendations'.

Whereas a similar provision was already included in the Forty Recommendations of 1996, the latest version of the Forty Recommendations strengthens enforcement by suggesting the imposition of appropriate counter-measures against NCCTs (Recommendation 21). Such counter-measures include the imposition of enhanced identification and reporting requirements on financial institutions dealing with an NCCT; the requirement for governments to take into account the NCCT status of a country when dealing with requests from banks headquartered in NCCTs for approval of the establishment of branches, subsidiaries or representative offices in a FATF member state; and finally the issuing of warnings to the non-financial business sector that transactions with entities within the NCCTs might run the risk of being related to money laundering (FATF 2003b). The FATF indicated to six NCCTs (Nauru, Philippines, Russia, Nigeria, Myanmar, and Ukraine) that counter-measures would go into effect if they did not adopt adequate reforms within a deadline of either one or two months. Half of these NCCTs were able to satisfy FATF demands in a timely manner, whereas as counter-measures went into effect against the remaining three—namely Nauru, Ukraine and Myanmar (FATF 2005b). Countermeasures were imposed against Ukraine from December 2002 until February 2003. Myanmar was sanctioned from November 2003 until October 2004, when also the countermeasures against Nauru, already in place since December 2001, were lifted (FATF 2005a, 15). Since that date no NCCTs have been subject to counter-measures. But even in cases where no counter-measures are imposed, a country still suffers considerably from being included in the NCCT list, primarily indirectly in the form of reputational costs. For instance, the Deputy Head of the Central Bank of Russia, Victor Melnikov, welcomed the removal of his country from the NCCT list as a move that strengthened Russia's credibility among investors (Pravda 2002). The FATF considers

its NCCT policy as an effective tool that 'triggered significant improvements in anti-money laundering systems throughout the world' (FATF 2005b). 70 percent of all NCCTs were de-listed within three years after the enactment and substantial implementation of anti-money laundering reforms, and only two jurisdictions—Myanmar and Nigeria—remained on the 'black-list' at the time of writing (October 2005). The FATF is currently reconsidering its practice of imposing counter-measures mainly in the light of the costs the secretariat incurs from compiling country profiles of sufficiently high quality to legitimate the potential imposition of such sanctions.

In theory, the FATF also allows for membership sanctions to be imposed on a non-complying member (FATF 2003a). So far, only one FATF member state, Russia, was ever categorised as a NCCT, and its membership was not suspended during the twenty-eight months it was included in the black list.

It is noteworthy that through its strategy of black-listing of and imposing counter-measures against non-cooperative countries and territories, the FATF seeks to ensure global compliance with its anti-money laundering standards, also among states which are *not* FATF members. Whereas legally binding treaties can only bind those states that have formally consented to be bound by it, the non-binding FATF Recommendations oblige also states that have never endorsed them. Against this background, Mitsilegas remarks that the FATF "is an ad hoc body consisting of 'rich' countries, and not an international organisation, which evaluates, on the basis of soft law, action taken by sovereign states" (2003, 205). With respect to enforcement, the compliance mechanisms of the non-binding Forty Recommendations surpass substantially that of most legally binding treaties.

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Overall, the Forty Recommendations presents an illustrative example of how soft law can compensate its weakness stemming from legal non-bindingness with rigorous moni-

toring and sanctioning mechanisms. The overall degree of obligation of the Forty Recommendations can thus be categorised as moderate.

5.3.2 Precision

The second dimension of legalisation, precision, can be analysed from two complementary angles: determinacy and coherence. As will be argued in the following, the Forty Recommendations of 2003 attain a moderate degree of determinacy and a high degree of coherence.

- Determinacy

The Recommendations contain a relatively high number of vague formulations. The ambiguous term 'appropriate', for instance is mentioned no less than 21 times, i.e. on average in every other Recommendation. The equally vague term 'possible' appears a total of seven times in formulations such as 'as far as possible' (Recommendation 11, 21, 27, 40) and 'to the widest extent possible' (Recommendation 36, 37, 40). Other ambiguous terms include 'unreasonable or unduly restrictive conditions' (Recommendation 36 and Recommendation 40). All these formulations open a wide range of interpretation for the participating states. The relative popularity of formulations such as 'may consider' (employed ten times) also make it hard to establish whether or not a state complies with the provisions in question as these formulations do not specify—though imply—what the outcome of such considerations should be. Also weak formulations such as 'countries are encouraged to' take certain actions (Recommendation 16, 20, 27, 35, 40) do not create a sufficient degree of obligation to allow for an unambiguous detection of cases of non-compliance.

The need for flexibility identified in the analysis of the degrees of environmental uncertainties is reflected in the phrasing of the Recommendations. In the introduction of the Forty Recommendations of 2003, the Financial Action Task Force acknowledges the need for flexibility resulting from the existing diversity in legal and financial systems and

from the increasing sophistication displayed by money launderers. Consequently, the FATF perceives the Forty Recommendations as a 'set of minimum standards for action for countries to implement the details according to their particular circumstances and constitutional frameworks'. States' sovereignty in judicial affairs is for example recognised by allowing states to define the twenty offences listed in the glossary as 'designated categories of offences'. Furthermore, the Recommendations abstain from specifying the type and severity of sanctions to be imposed against natural and legal persons found to violate anti-money laundering requirements. Recommendation 17 contents itself with stating that '[c]ountries should ensure that effective, proportionate, and dissuasive sanctions, whether criminal, civil or administrative, are available'. In general, the Recommendations rely primarily on 'standard-like' rather than precise, 'rule-like' prescriptions (Abbott et al. 2000). Many of these standards (e.g. 'due diligence' Recommendation 5) can, however, be interpreted unambiguously based on other anti-money laundering agreements (e.g. Basel Statement) and previous court rulings and allow for sufficient predictability on this basis. Thirty-three of the Forty Recommendations are specific enough to allow for a distinction between compliance and non-compliance.

- Coherence

Furthermore, the Recommendations in their entirety largely meet Franck's (1990) criterion of 'coherence', as they create a non-contradictory framework which allows for a case-by-case interpretation. The Recommendations are not only in themselves coherent but also with respect to other relevant international agreements. The Forty Recommendations explicitly acknowledge the importance of such external coherence in Recommendation 1 which refers directly to the anti-money laundering provisions of the Vienna Convention and the Palermo Convention. The Forty Recommendations of 1996 even called upon states to 'take immediate steps to ratify and to implement fully' the two previous agreements. The FAFT Recommendations are also coherent with respect to the provisions established by other intergovernmental bodies, as they are often modelled very closely to the standard set out by the FATF.

5.3.3 Delegation

Delegation presents the third and final dimension of legalisation. The degree of delegation created by the Forty Recommendations and its praxis will be based on the two aspects centralisation and independence already introduced in chapter 2. It will be shown that the degree of delegation enshrined in the Forty Recommendations is moderate, as both of its components have a moderate level.

- Centralisation

Centralisation refers to the extent to which an international agreement delegates certain functions to a centralised body. The FATF consists of two main organisational entities: the plenary and a permanent secretariat. The plenary is the primary actor assuming five major tasks. First, the FATF plenary sets the international anti-money laundering standards and specifies them through additional interpretation and guidelines. Second, it monitors the compliance of its members with the Forty Recommendations as discussed in the previous section. Third, the FATF plenary works towards the implementation of its anti-money laundering standards also among non-members through the establishment of and co-operation with the FSRBs, as well as through the NCCT review process and through the assessment of capacity building needs. Fourth, the FATF plenary examines the methods and trends of money laundering in its annual so-called 'typologies' exercise. These studies are undertaken so as to ensure that the FATF anti-money laundering measures remain appropriate in dealing with the evolving money laundering threat. Finally, the FATF is dedicated to developing better mechanisms for international cooperation, conducting outreach to the private sector, conducting training seminars for assessors in the use of the new methodology and working to improve international coordination of AML/CFT efforts with the FSRBs, the OGBS, international financial institutions and other relevant international organisations. The FATF does not dispose of any established dispute settlement mechanisms, leaving it to member states to seek an agreement on the basis of bilateral negotiations.

The FATF secretariat assumes many—albeit only—supportive functions (FATF 2005b). It organises meetings of the plenary and of working groups, and offers administrative support to the president and the steering group. The secretariat prepares and produces the policy papers discussed in working groups and/or in the plenary, organises mutual evaluation missions, and produces the related assessment reports. Furthermore, the executive secretary and his or her staff are in charge of maintaining external relations of the FATF with partner organisations and with the media.

- Independence

The second element of delegation is the degree of independence the central bodies—here the plenary and the secretariat—of an international institution enjoy.

The FATF functions primarily as an intergovernmental working party (Stessens 2000, 18) based on negotiations between representatives from member states. These negotiations are institutionalised in three plenary meetings per year, one annual meeting of governmental experts on typologies, and, depending on the focus of current work, meetings of various ad hoc groups (FATF 2005c). The degree of independence is low, as all states are represented in the plenary, and all decisions within the FATF are taken on a consensus basis. Furthermore, the FATF presidency is assumed by a representative of a member state and is rotating on an annual basis, which precludes the FATF from developing an identity independent of the member states. The FATF's independence is further circumscribed by its limited lifespan. When the FATF was created in 1989, the founding members decided to limit its mandate to five years. Only when all member governments agree that a continuation of the FATF is necessary will its mandate be extended for another five years. Again, this measure is designed to bind the 'agent' (i.e. the FATF) closely to its 'principal' (i.e. the member states). In 2004, the participating states agreed to renew the FATF's mandate for an eight-year period (FATF 2005b). In comparison to the Kimberley Process Certification Scheme—which will be discussed in detail in the next chapter—the FATF's independence is weakened by the non-inclusion of representatives from civil society. FATF meetings are only open to delegations from FATF mem-

bers, observer members, and observer international organisations, but not to the general public or representatives from civil society organisations. Also the review missions are exclusively carried out by government representatives. The only element that lends a little bit of independence to the plenary is the comparably high frequency of plenary meetings, which allows the participants to develop some sort of *esprit de corps*.

The only centralised support structure in place is provided by a small specialised secretariat headquartered in, but independent of, the Organisation for Economic Cooperation and Development (OECD) in Paris. The degree of independence of this secretariat is moderate. On the one hand, it is limited by its small number of staff (currently ten[47]), a small budget (€1,740,100 for the fiscal year 2005), the absence of an independent source of income and by the fact that the executive secretary is selected by the plenary. On the other hand, the secretariat's independence has increased with a considerable expansion of both staff[48] and budget[49]—albeit starting from very modest levels—, with a funding mechanism that defines the financial contribution of each participating country as a percentage of that country's economic wealth, and finally with the fact that the tenure of the executive secretary is not limited in practice, with the last executive secretary assuming his post for almost ten years.

Overall, the FATF reaches a moderate level of delegation, both with respect to centralisation and independence.

5.3.4 In sum: level of legalisation

Table 5.2 summarises the assessment of the level of legalisation of the Forty Recommendations of the Financial Action Task Force. While looking purely at the text of the Forty Recommendations, one would be misled to believe that the level of legalisation is

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[47] One executive secretary, two principal administrators, four administrators, one administrative assistant, and two assistants/secretaries (FATF 2005b).

[48] Total of three in 1998 (FATF 2005b).

[49] Four million French francs in 1998 (Gilmore 1999).

low, this picture changes once the practice of the FATF and its legal environment are taken into account. The legal bindingness of the FATF is low, as signatories did not initially intend a legally binding treaty and are still opposed to such a move. However, in practice, the FATF has developed tough mechanisms to monitor compliance and to sanction non-compliance—procedures, which are only weakly founded in the FATF's Forty Recommendations themselves. Similarly, the FATF agreement as such is imprecise, but once other international anti-money laundering agreements and court judgments are taken into account, its wording gains considerably in determinacy. The FATF's degree of delegation is moderate, as the plenary possesses significant powers with respect to rule-making, implementation and enforcement, but cannot use these powers independently from signatory states, as all decisions are taken unanimously and since representatives from all signatories participate in the decision making process.

Indicator	Level	Argument
1. Obligation	**Moderate**	
A. Legal bindingness		
a. Language	Low	▪ Agreement is titled 'Recommendations', not 'Convention' or 'Treaty', thereby signalling legal non-bindingness. ▪ Other formulations typically associated with binding treaties are missing, e.g. participating states are referred to as 'countries' not as 'parties'.
b. Procedural provisions	Low	▪ On the domestic level, agreement did not go through procedures required for the ratification of binding treaties. ▪ Agreement is not registered under article 102 of the UN charter.
B. Tenacity of obligation	Moderate	▪ Despite its legal non-bindingness, the agreement contains three provisions with safeguard-like formulations.
C. Compliance mechanisms		
a. Monitoring	High	▪ Countries are required to complete an annual self-assessment exercise analysed by FATF in Paris. ▪ Each member state is subject to a mutual evaluation process, which involves on-site visits conducted by a team of three or four selected experts from other member governments and the FATF secretariat.
b. Enforcement	High	▪ Sanctioning mechanisms developed in praxis, only partially enshrined in Forty Recommendations. ▪ Non-cooperating countries are put on a black-list, with countermeasures including the imposition of enhanced identification and reporting requirements imposed on financial institutions dealing with black-listed countries. ▪ Membership sanction for black-listed countries possible.
2. Precision	**Moderate**	
A. Determinacy	Moderate	▪ Extensive use of ambiguous formulations such as 'appropriate', 'possible', 'unreasonable', 'unduly', 'may consider' and 'encouraged'. ▪ Many imprecise terms can be interpreted using other anti-money laundering agreements and court rulings.
B. Coherence	High	▪ High degree of internal coherence. ▪ Forty Recommendations explicitly acknowledge the importance of such external coherence in Recommendation 1. ▪ Other AML agreements often modelled very closely to the standard set out by the FATF.

3. Delegation	Moderate	
A. Independence		
a. Human resources	Moderate	▪ Plenary consists of representatives from member countries. ▪ FATF presidency is assumed by a representative of a member country and is rotating on an annual basis. ▪ Secretariat permanent, selected by the plenary
b. Financial resources	Moderate	▪ Funding mechanisms defines the financial contribution of each participating country as a percentage of that country's economic wealth.
c. Decision making	Low	▪ All states are represented in the plenary. ▪ All decisions within the FATF are taken on a consensus basis. ▪ The FATF's mandate is limited to five years but subject to renewal.
B. Centralisation		
a. Rule making	Low	▪ Plenary sets the international anti-money laundering standards and specifies them through additional interpretation and guidelines
b. Implementation	Moderate	▪ Plenary monitors the compliance of its members with the Forty Recommendations ▪ Secretariat charged with organising and reporting on mutual evaluation missions
c. Dispute resolution and enforcement	Low	▪ Secretariat compiles, but plenary adopts black-lists

Table 5.2 Summary of the assessment of the level of legalisation of the Forty Recommendations of the Financial Action Task Force.

5.4 Comparing expectations and reality

This second case study poses a real challenge to explanatory power of the transaction cost economics framework set out in part one. The analysis of the problem constellation underlying the internationally concerted fight against money laundering failed to yield a specific expectation on the optimal design of an international institution created for this purpose. This failure resulted from the contradictory design expectations a simultaneously high degree of asset specificity and environmental uncertainty give rise to. Whereas the high levels of asset specificity associated with anti-money laundering measures require an international institution with hard legalisation that strengthens its credibility, the high levels of environmental uncertainty demand the flexibility granted by institutions built on soft law. It was therefore of particular interest to see how policy-makers handled this contradiction when designing the institutional foundation of the Forty Recommendations.

The analysis of the level of legalisation actually incorporated in the Forty Recommendations revealed a moderate level of obligation, precision and delegation, but a closer look at the FATF practices around these Recommendations revealed that the degree of obligation is not stable and oscillating between moderate and high. The key factor in this in-

stability is the changing practice with respect to monitoring and sanctioning on non-compliance. In 2000, the FATF abandoned the policy of 'white-listing' complying states in favour of 'black-listing' non-cooperative countries and territories—including states that are not members of the FATF—and of subjecting them to financial sanctions by FAFT members. However, this 'hardening' of the Forty Recommendations was partially reversed, when the FATF decided in 2005 to rethink this black-listing policy.

This analysis of the anti-money laundering regime created by the FATF thus reveals an association between, on the one side, a contradictory problem constellation in the form of a simultaneously high degree of asset specificity and of environmental uncertainty and, on the other, an unstable design outcome. Whether this outcome is specific to this case or representative for a wider pattern is an interesting question to be subjected to further research.

6 Conflict diamonds: The Kimberley Process Certification Scheme

The Kimberley Process Certification Scheme (KPCS) of 2002 forms the centre-piece of international efforts to curb the illicit trade in rough diamonds. This chapter addresses the issue of conflict diamonds and examines to what extent the particular constellation of this problem provides an explanation for the degree of legalisation incorporated in the KPCS. The chapter starts by giving a brief *tour d'horizon* of the background of the issue and of international initiatives—and in particular the Kimberley Process—launched to decouple the devastating link between diamond mining and armed conflict under which some countries in central and western Africa have been—and to some extent still are—suffering. Based on this background information, the chapter then proceeds to scrutinise the particularities of the constellation underlying this policy problem. This analysis will again be guided by the three criteria already introduced earlier, namely asset specificity, behavioural and environmental uncertainty. The discussion will show that the issue of conflict diamonds is characterised by a moderate degree of asset specificity, a moderate degree of behavioural uncertainty and a moderate degree of environmental uncertainty, which suggests an agreement with a moderate level of legalisation as the optimal institutional response. Juxtaposing this predicted optimal governance mode with the actual design of the Kimberley Process Certification Scheme of 2002 and its subsequent development in praxis reveals that, in fact, the KPCS is indeed an international institution with a moderate level of legalisation, confirming the prediction by the transaction cost economic approach.

6.1 Conflict diamonds as an international policy problem

This first sub-chapter provides the background for the analysis of the problem constellation and of the design of the international institution drawn up to tackle the problems arising from conflict diamonds. The first section of this sub-chapter explains why rough diamonds became a matter of international concern in the 1990s and, in particular,

sheds light on the link between diamond mining and armed conflicts that were raging in several sub-Saharan states at that time. The discussion then moves on to present and assess different international initiatives launched to tackle this problem. Finally, the Kimberley Process Certification Scheme of 2000, which forms the core agreement of the anti-conflict diamond framework, is presented in greater detail.

6.1.1 Conflict diamonds as an international policy problem

The issue of conflict diamonds emerged on the international agenda primarily against the background of intensified fighting and horrific atrocities committed in Angola and Sierra Leone, but also in the Democratic Republic of Congo (DRC) and Liberia in the 1990s. Both Angola and the DRC had previously suffered under decades of instability and armed conflicts, but the end of the Cold War changed the nature of these wars in important ways. During the Cold War, these conflicts were largely seen as results of the political antagonism between capitalism and communism, and both the Western and the Eastern block supported political movements in developing countries they felt stood for their political ideology[50]. The end of the Cold War brought about a sharp decline in the economic and military assistance governments and rebel groups in these countries received from their respective patrons, creating the need for alternative sources of funding. Rebel groups and governments alike found them largely in the form of natural resources such as oil, gold, diamonds, other valuable minerals and old-growth timber. Although primary assets have a long history of being exploited to fund military activities, their relative importance increased significantly during the 1990s, as civil wars were becoming increasingly self-financing in nature (Ballentine and Sherman 2003).

From the late 1990s onwards, the role of valuable primary resources in armed conflicts has gained considerable interest from both academics (among the first were Collier and Hoeffler 1998, ; Jean and Rufin 1996, ; Keen 1998a) and policymakers. No academic

[50]Although it is questionable whether the antagonistic parties were ever true-blue supporters of either of the two Cold War ideologies (Cortright and Lopez 2000).

consensus has yet emerged on the precise causal mechanisms that link natural resource abundance and armed conflicts[51]. The central point of disagreement is whether resource wealth has to be seen as a *trigger* of armed conflicts or as a factor *sustaining* them. Consensus does exist, however, on the fact that in many conflicts in Africa, but also in Cambodia, Borneo, New Guinea and in the Amazon basin (Cooper 2002, ; Keen 1998b, ; Klare 2001, ; Le Billion, Sherman, and Hartwell 2002) natural resources have played an important role with negative consequences. This perception is also widely shared among policymakers.

A UN panel of experts (S/2000/203) found that in the case of Angola diamonds constituted an important pillar of the political and military economy of the *União Nacional para a Independência Total de Angola* (UNITA). This rebel group led by Jonas Savimbi had been engaged in armed confrontations with the ruling *Movimento Popular para a Libertação de Angola* (MPLA) for most of the time after the country's independence from Portugal in 1975. Until the New York accords were signed in 1988, the two antagonists had relied heavily on the support provided by the superpowers, with the MPLA being backed by the Soviet Union and Cuba, while UNITA benefited from the support of the United States and South Africa (Le Billon 2001). In the accords, both superpowers promised to cease their support for the MPLA and UNITA respectively. This led to a localisation of the conflict, with the exploitation of the country's natural resource becoming the predominant source of income of both warring parties—oil in the case of the MPLA and diamonds for UNITA. It has been estimated that between 1992 and 2000 UNITA managed to control 60-70 percent of Angola's diamond production (Global Witness 1998), generating an estimated US$3-4 billion in revenue (Le Billion 2001, 69). These tremendous revenues allowed Savimbi's movement to purchase weapons, hire soldiers as well as to acquire friends and to maintain external support, most prominently from Zaïre (today's DRC) under Mobutu.

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[51] For a comprehensive summary of the debate see Humphreys (2005) and Basedau (2005).

In Sierra Leone, diamonds played a similar role in supporting the Revolutionary United Front (RUF)'s fight against the government of Ahmed Tejan Kabah. Under the leadership of Foday Sankoh, the RUF focused its efforts from 1995 onwards on securing access to diamonds and conquered the diamond rich regions of Kono and Tongo Field. According to estimates published by the UN Panel of Experts on Sierra Leone, the RUF managed to generate an annual income between US$25 million and US$125 million (S/2000/1195). The same report also reproduced an estimate by De Beers which puts the estimated income at US$70 million for the year 1999. Even the lower estimates constitute diamonds as the primary source of income for the RUF, an income which was more than enough to sustain RUF's military activities.

In the case of the Democratic Republic of Congo (DRC), the abundance in natural resources such as gold, old-growth timber, Columbite-tantalite (Coltan), copper, cobalt and diamonds, has contributed to the country's instability mainly by attracting the interest of foreign troops (Global Witness 2004b, ; Montague 2002). The country's wealth in natural resources played an important role already under the brutal rule of the Belgian King Léopold II in the 19th century (Hochschild 1999). In contemporary times, the DRC's resource wealth has been seen as a motivating factor in the intervention of troops from Uganda, Rwanda, Zimbabwe, Angola, Sudan, Namibia and Chad and in their reluctance to withdraw from the DRC (S/2001/357).

In Liberia, the main problem was not primarily the misuse of domestic diamonds, which constitute only a minor share of world production (Goreux 2001b) and of the country's postwar economic potential (Gberie 2004), but rather the country's role as a trading centre for illicit diamonds from Sierra Leone. In exchange for diamonds, the Liberian president Charles Taylor, granted his longtime friend Foday Sankoh military equipment and training as well as a sanctuary for RUF troops that needed a refuge (S/2000/1195).

Against this background, the terms 'blood diamonds' and 'conflict diamonds'[52] started to make their rounds in the media and international policy fora in the second half of the 1990s. The United Nations General Assembly defined conflict diamonds as 'rough diamonds that are used by rebel movements to finance their military activities, including attempts to undermine or overthrow legitimate Governments' (A/RES/55/56)[53]. Estimates on the relative volume of conflict diamonds in the late 1990s varied between two percent (O'Ferrall 2002) and fifteen percent (Orogun 2004) of the world diamond market. The higher end of the estimate can be assumed to include also other forms of illicit diamond trade, including the smuggling and trading of diamonds for reasons of tax evasion, money laundering, terrorist financing and for other criminal purposes[54]. The most widely accepted estimate puts the relative volume of conflict diamonds between three and four percent (Goreux 2001b, ; Tamm 2002). In 1999, almost 60 percent of conflict diamonds in the world market originated from Angola, followed by Sierra Leone which accounted for 28 percent (Goreux 2001b).

6.1.2 International initiatives dealing with conflict diamonds

As some policy analysts started to emphasise the *economic* rather than the *political* motives behind many armed conflicts, economic solutions gained prevalence over military ones. As the war on drugs turned towards the strategy of 'taking profits out of crime' from the 1990s onwards, so did international efforts to solve armed conflicts which were seen as 'resource wars' or quasi-criminal enterprises (Collier 2000). Instead of having to send troops to the complex and intractable ethnic and religious conflicts of the early 1990s, the emphasis on the 'greed' dimension of these conflicts allowed for a seemingly easier and less expensive solution: targeted economic sanction, often also referred to as

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[52] The two terms are essentially synonymous but with slightly different connotations. The term 'conflict diamonds' is more neutral and used in the KPCS and other official documents. The term 'blood diamonds', in contrast, is more widely used in the press and among NGOs.

[53] This definition can be criticised for failing to address the question of what a 'legitimate' government can mean in the context of authoritarian rule, endemic corruption and government sponsored human rights abuse found in some of the countries concerned (Ballentine and Nitzschke 2005).

[54] The UN Panel of Experts on Sierra Leone estimated that up to twenty percent of the worldwide trade in rough diamonds were of illicit nature (S/2000/1195).

smart sanctions. The objectives of this strategy were twofold. First, it aimed at cutting off rebel groups from their revenue sources, thus, coercing them to the negotiation table or to full surrender. At the same time, it was important to ensure that the measures imposed would neither damage the legitimate diamond industry of the countries suffering directly under resource-related conflicts nor of other diamond-mining countries.

Pursuing these three objectives, the Security Council adopted Resolution 1173 on 12 June 1998, which—among other targeted measures—imposed an embargo on all imports of rough diamonds not certified by the Angola government. It also prohibited the export of mining equipment to UNITA controlled territory. Similar steps were taken two years later against Sierra Leone's RUF (S/RES/1306). As the Liberian president Charles Taylor continued to lend military support to the RUF—often in exchange for diamonds—targeted sanctions were also imposed against Liberia (S/RES/1343). Although the UN fell short of imposing official sanctions with regard to the DRC (Cater 2003, ; Ross 2003), a UN Panel of Experts still declared '[a]ll activities—extraction, production, commercialisation, and exports—taking place in the Democratic Republic of Congo without the consent of the legitimate government' to be illegal (S/2001/357, 5).

As the armed conflicts in both Angola and Sierra Leone were brought to a resolution in 2002, the sanctions on commodity exports from these two countries also ended. In the case of Sierra Leone, the sanctions were lifted following a United Nations Security Council Resolution in December 2002 (S/RES/1448), while the sanctions imposed on UNITA expired in June 2003. The only diamond related sanctions currently in place are those imposed on Liberia. These sanctions were last renewed on 21 June 2005 (S/RES/1607) and extended for a further period until 21 December 2005 in order to bolster the peace process. In a letter to the president of the UN Security Council dated on 17 March 2005 the chairman of the UNSC Committee recommended a continuation of the sanctions on the exports of rough diamonds from Liberia (S/2005/176) on the grounds that the diamond trade in Liberia was largely illegally controlled by an opaque monopoly and that

the country still lacked the funds to adequately certify rough diamonds for international sale.

The targeted sanctions proved little effective with regard to both Sierra Leone and Angola (Cortright and Lopez 2000, ; Global Witness 1998). Le Billion (2003, 235) points out that in both cases the conflict resolution was primarily an outcome of military intervention rather than the result of commodity sanctions (on Angola see in particular S/2000/203). The reasons for this relative ineffectiveness were fourfold (Cortright and Lopez 2000, 158; Le Billion 2001, 74). First, the effectiveness of the certification scheme set up by the governments was limited due to widespread corruption which led to a fraudulent use of the diamond certification system by government officials (S/2000/203). Second, the governments lacked the capacities to control the borders and to prevent diamonds from being smuggled out of the country to be sold in neighbouring states. Third, other states were often too willing to condone this practice or even openly collaborated and supported UNITA in its efforts to circumvent the sanctions. The UN panel of experts chaired by the Canadian Ambassador to the UN, Robert Fowler, denounced presidents Gnassingbe Eyadema of Togo and Blaise Compaore of Burkina Faso as the main culprits; but also criticised other African states—namely Rwanda, Zambia, Cote d'Ivoire and Gabon—and European states—namely Portugal, France, Belgium and Switzerland—for being too lenient towards UNITA dealings taking place within their territories (S/2000/203). The role of Charles Taylor as a major sanctions buster with regard to Sierra Leone has already been mentioned above. Finally, the UNSC and the major powers remained reluctant to adopt measures to monitor and enforce the sanctions more effectively despite the widespread knowledge about the strategies adopted by UNITA and RUF to circumvent the sanctions (Cortright and Lopez 2000, 149).

When the fighting continued in Angola and Sierra Leone, despite the UN sanctions, non-governmental organisations sought other means to prevent rough diamonds from financing these armed conflicts. London-based Global Witness and Partnership Africa Canada (PAC) led a campaign to pressurise the diamond industry into assuming its re-

sponsibility in this respect and the governments, mainly of the UK and the US, into launching international control efforts that went beyond the existing UN smart sanctions regime. Both NGOs were highly influential through the thoroughly researched reports they published on conflict diamonds. In December 1998, Global Witness released a short report which highlighted this *problématique* in the context of the civil war raging in Angola, followed by a longer study in 2000. Also in 2000, Partnership Africa Canada published a study, which showed that the illicit sales of rough diamonds played a similar role in the armed conflict in Sierra Leone (Smillie, Gberie, and Hazleton 2000).

Global Witness and PAC formed a network of over one hundred NGOs—including Amnesty International, Oxfam, Human Rights Watch—, which created significant public awareness for conflict diamonds through the media. This network also considered the option of launching a consumer boycott campaign to exert additional pressure on the industry and on governments, and some NGOs even contemplated the option of demanding reparations for the damage caused by the civil wars and compensation for the victims from diamond-mining companies operating in the affected countries.

6.1.3 Overview of the Kimberley Process Certification Scheme

The KPCS is the result of a comparably fast negotiation process between governments, NGOs and the diamond industry called the Kimberley Process (KP). The Kimberly Process was launched against the backdrop of the largely ineffective sanctions imposed against unauthorised diamond exports from Sierra Leone and Angola and growing NGO pressure in reaction to the fatal consequences of this ineffectiveness. Worried about a potential consumer boycott, the diamond industry and the governments of a number of diamond producing, in particular South Africa, Botswana and Namibia, and consuming countries, mainly the US and the UK, decided to adopt a proactive policy to curb the illicit trade in conflict diamonds. As one policymaker recalled '[t]hey [the governments of these countries] got worried that the NGO movement could run amok and start a consumer boycott. The NGOs had not much to lose from this—but for the diamond producing countries such a campaign could have had disastrous outcomes' (Morrison 2004).

The government of South Africa, the world's third largest exporter of rough diamonds, supported by Botswana, the United Kingdom and the United States, took the lead and invited the representatives of governments, the industry and of NGOs to a meeting in the old diamond-mining city of Kimberley in May 2000. From its onset, the Kimberley Process sought to prevent rebel groups from financing their activities through selling rough diamonds while protecting the legitimate trade from adverse effects of a potential consumer boycott and of a proliferation of insulated UN embargoes on diamond exports. With the explicit backing of the UN General Assembly (A/RES/55/56 and A/RES/56/263) and of the UN Security Council (S/RES/1295), the participants developed the Kimberley Process Certification Scheme (KPCS), which spells out the minimum standards all participating states have to adopt with respect to the import and export of rough diamonds. This scheme was adopted by the representatives of 48 governments and of the European Community at a plenary session in Interlaken, Switzerland, on 5 November 2002[55].

The KPCS contains a preamble, six sections, and three annexes. The first section provides the definitions of eighteen core terms used in the Kimberley Process Certification Scheme. Most importantly, it defines 'conflict diamonds' along the lines of the definition of the UN General Assembly resolution A/RES/55/56 mentioned above. This definition furthermore presupposes the existence of relevant UNSC resolutions. As a consequence of this definition, 'conflict diamonds' cease to exist, with the lifting or expiration of the last UNSC sponsored embargo on rough diamonds—at least according to this narrow definition. Section II establishes participants' obligation to ensure that each shipment of rough diamonds is accompanied by a certificate that meets the minimum technical standards set out in Annex 1. Section III spells out which measures exporting and importing countries are required to implement with respect to international trade in rough diamonds. Most importantly, letter c of this section prohibits participating states to trade (import from or export to) rough diamonds with any state that is not an official partici-

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[55] The full text of the Kimberley Process Certification Scheme can be found in Annex 2

pant of the KPCS. Section IV calls upon states to establish mechanisms of internal control, most importantly through the penalisation of transgression and the collection of data on production, import and export. This same section also emphasises the importance of a voluntary system of industry self-regulation. In response to this call, the International Diamond Manufacturers Association (IDMA) and the World Federation of Diamond Bourses (WFDB) established the 'Essential Guide to Implementing the Kimberley Process' on behalf of the whole industry. Section V addresses the matter of on international co-operation and transparency, with a special emphasis on the importance of statistical data. Section VI, finally, is the longest of all sections of the Scheme and deals with administrative matters such as meetings, administrative support, and participation.

6.2 Problem constellation

After this brief overview of the emergence of conflict diamonds on the international political agenda, the discussion now moves on to analyse systematically the specific attributes of this *problématique*. This analysis will be guided by the three explanatory variables introduced in chapter 3, i.e. asset specificity, behavioural uncertainty, and environmental uncertainty. The following paragraphs will examine how each of these three variables poses specific challenges to international efforts to curb the illicit trade in rough diamonds, giving rise to certain demands on the design of international institutions established to achieve this goal. The assessment below will reveal that all three indicators reach a moderate degree. Therefore, this sub-chapter concludes that an international agreement established to tackle this problem is most appropriately designed when incorporating a moderate level of legalisation.

6.2.1 Asset specificity

The costs and benefits resulting from an effective scheme to fight the illegal trade in rough diamonds vary between countries, mainly as a result of the varying degrees to which they are involved in the rough diamond trade and to which they are exposed to the risk of diamond-related conflicts. It will be shown that all countries involved with the

KPCS face costs proportional to the benefits they expect to receive by cooperating. Incentives to shirk are moderate.

6.2.1.1 Costs

The adoption and implementation of an international cooperation to fight the illicit trade in rough diamonds involves both direct and indirect costs, which will be analysed separately in the following.

- Direct costs

The implementation costs associated with the KPCS are positively correlated with the volume of diamond trade, which varies considerably between countries. The trade in rough diamonds is concentrated in a very limited number of countries throughout the mining, trading and polishing stages. The commercially attractive mining of diamonds is limited to roughly a dozen countries (see Table 6.1). The five largest diamond producers account for 75 percent of the world export value, the ten largest producers even share more then 97 percent of the world market among them (Goreux 2001b).

Country	Production (millions of US$)	Percentage of world Export value
Botswana	1613	22
Russia	1523	21
South Africa	985	14
DR Congo	725	10
Angola	544	8
Australia	437	6
Canada	422	6
Namibia	414	6
Sierra Leone	138	2
ROW	452	5
World	7253	100

Table 6.1 Major Diamond Producing Countries 1999 (Goreux 2001b).

The trading of rough diamonds is also concentrated in a small number of centres. The Belgian city Antwerp has a 560-year-old history as the centre of the global diamond industry, and still today do approximately 80 percent of all rough diamonds pass through

Antwerp's bourses (Global Witness 2000, ; Goreux 2001b). The remainder is traded in places like London, New York, Tel Aviv, Johannesburg, Bombay and Dubai, with the latter pursuing an aggressive strategy to challenge Antwerp's dominance (Laitner 2005). The polishing of rough diamonds, finally, is concentrated in countries like India, which holds around half of the world market of polished diamonds and fast-growing China, but also Thailand and Mauritius seek to conquer a share of this labour-intensive part of the production chain (Global Witness 2000).

States that have a major stake in the mining, trading and polishing of rough diamonds face the highest implementation costs, as they need to issue and check the validity of certificates for diamonds leaving or entering their territory. These tasks require both dedicated physical and human assets. The required dedicated physical assets come in the form of printing forgery-proof certificates and establishing secured internet links through which KP participants can send advance advice to the destination of an outgoing diamond shipment. These costs are, however, minor, and were, in the case of Sierra Leone, covered by the British government. Several policy options, such as the tagging of diamonds by means of laser and focused ion beam technologies were discussed but then discarded primarily because of the high costs involved (Cook 2001, ; Global Witness 2000).

With respect to human assets, the implementation costs of the KP are more important. In the case of diamond producing countries, the overall responsibility for this task was usually assigned to an already existing ministry, such as the Ministry of Geology and Mines in the case of Angola. Diamond importing countries often had no dedicated offices in place prior to the KP, as the import of rough diamonds was not considered a distinct category within the countries' customs regulations nor within the World Customs Organisation. Some importing states established dedicated posts, like the 'Special Negotiator for Conflict Diamonds' within the US State Department, or separate offices, like the 'Government Diamond Office' with a staff of three in the British Foreign and Com-

monwealth Office[56]. States with only a limited number of rough diamond imports did not create a new and dedicated position but added the responsibility for dealing with the issue to the normal workload of pre-established positions, in the case of Germany to three desk officers working in the Federal Foreign Office, the Federal Ministry of Finance and the Federal Ministry of Economics and Labour.

In sum, the implementation of the KPCS incurs a moderate amount of direct costs in a handful of mining, trading and polishing countries. Throughout the drafting process of the KPCS, participants were wary of avoiding cost-intensive implementation. It is thus not surprising that the substantive provisions of the scheme involve less technical and human asset specific costs than do the requirements spelled out in the Vienna Convention and the Forty Recommendations discussed in the preceding two chapters.

- Indirect costs

More important than the direct costs associated with the adoption of a scheme to curb the illicit trade in diamonds are the indirect negative consequences for countries that have so far benefited from this illicit trade. As mentioned above, an estimated 20 percent of the world market in rough diamonds is believed to be illicit (Tamm 2002)—usually associated with diamond smuggling motivated by the desire to avoid tighter regulation, high export taxes, or the obligation to sell exclusively to a parastatal diamond marketing company, which often offers only below-market prices.

Quite revealing is in this respect is Table 6.2 below, which compares the estimated diamond mining value with its estimated official export value based on UN trade data. It shows cases with considerable discrepancies between these two values. Some countries export considerably more diamonds than they are believed to have mined domestically, while others display a deficit in that respect. Part of this discrepancy results from diamond trade data limitations, but part of it reflects illicit diamond flows, i.e. diamond

[56] This office is about to move to the Department for International Development (DFID).

smuggling, between the countries with a net deficit and those with a net surplus in terms of diamond exports. It shows for example that in 2000 the Central African Republic exported more than twice as many diamonds (in value) as it is estimated to have mined domestically; in Liberia the exports of rough diamonds exceed the value generated through mining even by a factor of five. The Republic of Congo was reported to have the greatest net export surplus—exporting annually 5.2 million carats of diamonds, while its production potential was estimated at 55,000 carats (Fraser 2004)[57]. These states with net surpluses benefited from the inflow of smuggled diamonds, as they typically levy an export tax on diamond sales before these diamonds are officially fed into the world market. Although the KPCS was not primarily established to prevent international diamond smuggling it should still have the secondary effect of exposing states which benefit on a large scale from the export of illicitly imported diamonds and of undermining this additional source of export tax revenue.

Country	Estimated mining value (thousand of US$)	Estimated export value (thousands of US$)	Difference between mining and estimated exports (thousands of US$)
Angola	739,662	633,265	(106,397)
Central African Rep.	72,000	168,515	96,515
Guinea	103,500	163,166	59,666
Liberia	27,200	101,861	74,661
Namibia	419,120	709,000	289,880
Sierra Leone	87,500	14,114	(73,386)
Tanzania	45,065	30,294	(15,671)

Table 6.2 Estimated mining value and estimated export value of rough diamonds in selected African countries, 2000 Source: (US General Accounting Office 2002).

In sum, the implementation of the KPCS will impose indirect costs on a small number of diamond mining countries, which have traditionally benefited from diamond smuggling. If the KPCS is thoroughly implemented, these countries will miss this particular source of revenue. While these indirect costs are real, they are much smaller than the indirect costs faced by countries that are obliged by the Vienna Convention to eliminate the culti-

[57] The case of Congo Brazzaville is discussed further under 6.3.1.3.

vation of narcotic plants. Whereas in these countries, the livelihood of a large population is provided for by narcotic plants, rough diamond smuggling does not provide benefits to a comparably large segments of the population neither in Liberia, nor in Namibia nor in other countries with excess rough diamond exports. For this reason, the indirect costs are judged to be just moderate.

6.2.1.2 Benefits

The KPCS has not only resulted in costs for participating states but also in considerable benefits. The type and scope of benefits the currently 43 KP participants reach from participating in the agreement vary considerably. Two major types of immediate benefits[58] can be discerned: security-related benefits and economic benefits.

Security-related benefits of an effective instrument to curb illicit diamond flows arise from the fact that such an instrument limits rebel groups' ability to finance their uprising, maybe even weakening their incentives to take up their arms in the first place (see discussion above under 6.1.1). These benefits are of vital importance not only for diamond-rich states that are threatened by such a rebellion but also for neighbouring states, as these conflicts often entail negative spill-over effects in the form of uncontrolled inflows of refugees but also of arms and fighters. Angola, the Central African Republic, the Democratic Republic of Congo, Guinea, Liberia, the Republic of Congo and Sierra Leone all fall into this category of states with direct or indirect security concerns.

The economic benefits created by the Kimberley Process come in three forms. First, an effective international control of the trade in rough diamonds fosters stability in countries exposed to the risk of diamond related conflicts. This benefit is illustrated by the

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[58] Several states did not primarily support the KP out of an immediate self-interest but rather motivated by concerns about the devastation caused by diamond-related conflicts in the affected states and about the negative economic consequences a potential consumer boycott would have on a number of developing states. Tim Martin, a Canadian diplomat and chair of the KP from 2003-2004 stated for example that „Canada has always taken a human security approach to the question of conflict diamonds. ... Our goal is to ensure that diamonds start to support, rather than undermine, human development" (Canadian Department of Foreign Affairs and Trade 2004).

case of Sierra Leone, where the economy grew by 9.3 percent in the year following the official end of the conflict (White 2005b).

Second, all diamond producing countries—not only those threatened by diamond related conflicts—can derive direct economic benefit resulting from the KPCS' anti-smuggling effect already mentioned above. As the KPCS renders it more difficult for any illicit rough diamonds—not only conflict diamonds in the narrow sense—to enter the legitimate market, it increases the revenues of diamond mining states through an increase in diamond export taxes and taxes on mining firms' profits as well as through an increase in profits of state owned diamond companies, as for example Empresa Nacional de Diamantes de Angola (Endiama), of joint-ventures between a government and a private company, as Debswana (Botswana and De Beers) and Namdeb (Namibia and De Beers). Table 6.2 above showed not only states with an diamond export surplus but also states where the estimated value of mined diamonds exceeded that of exported diamonds. Most dramatic is this negative discrepancy in the case of Sierra Leone, where in 2000 the estimated value of the diamonds mined surpassed the official exports by a factor of seven. As William Reno (1995) notes, this country has a long-established history of illegal diamond mining, dating back decades before the outbreak of the civil war. Following the end of the armed conflict in Sierra Leone and the implementation of the Kimberley Process Certification Scheme official diamond exports rose by two thirds between 2003 and 2004 to reach a total of US$127m (White 2005a). However, official exports still account for only a quarter to a half of total exports in rough diamonds. Also the government of the Democratic Republic of Congo has claimed to lose diamonds worth a total of US$800m annually due to smuggling. The government therefore expressed strong hopes that the Kimberley Process will curb the fraudulent export of diamonds from DRC and enable the Congolese to reap the full benefits of their country's natural wealth (Business Day 2002).

The third and final type of economic benefit created by the Kimberley Process Certification Scheme lays in the fact that its successful launch helped to avert a potential con-

sumer boycott campaigned by NGOs. Such a campaign could have crippled the sales of diamonds, negatively affecting the economy of diamond producing and processing countries. Diamond mining constitutes an indispensable pillar of the economy in a number of countries. In the world's largest diamond producer country, Botswana, diamond mining generates 80 percent of the country's export revenues (Kuriyan 2005) and 40 percent of the country's GDP (US General Accounting Office 2002, 49). In Namibia, rough diamond exports accounted for 47.9 percent of total exports in 2000, in Sierra Leone for 18.6 percent and in Angola for 8.1 percent, respectively (Laitner 2005). The world's largest diamond trading centre, Antwerp, generates an annual turnover of US$34bn and contributes 7 percent to Belgium's exports (US General Accounting Office 2002). In the world's leading diamond cutting centre, India, cut and polished diamond exports also accounted for US$10.8bn or 13 percent of the country's total exports in 2004 (Kuriyan 2005, calculations by author). Lesotho, which itself is not a diamond producer, relies heavily on the diamond industry as the remittances from diamond miners employed in South Africa present a major source of income (CIA 2005a). Also in terms of employment, the diamond industry is an important factor. For example, more than 100,000 people work in Angola's remote areas as so-called *garimpeiros*, freelance diamond seekers (Roox 2002). In India, around 750,000 people, many of them with little formal qualifications, find work in the diamond industry, mainly in polishing (Laitner 2005). Consequently, the launch of a consumer boycott would have had severe economic consequences for these countries.

In sum, the benefits some countries can derive from an effective scheme to curb trade in conflict diamonds can be assessed as high. Hence, the Vienna Convention and the KPCS are comparable in this respect, as in both cases illicit activities threaten to seriously undermine stability in the affected states.

6.2.1.3 Comparison of costs and benefits

Figure 6.1 shows the distribution of costs and benefits between different groups of countries. The KPCS induces costs primarily in diamond producing countries, which issue

certificates and, hence, must maintain an infrastructure to assess the licit nature of all rough diamonds received for certification. These costs are higher in countries, whose diamond reserves are in alluvial deposits, because such deposits are spread out over vast areas of land and are exploited by a large number of independent artisanal operators. Polishing centres incur smaller costs for receiving and examining certificates, whereas such cost are reduced to a negligible amount in purely diamond consuming countries. This latter group of countries includes countries like Norway and France, which participate in such a global initiative solely to show their support for a purpose they consider worthwhile out of humanitarian considerations.

The benefits of the KPCS are also mostly felt in diamond producing countries, especially in those conflict-ridden states with primarily alluvial deposits. Inhibiting rebels to finance their fight by trading rough diamonds will increase the national security of countries such as the Democratic Republic of Congo, Liberia, Angola, and thereby facilitate the emergence of a more stable environment conducive for economic growth. But also Botswana, which does not suffer from violent internal conflict, benefits from participation in the KPCS, as the lion's share of its economy is based in the diamond industry and non-participation would exclude it from the world diamond market. Diamond polishing and consuming states also benefit by averting a consumer boycott and a potential collapse of the diamond trade.

The above depiction of the distribution of costs and benefits also shows that the degree of asset specificity resulting from the Kimberley Process Certification Scheme is only moderate. The incentive of most states to shirk is rather modest mainly due to the low level of direct implementation costs. Only diamond producing countries that are generating or hope to generate additional tax revenues from certifying diamonds of illicit origin may feel compelled to shirk from their obligations. These states are typically located in geographical proximity of states that are threatened by diamond-related conflicts. Given the great importance a functioning agreement has for the latter category of states, these states will seek to endow an international institution created to combat conflict

diamonds with at least a moderate degree of legalisation in order to alter the incentive structures of unofficial 'surplus' exporters.

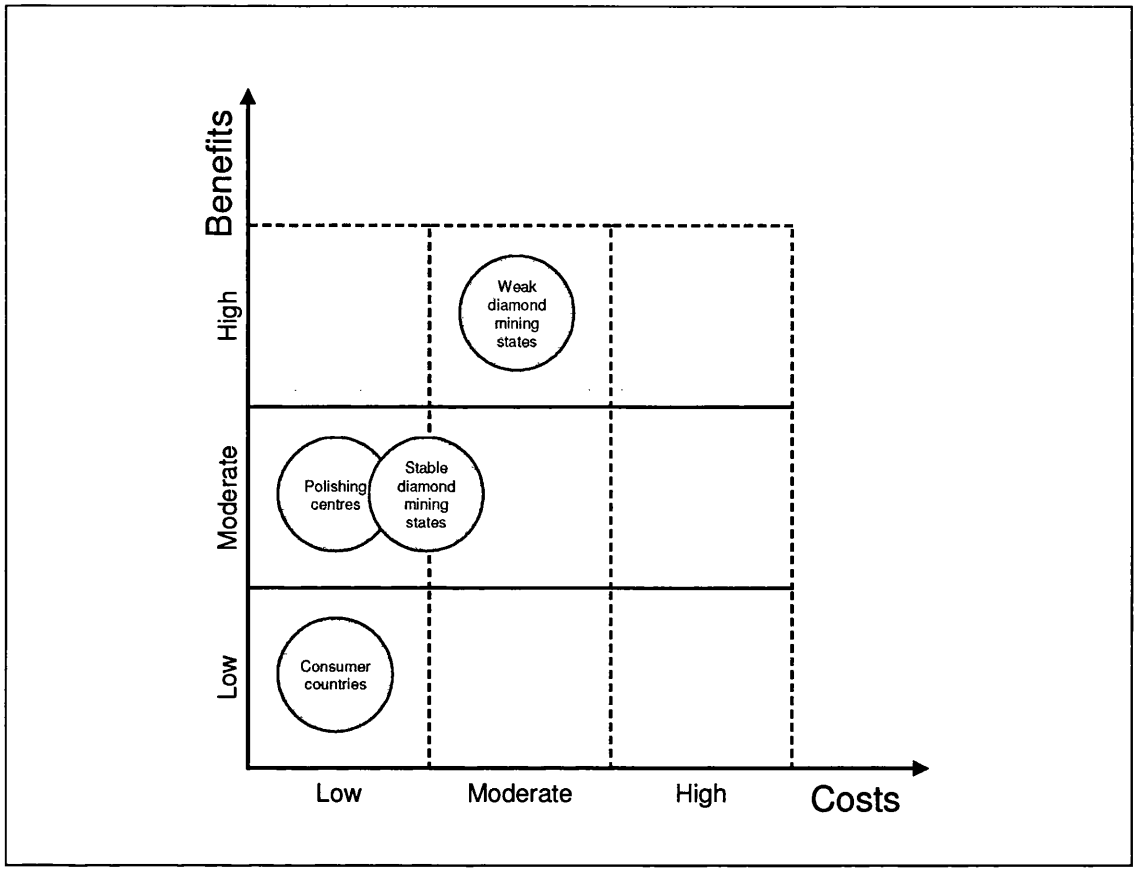

Figure 6.1 The distribution of costs and benefits amongst countries participating in the Kimberley Process Certification Scheme.

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In sum, the degree of asset specificity stemming from efforts to curb illicit flows in rough diamonds can be considered to be moderate. Incentives to shirk are low to moderate as the implementation of the KPCS does not result in high costs for any of the participating states, while the potential loss from an *ex post* breakdown of an agreement could be very significant for countries at risk of diamond-related conflicts.

6.2.2 Behavioural uncertainty

Whereas the above discussion examined the extent to which states may have an incentive to deliberately shirk from their obligations to control the trade in rough diamonds,

behavioural uncertainty addresses the extent to which states can disregard their obligations without being detected. As in the preceding two case studies, behavioural will be assessed based on three indicators—government incapacity, the relative reliance on governmental monitoring and industry opacity. It will be shown that the general level of behavioural uncertainty associated with an international scheme to combat the illicit trade in conflict diamonds is of moderate degree. State incapacity and industry opacity are both high, but valiant NGOs are at hand to operate as fire alarms, limiting countries' ability to shirk from their obligations without being exposed.

- Government incapacity

An effective solution to the problems associated with the trade in rough diamonds requires governments to have full control over the mining and movement of rough diamonds within their territory and across borders. However, those countries, which give rise to the creation of a global anti-conflict diamond scheme are weak states plagued by internal war or just emerging from conflict. The Democratic Republic of Congo and the Central African Republic, Liberia and Angola all rank in the bottom decile of the World Bank's 2004 rule of law index. The rule of law fares only slightly better in Sierra Leone, which is assumes a percentile rank of 12.6. The KP was launched specifically to compensate for these states' governance incapacity by enlisting other states with a stronger rule of law in the fight against conflict diamonds. In that respect, governance incapacity found in association with conflict diamonds is comparable to that found in the case of narcotic drugs.

- Relative reliance on governmental monitoring

As discussed in section above, NGOs have been exceptionally active in promoting international efforts to curb the trade in conflict diamonds. The two most important organisations are Global Witness and Partnership Africa Canada (PAC). Throughout the KP, these two NGOs were lobbying the governments of the UK and the US very effectively to create an effective anti-conflict diamond regime. They attracted significant attention by completing and publishing well-researched reports about conflict diamonds, which have become the standard reference for policy makers. The involvement of Global Witness and Partnership Africa Canada has not ceased since the signing of the KPCS. Both NGOs are still active in monitoring the implementation of the agreement. Thanks to a number of highly qualified members of staff directly in the field they are able to detect inconsistent implementation. Well-established media contacts ensure that they can create sufficient bad publicity about cases of non-compliance.

- Industry opacity

The diamond industry is traditionally secretive (US General Accounting Office 2002), with trade data hardy obtainable from mining companies. Most business in the diamond industry is conducted on the basis of a handshake and little written documentation of deals exist (Laitner 2005). A more important source of industry opacity, however, results from differences in the nature of rough diamonds.

Diamonds are extracted from two types of deposits—primary and secondary deposits—, which differ from each other with respect to the extent to which they allow for undetectable shirking. The majority of diamonds, around 78 percent (US General Accounting Office 2002), are mined from primary deposits—kimberlite and lamproite pipes that raise diamonds from Earth's mantle to close to the surface (American Museum of Natural History 2004). Alluvial diamonds are the most important form of secondary diamonds. On the African continent, these diamonds were eroded from their mother rocks in

Southern Africa and carried westwards to countries like Angola, Sierra Leone, Congo Brazzaville and the DRC.

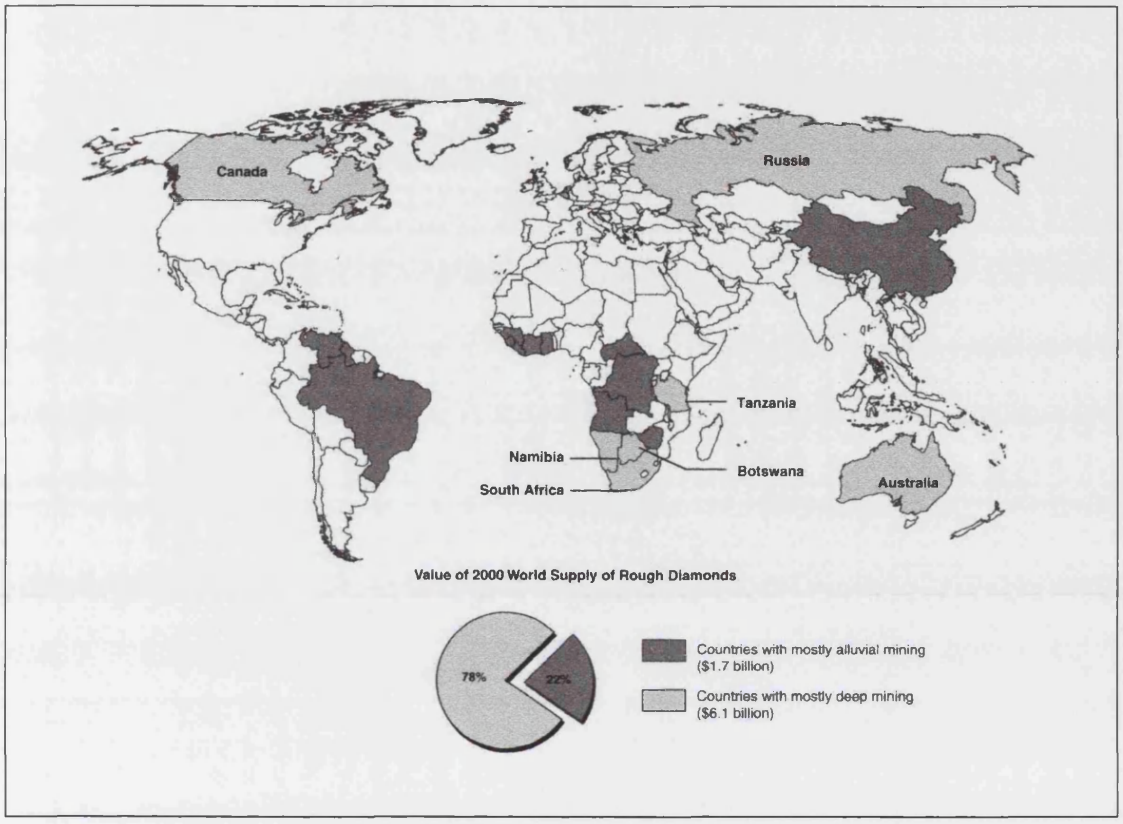

Figure 6.2 Global map of countries with alluvial and kimberlite diamonds. Source: US General Accounting Office 2002.

The potential for undetectable shirking differs between these two types of diamonds for two major reasons. First, the mining potentials and the actual level of mining activities of primary deposits are easier to assess than those of secondary deposits. Diamond extraction from kimberlite deposits requires capital-intensive technology, leading to an industry concentration of a small number of big scale companies. Furthermore, mining is concentrated on a few spots, which are fenced and heavily controlled (Goreux 2001a). In contrast, the mining of alluvial diamonds requires nothing but a shovel and pan. This low capital intensity allows the artisan or small-scale mining to thrive in many places in western and central Africa, Latin America and Asia. In Angola, for instance, it is estimated that more than 100,000 so-called *garimpeiros* are engaged in the exploitation of alluvial diamonds spread out over vast areas of land (US General Accounting Office

2002, 44). For all these reasons, it is easier to assess whether the export volume of a diamond mining country with primarily kimberlite deposits is in line with its domestic mining potentials than it is the case with countries exporting predominantly alluvial diamonds. Second, the identification of the provenance of alluvial diamonds is technically impossible. Whereas cost-intensive physical and chemical identification processes can establish the origin of kimberlite diamonds with some degree of certainty, it is outright impossible to determine where an alluvial diamond was mined, as the diamond only carries the characteristics of the kimberlite pipe where it originated from but not of the place where it was actually extracted. Consequently, it is thus virtually impossible to detect non-compliance when Guinea certifies alluvial diamonds as domestic production when these diamonds were in fact extracted in Sierra Leone.

The extent to which states can shirk from their KP obligations without detection depends not only on the type of their diamond deposits but also on the volume of diamonds they trade legally. A country like Botswana, which exported diamonds worth more than US$2billion in 2004 (Kuriyan 2005), has in absolute terms many more opportunities to certify diamonds of dubious origin than does for example Tanzania, which only contributes 0.1 percent to the world production in rough diamonds worth only US$20 million (MBendi 2004).

In terms of industry opacity, the case on conflict diamonds can be best compared to the case on illicit drugs. Both policy problems are highly opaque, a sharp contrast to the well documented world of financial services.

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In sum, behavioural uncertainty reaches a moderate level in the case of conflict diamonds, with governance incapacity and industry opacity both being pronounced but partly offset by the important role non-state actors play in the monitoring of compliance.

6.2.3 Environmental uncertainty

Environmental uncertainty is the third and final variable the TCE model uses to assess the problem constellation underlying an international institution. This variable refers to two major aspects: first, to the novelty of a policy issue and, second, to the degree of innovativeness associated with the activity that is to be regulated. It will be shown that the problems associated with the trade in conflict diamonds are new, while the innovativeness of the industry is moderate.

6.2.3.1 Novelty of policy issue

Before the late 1990s, the link between armed conflicts and diamonds had received hardly any attention neither from academics, NGOs, media nor policymakers. It is therefore little surprising that most policymakers had no previous knowledge neither of the problem mechanisms nor of potential solutions. Several of the desk officers interviewed by the author confirmed that the issue was 'brand new' to them as individuals as well as to their ministerial department. Also the regulatory instruments finally adopted by the KPCS to tackle the problem of conflict diamonds are often described as highly innovative.

Of the three policy problems discussed so far in this study, the policy issue of conflict diamonds presents the highest level of policy issue novelty. In the case of money laundering, for instance, policy makers have to adapt to the spread of laundering activities beyond the traditional financial sector to sectors in which they possess little pre-existing regulatory experience but they can still build upon a more than two decades long history of coordinated efforts against money laundering. This experience is missing in the case of conflict diamonds, as the diamond trade has never been regulated on a global scale before, and no comparable commodity certification scheme has even been implemented—neither on the global level nor on regional levels.

6.2.3.2 *Innovativeness of criminal field*

This second aspect of environmental uncertainty refers to the ease with which rebels or criminals engaged in the illicit trafficking of conflict diamonds can circumvent regulatory measures.

Diamonds have been described as the most concentrated form of wealth (Tamm 2002), and are therefore easy to conceal and to smuggle. However, and as already mentioned, the KPCS limits the smuggling opportunities, because smuggled diamonds—at least on the large scale—can only be certified and introduced to the licit world market in states that are engaged in diamond mining and have a substantial licit output or reserves, large enough to dwarf the volume of illicit gems.

More important than these strategies to circumvent KPCS regulations for criminal purposes are developments, which have the effect, though not the intention, of rendering the KPCS void. One such trend is the current move towards the establishment of cutting and polishing centres in diamond mining countries. For instance, the Israeli diamond magnate, Lev Leviev, opened Namibia's biggest polishing factory on June 28, 2004 (The Economist 2004). This trend undermines the KPCS because the scheme only covers international trade in rough diamonds, not cut or polished diamonds, which fall under a different WCO category. An expansion of the scheme so as to cover cut and polished diamonds is little meaningful as '[t]here are no practical means to determine the country of origin of a polished diamond' according to the director of research at the Gemological Institute of America, James Shigley (Wright 2001). The only techniques that do allow for the identification of the origin of polished diamonds lead to their complete destruction. Some diamond producing countries, namely Botswana, Namibia, Angola and Sierra Leone, have recently embraced a 'beneficiation strategy', which seeks to create additional employment opportunities and wealth by compelling diamond mining companies to process the diamonds in the country where the diamonds were mined (Reed 2005a). An expansion of such a beneficiation strategy will ultimately lead to a significant reduction in rough diamond trade volumes, thereby reducing the relevance of the KPCS.

A second trend with a similar effect stems from technological advancements in the synthetisation of diamonds. The technology to produce synthetic diamonds has been around since the 1950s, with most synthetic diamonds used as industrial diamonds as part of cutting tools. Technological advances now allow for the production of synthetic diamonds of gem like quality (Reed 2005b). As these synthetic diamonds are, although expensive, still cheaper than mined diamonds they might eventually become serious competitors to natural diamonds and lead to a drop in the price for diamonds. Such a development could in turn mollify the risk of diamond related conflicts as this commodity loses in attractiveness in the eyes of rebel groups.

The innovativeness of the conflict diamond trade can be compared to that of the illicit narcotics trade. Product innovation is low in both cases, because the traded products cannot be substituted easily, whereas criminals involved in money laundering can easily switch to other carriers of value. The level of process innovation is higher, but still lower than in the case of money laundering, because places and techniques of production can be altered only relatively slowly.

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The environmental uncertainty associated with international efforts to curb the trade in conflict diamonds can be described as moderate. Policy makers had little knowledge of the diamonds industry and of conflict diamonds prior to the report published by the NGO Global Witness. Also, a regulatory scheme for rough diamonds is threatened by process innovation, as processing centres can be relocated to diamond mining countries and because synthetic diamonds may become true rivals to mined diamonds. However, process innovation is very slow and the scope for product innovation is very limited—from the viewpoint of buyers of diamonds these gems cannot be substituted by anything else.

6.2.4 In sum: institutional preferences based on problem structure

As the analysis above shows, the issue of conflict diamonds can be characterised as involving a moderate degree of asset specificity, a moderate degree of behavioural uncertainty and a moderate degree of environmental uncertainty. Such a problem constellation leads us to expect a moderate degree of legalisation in an international institution established to tackle this problem. Countries threatened by diamond related conflicts can be expected to insist on at least a moderate degree of legalisation in order to prevent other participating states from shirking, which could jeopardise the benefits the former category of states hopes to derive from an effective global regime against conflict diamonds. It can be assumed that they will not insist on hard law as a high degree of legalisation would make it more difficult for the created institution to respond to changes in a moderately uncertain environment. Furthermore, a moderate degree of legalisation can be expected to be sufficient to prevent shirking, as no state faces high direct and/or indirect implementation costs and, consequently, no state has a strong incentive to shirk.

Problem attribute	Level	Argument
1. Asset specificity	**Moderate**	
A. Potential loss	Moderate	▪ Tough global policies to curb the illicit trade in conflict diamonds can help create peace and spur economic growth in conflict-ridden states in sub-Saharan Africa. ▪ An effective policy helps to avert a consumer boycott in consuming states and keeps operations going in polishing states.
B. Propensity to shirk	Moderate	▪ The costs borne by individual countries is largely proportional to the benefits they are expecting to gain from curbing the international trade in conflict diamonds. ▪ Some countries profiting from trading illicit diamonds forego a source of revenue.
2. Behavioural uncertainty	**Moderate**	
A. Governance incapacity	High	▪ Most diamond producing countries with weak state capacities
B. Relative reliance on governmental monitoring	Low	▪ Well organised NGOs with great expertise and staff on the ground enabling them to act as watchdogs
C. Industry opacity	High	▪ Identification of origin of alluvial diamonds almost impossible ▪ Diamond industry traditionally secretive with business done on the basis of a handshake

3. Environmental uncertainty	**Moderate**	
A. Novelty of policy issue	High	▪ Governments had little knowledge of the trade in rough diamonds and the problems associated with conflict diamonds prior to the start of the KP.
B. Innovativeness		
a. Product innovation	Low	▪ Technological advances increase the attractiveness of synthetic diamonds, but still not a major challenge to natural diamonds of gem quality
b. Process innovation	Moderate	▪ Trend towards beneficiation, i.e. the establishment of cutting and polishing centres in mining countries which would undermine effectiveness of KPCS; takes time to establish local expertise and economic advantages of beneficiation questionable from firms' perspective

Table 6.3 Summary of the assessment of the constellation of the problem of conflict diamonds.

6.3 Degree of legalisation

The degree of legalisation of the Kimberley Process will be assessed based on the Kimberley Process Certification Scheme as adopted with the Interlaken Declaration of November 2002, on final communiqués adopted at plenary meetings thereafter, and on the praxis of implementation of the agreement. The trilogy of obligation, precision and delegation already introduced in chapter 2 will guide the analysis below. It will be argued that the overall level of legalisation enshrined in the KPCS is of moderate degree.

6.3.1 Obligation

Assessing the degree of obligation established by an international institution requires the examination of three major elements: first, the question of whether or not the institution rests upon a legally binding agreement; second, in the case of a legally binding agreement, the extent to which the obligations established by the agreement are attenuated through reservations, safeguards, and denunciation; third and finally, the extent to which the institution provides for procedures to detect non-compliance and to deter such behaviour through predefined consequences of breach.

6.3.1.1 Legal bindingness

The KPCS does not explicate whether or not it is a legally binding treaty. However, both the language adopted in the KPCS and the process through which it was made effective

on the national level give strong indications for states' intention *not* to design a legally binding treaty. The key document of the KP is simply called the 'Kimberley Process Certification Scheme', the terms 'convention' or 'treaty' do not appear anywhere in the official documents. The preamble concludes for example with the phrase that participants 'recommend the following provisions', and each provision states what participants 'should' do (and not what they 'shall' do). Formulations such as 'obligation' are also missing throughout the document. The document refers to its signatories as 'participants', instead of 'parties'. The official website of the Kimberley Process[59] refers to the Scheme as 'an innovative, *voluntary* system that imposes extensive requirements on participants to certify that shipments of rough diamonds are free from conflict diamonds' (emphasis added). Furthermore, the KPCS was not implemented in the participating states in the same way as legally binding treaties are. In the United States, for example, the KPCS was not presented to the Senate for its advice and consent, as would be required for the ratification of a legally binding treaty.

For these reasons, the KPCS cannot be considered a legally binding treaty. Price argues that because of its 'lack of formality, treaty-like final clauses, or registration requirements' the KPCS presents a memorandum of understanding or a political agreement (Price 2003). The KPCS is therefore very much comparable to the Forty Recommendations discussed in the preceding chapter.

6.3.1.2 Tenacity of obligation

Obligation attenuating provisions such as reservations, safeguards and withdrawal procedures are missing in the KPCS as this type of procedural provisions are typically only found in legally binding agreements.

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[59] The official website of the Kimberley Process can be accessed at http://www.kimberleyprocess.com:8080/site/.

6.3.1.3 Compliance mechanisms

The Kimberley Process Certification Scheme compensates for the low level of obligation resulting from legal non-bindingness through the mechanisms it established to detect and sanction non-compliance. For this assessment it is important to look beyond the KPCS as adopted in November 2002 and to include associated decisions made by participants later on and the actual practice that developed around it to strengthen monitoring mechanisms and to enforce compliance through a number of specific sanctions.

- Monitoring

On a 'learning-by-doing' basis, the Kimberley Process has developed unique mechanisms to monitor compliance of both states applying to become official participants and of existing participants. A first important development that increased the degree of obligation enshrined in the KPCS was the policy it developed regarding the admission of applicants. As observed correctly by Price (2003), the KPCS of 2002 itself does not make clear how it should be determined which states are to be considered as official participants and which are not. Paragraph 8 of section VI only stipulates that 'participation in the Certification Scheme is open on a global, non-discriminatory basis to all applicants willing and able to fulfil the requirements of that Scheme', without specifying how an applicant's true willingness and capacity to comply ought to be assessed. This question proved highly controversial and was only settled at the first plenary meeting in Johannesburg in April 2003, i.e. three months after the official start of the KPCS. In that meeting, participants agreed that only those states should be formally admitted which documented that they had adopted a national legislation which ensured that the minimum requirements spelled out in the KPCS were met. States that did not meet this condition by the end of an agreed tolerance period were removed from the KP list. From the originally 51 states plus the EC which had originally signalled their interest in participating in the scheme, forty-five states plus the EC fulfilled these requirements by the expiration of the tolerance period and were therefore recognised as official KP participants. The remaining six states were in contrast removed from the list of official participants, among them some

states with no stakes in the diamond trade, such as North Korea, and states with direct interests in the diamond trade but which had failed to demonstrate convincingly that they had established the domestic institutions necessary to correct previously poor practice with regard to conflict diamonds, such as Burkina Faso.

More recently, the admission procedures have further been toughened. In connection with Liberia's application to join the KP, the KP chair of 2004 decided that in addition to 'a formal application including the required legislation and Kimberley Process certificate' Liberia also had to accept 'an ad hoc mission, led by South Africa, to assess the measures put in place ... to implement the KPCS; and an independent assessment by a recognised international organisation of Liberia's rough diamond production capacity' (Martin 2004).

These accession procedures strengthened the KP's degree of obligation considerably. A second development with the same effect relates to the question of how compliance could be ensured after a state had been officially accepted as a participant. The KPCS already addressed this question by establishing certain post-accession monitoring mechanisms, in paragraphs 11-15 of Section VI. Paragraph 11 provides that 'participants are to prepare, and make available to other participants ... information ... outlining how the requirements of the Certification Scheme are being implemented within their respective jurisdictions'. Paragraph 13 specifies that '[w]here further clarification is needed, participants at plenary meetings, ... can decide on additional verification measures to be undertaken ... such as (a) requesting additional information and clarification from participants; (b) review missions by other participants or their representatives where there are credible indications of significant non-compliance with the Certification Scheme'. This latter verification mechanism was also surrounded by considerable controversy, as some states feared that such review missions might give rise to industrial espionage. Paragraph 14 seeks to dispel such concerns by stipulating that '[r]eview missions are to be conducted in an analytical, expert and impartial manner with the consent of the participant concerned'.

A first test case of this review mechanism was the review mission that was sent to assess the implementation of the KPCS in the Central African Republic in June 2003, after the country's participation had been suspended following a military *coup d'état* in March that same year. The review mission was satisfied with the Central African Republic's willingness and capacity to implement the KPCS, and the suspension was lifted. The Republic of Congo was the second, and so far only, other participant to receive a review mission. In this case, the review mission was not satisfied and—as it will be explained below—Congo's membership in the KPCS was suspended.

Whereas these review missions were already established in the original KPCS document the Scheme strengthened the monitoring mechanisms even further in its plenary meeting in Sun City, South Africa in October 2003. A major breakthrough was achieved when the plenary adopted a peer review mechanism, so called 'review visits', to guarantee that the provisions of the KPCS are effectively implemented by all participants. In contrast to the already mentioned review missions, the review visits do not follow any suspected non-compliance but offer all participants on a voluntary basis an opportunity to demonstrate their compliance. The desire was expresses for 'the largest number of participants possible to volunteer to receive a review visit' by the end of 2006 (Kimberley Process 2003). A total of 12 participating states plus the EC, including most of the major exporting and importing states, had welcomed a review visit by end December 2004; another thirty participants have invited a review visit between 2005 and 2006 (Martin 2004).

TheKPCS' two monitoring mechanisms are further strengthened by the significant role non-state actors are playing in this process. Their role is officially acknowledged in Section VI paragraph 10 which grants their representatives, along with the representatives of the diamond industry and of international organisations—upon the invitation of participants—the right to participate in plenary meetings as observers. The NGO community is represented by Global Witness and Partnership Africa Canada, two NGOs with a highly focused interest in this topic and unparalleled expertise (see above under 6.2.2). The diamond industry is represented by the World Diamond Council and the Antwerp

High Diamond Council (often referred to under its Flemish acronym HRD). Given their strong official status within the KP framework and their institutional strength, including several field officers, they are well disposed to provide 'fire alarm' oversight, to use McCubbins and Schwartz's notion (1984).

These monitoring mechanisms are more far-reaching than those established under most other international institutions. They are largely comparable to those established under the Financial Action Task (see chapter 5), but go even a step further by assigning non-state actors an official role in the monitoring process.

- Sanctions

Section III letter c of the KPCS lays the grounds for very far-reaching consequences for non-participation and non-compliance. This provision calls upon participants to 'ensure that no shipment of rough diamonds is imported from or exported to a non-participant'. As the current participants of the scheme account for 99.8 percent of the world trade in rough diamonds (Kimberley Process 2005a), states with stakes in this business have very strong incentives, first, to become participants and second not be expelled from the scheme in order not be locked out of their market. The inclusion of this provision created considerable controversy among the enacting states. Some states—namely Australia, Brazil, Canada, Israel, Japan, South Korea, Philippines, Sierra Leone, Thailand, United Arab Emirates and United States—were concerned that such a provision contradicted their obligations under the World Trade Organisation, in particular GATT provisions on most-favoured-nation treatment (article I:1), elimination of quantitative restrictions (article XI:1) and non-discriminatory administration of quantitative restrictions (article XIII:1). On 24 February 2003, the General Council of the WTO recognised 'the extraordinary humanitarian nature of this issue and the devastating impact of conflicts fuelled by the trade in conflict diamonds on the peace, safety and security of people in affected countries and the systematic and gross human rights violations that have been perpetrated in such conflicts'. The Council therefore decided to waive the relevant GATT articles with respect to the prohibition of rough diamond imports from and exports to

non-participants as stipulated by the KPCS from January 2003 until 31 December 2006 (WTO 2003).

So far, the membership sanction has been used in the aforementioned case of the Republic of Congo. Since the very beginning of the KPSC, concerns were expressed about the certification practice of Congo Brazzaville. The country issued certificates for exports of considerably more rough diamonds than it could possible have mined domestically given its geological makeup. According to the 2003 KP chair, Abbey Chikane, the ROC had been exporting about 5.2-million carats of diamonds a year, while its production potential was estimated at 55,000 carats a year. He suggested that this 'huge discrepancy' resulted from a big illegal trade in rough diamonds (Fraser 2004).

This unaccounted inflow of rough diamonds was believed to stem primarily from the DRC and be driven mainly by tax evasion motives. As a result of the increasing doubts about the practices of Congo Brazzaville, other Kimberley Process participants and NGOs urged the government to accept a review mission. This review mission took place in May 2004 and found the ROC's system of controls to be inadequate and poorly enforced (Fraser 2004, ; Global Witness 2004a). Based on these findings, the chair decided on 9 July 204 to remove Congo Brazzaville from the list of participants with immediate effect. This step not only cut the ROC off the world trade in rough diamonds but also did not help the country to repair its reputation after a prolonged civil conflict.

The KPCS is comparable to the Forty Recommendations also with respect to the sanctioning mechanisms. In both cases, sanctions evolved in practice and were not part of the original institution at its launch. Both institutions have developed strong instruments to induce compliance with the rules they established by sanctioning non-complying states independent of whether they officially accepted to be bound by these rules or not. The sanctions mechanism established by the KP therefore goes beyond those found in most other international agreements and also beyond the legally binding Vienna Convention.

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In sum, the level of obligation embodied by the KPCS is moderate. On the one hand, the agreement's level of obligation is low, because states did not intend to create a legally binding agreement. It neither passed legislative ratification in member states nor was it registered under article 102 of the UN charter. On the other hand, enforcement mechanisms set out in the KPCS and developed in subsequent practice are exceptionally strict. Participants are monitoring each other's compliance with review visits and send review missions to countries which are suspected of breaching commitments. Countries found in neglect of their promises are excluded from the KPCS and, thus, from the lion's share of the world market for rough diamonds, as participants are not allowed to trade with non-participants and entry into the club is also preceded by a review process.

6.3.2 Precision

The second dimension of an international institution's design is the degree of precision with which its founding agreement is formulated. As in the previous two case studies, the degree of precision will be assessed based on the determinacy of the provisions found in the core agreement and their internal and external coherence. The KPCS is found to have a high degree of determinacy, but a moderate degree of coherence, as it is at odds with general principles of WTO law.

- Determinacy

The provisions contained in the KPCS are overall very determinate. Section I provides an 18-item-long list of definitions, which is rather long compared to the overall shortness of the document and the limited scope of the agreement.

Some of the more ambiguous terms used in the KPCS such as '*duly* validated Certificates' become clear in the overall context of the document and in particular in the light of the recommendations provided in the annexes. The term 'appropriate' appears only

three times in the entire document, seven times less often than in the Forty Recommendations, and ten times less often than in the Vienna Convention. The term 'possible' features twice in the KPCS, whereas seven mentions are present in the Forty Recommendations. Taking also the general length of these agreements into consideration, the KPCS' level of precision is certainly higher.

Annex I of the KPCS adds considerably to the degree of detail of the agreement. It spells out the minimum requirements of the certificates in terms of the information they must provide, including a great number of technical details such as 'unique numbering with the Alpha 2 country code, according to ISO 3166-1' and 'Relevant Harmonised Commodity Description and Coding System'.

- Coherence

The internal coherence of the norms spelled out in the KPCS is high, as they form together a non-contradictory whole with all provisions clearly serving one clear and overriding objective—to increase transparency in the international trade in rough diamonds. The external coherence, i.e. the relationship of the norms spelled out in the KPCS and other international norms, is slightly more problematic. As already noted, the restriction to trade exclusively with official KP participants as stipulated by Section III letter c of the Kimberley Process Certification Scheme conflicts with core GATT provisions. However, this clash of norms has been unambiguously sorted with the waiver granted by the WTO. The issue of non-compatibility with WTO rules has not been a problem in the case of neither the Vienna Convention, nor the Forty Recommendations, which have been assessed in the previous chapters to possess a high—instead of only a moderate—degree of coherence.

6.3.3 Delegation

The overall degree of delegation found in the Kimberley Process is low, with both the degree of centralisation and the level of independence being low. Kimberley Process estab-

lishes a number of institutional bodies: plenary meetings, working groups and committees, groups carrying out the review missions and review visits, plus a chair and his secretariat.

The central body of decision-making is the plenary. The KPCS requires that the 'participants and observers are to meet in plenary annually, and on other occasions as participants may deem necessary, in order to discuss the effectiveness of the Certification Scheme' (Section VI paragraph 1). The plenary elects the chair and the vice-chair, reviews the information submitted by the participants in accordance with Section V of the KPCS, decides whether and what kind of additional verification measures are needed in certain cases, and decides upon proposed modifications of the KPCS (Section VI paragraph 19). Subsequent practice of the KPCS has shown that the plenary has taken its mandate very far. It has exercised substantial freedom in shaping and advancing the anti-conflict diamonds regime, most notably by establishing the instrument of membership sanctions and peer reviews already discussed above. It is authorised to send review missions to countries suspected of breaching KPCS commitments, and has exercised this right twice already. The plenary has created working groups and committees (see below), to which it has delegated a number of functions. Representatives of the NGOs Global Witness and Partnership Africa Canada and of the diamond industry—namely of the World Diamond Council and HRD—participate in these plenary meetings. They do not possess the right to vote, but still exert considerable influence as decisions are usually without formal vote anyway and thanks to their expertise and clout. The influence of other civil society groups is, however, constrained by the fact that plenary meetings are usually held in private (Rule 27), and reports on compliance verification measures are strictly confidential (Section VI paragraph 15). While the degree of legalisation of the plenary is high, its independence is low. All participants can send a representative to the plenary meetings and as all decisions are made by consensus (Section VI paragraph 5 KPCS, Rule 42 of Rules of Procedures), usually.

In order to deal with certain issues in greater depth and with more continuity, the KP established working groups and committees. The KPCS of November 2002 does not directly envisage working groups and committees, these bodies are rather the product of decisions taken later in plenary meetings. There are currently three working groups in place—one on monitoring, one on statistics and one on diamond expert issues—and two committees, namely the participation committee, and the selection committee. Authority has been delegated to these working groups and committees, as not all participants are represented in all of these committees or working groups, which usually comprise about ten members (incl. participants and NGO and industry). However, their authority is limited, as they do not possess the power to take any decisions. In the plenary meeting held in Gaineau, Canada, in late October 2004, the KP participants agreed to strengthen the role of the participation committee. The chair is now required to seek the advice of the committed on matters of non-compliance by participants, as well as on the assessment of applications to join the Kimberley Process. (Kimberley Process 2004).

The review visits and review missions already discussed above are conducted by groups of experts nominated by KP participants and observers. These groups are not fully independent, as the state receiving the review visit or mission has to consent to the composition of the review group. However, the example of the Republic of Congo has shown, this imperfect independence does not necessarily stop a review mission recommending the suspension the membership of the participant, which has initially agreed to its work. The composition of the review missions is changing from review to review—the experts are drawn from a roster with currently more than 60 entries (Kimberley Process 2004).

The chairmanship is assumed by a government representative, typically a diplomat, from one of the participating states. The chair's independence is limited. He is elected by the plenary and assumes this role for one year, starting on the first of January over every year (Rule 16 paragraph 1 (Rules of Procedures of Meetings of the Plenary, and its ad hoc Working Groups and Subsidiary Bodies). In the first year after the adoption of the KPCS, this function was assumed by Abbey Chikane from South Africa, who was succeeded by

Tim Martin from Canada in 2004. For the year 2005 the Russian diplomat Vyacheslav Shtyrov acts as KP chairman. Recognising that this rather short-term of office could limit the continuity of the KP, the plenary amended the Rules of Procedure in October 2003 so as to establish a vice-chair who succeeds the chair on completion of one calendar year in office. Rule 16 paragraph 2 stipulates that the chair and vice-chair can only be re-elected once, thus serve a maximum period of two consecutive years. When electing a new chair, the plenary is urged to ensure 'equitable geographical rotation and ... equitable representation of producing/exporting, importing/exporting and importing only participants' (Rule 15 paragraph 3)

While the independence of chairman is limited, the centralisation of this role is not negligible. On the one hand, the functions assumed by the chairperson as listed in the Rules of Procedure are of procedural nature such as opening and closing of plenary meetings, directing the discussions, etc (Rule 33). However, section VI of the KPCS spells out more leading functions assumed by the chair including presiding over the plenary meetings, working groups, committees and ad hoc groups (paragraph 4), conduct consultations among participants when consensus seems impossible to establish (paragraph 5), receiving notification of an applicants interest in participating in the KPCS (paragraph 9), formulating recommendations regarding verification measures to be undertaken in cases of suspected non-compliance (paragraph 13), establishing review missions with the consent of the participant concerned (paragraph 14), and finally receiving reports on the results of compliance verification measures (paragraph 15).

The KP does not dispose of an independent and permanent secretariat. The secretariat is instead attached to the rotating chairmanship. The KPCS does not explicitly mention the establishment of a secretariat but recognises that '[f]or the effective administration of the Certification Scheme, administrative support will be necessary' (Section VI paragraph 6). Paragraph 7 goes on to mention four such administrative support functions. The role of the secretariat now covers responsibility 'for scheduling meetings of the Working Groups, the circulation of documents between participants, maintenance of the

Kimberley Process website and all other duties designated by the chair', according to the official KP website (Kimberley Process 2005b). The centralisation of tasks in the secretariat is thus very low.

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The overall level of delegation reached by the KP is low. No institutionalised body with a degree of independence has been created. All decisions are taken by the plenary by consensus. Its independence is low, because each member state sends one representative into the plenary, and because the plenary takes decisions unanimously.

Among the three cases studies discussed so far, the KPCS possesses the lowest level of delegation. With respect to delegation, the Vienna Convention and the KPCS represent the two opposing ends of the scale for assessing the level of delegation in international institutions, while the Forty Recommendations are in between. There are substantial differences that exist between the level of independence established in the Vienna Convention and in the KPCS. Most importantly, INBC decisions require a two-thirds majority, whereas the KPCS plenary can take decisions unanimously only. Also, not all members are present in both the CND and the INBC, whereas the only decision making body of the KP is the plenary which assembles all participants. Similarly, the level of centralisation on the anti-narcotics framework is substantially higher than that of the anti-conflict diamonds institution. The UNODC is offering far-reaching technical and operational services, whereas no permanent support bodies have been created by the KP.

6.3.4 In sum: level of legalisation

As Table 6.4 summarises, the KPCS is an international agreement with a low level of legal bindingness, but with strict non-compliance mechanisms, which were developed by the plenary in practice. Hence, this institution possesses a moderate level of obligation. The level of precision of the KPCS is high, as it is determinate and coherent, while having been in need of getting a special waiver from the WTO to ensure conformity with exist-

ing principles of international law. The level of delegation is low, because the plenary—thus the convention of all signatories—is the only decision-making body, with no other independent body having been created. In sum, the KPCS' level of legalisation is moderate.

Indicator	Level	Argument
1. Obligation	**High**	
A. Legal bindingness		
a. Language	Low	▪ Agreement is titled 'Scheme' and not 'Convention' or 'Treaty'. ▪ States are referred to as 'participants' not 'parties'. ▪ Agreement text uses formulations such as 'recommend', rather than 'shall'.
b. Procedural provisions	Low	▪ Agreement not required to be adapted through ratification process in participating states
B. Tenacity of obligation	n/a	▪ As typical for legally non-binding agreements, the KPCS does not contain any provisions on withdrawal, reservations, etc.
C. Compliance mechanisms		
a. Monitoring	High	▪ Countries applying for KPCS participation may be reviewed before admission. ▪ Review *missions* dispatched to participating countries suspected of non-compliance. ▪ Review *visits* to participating countries as part of a voluntary peer-review system ▪ Representatives from NGOs and industry organisations are officially included in these review missions and review visits.
b. Enforcement	High	▪ Non-participating and non-complying states excluded from KPCS, thus from 99.8% of the world market in rough diamonds
2. Precision	**High**	
A. Determinacy	High	▪ Key terms are very precisely defined. ▪ Annexes provide additional detailed requirements, thereby enhancing the determinacy of the core agreement.
B. Coherence	Moderate	▪ High degree of internal coherence ▪ KPCS conflicts with fundamental WTO rules, but was granted a waiver from the WTO.
3. Delegation	**Low**	
A. Independence		
a. Human resources	Low	▪ Secretariat provided by annually rotating chair ▪ Representatives of the plenary are directly sent by member states
b. Financial resources	Low	▪ The agreement does not establish any agents with additional funding to fulfil delegated tasks.
c. Decision making	Low	▪ Plenary decisions are taken by consensus, usually no formal vote ▪ Plenary consists of delegates from all countries acting as their country's representative ▪ Working groups and committees preparing plenary decisions consist of about 10 members acting on behalf of all KP participants but without decision-making power.
B. Centralisation		
a. Rule making	Low	▪ All decisions remain with plenary, no rule making powers delegated
b. Implementation	Low	▪ Implementation remains with plenary, no implementation delegated ▪ Secretariat only limited support role
c. Dispute resolution and enforcement	Low	▪ Enforcement dealt with by plenary, working groups can only recommend measures

Table 6.4 Summary of the assessment of the level of legalisation of the Kimberley Process Certification Scheme.

6.4 Comparing expectations and reality

After the troubling case presented by the TCE framework's failure to reach a conclusive design prediction in the previous chapter, this third case study is restoring the framework's record to some extent. The analysis of the problem constellation underlying the trafficking in conflict diamonds reached the conclusion that an international institution with a moderate level of legalisation is best apt at catering for the specific hazards international cooperation on this policy issue. Moderately hard law would simultaneously help to keep at bay the medium incentives that some states have to shirk and to provide policymakers with sufficient flexibility to adjust their instruments gradually as they are gaining more experience in dealing with this very novel policy problem.

The actual design of the KPCS and its institutional development since its adoption matches indeed these expectations. It is an institution with a moderate level of legalisation, as it disposes of an effective sanctioning and monitoring mechanism, administered by the plenary. Although the KPCS' degree of legalisation is weaker than that of the Vienna Convention in terms of legal bindingness and delegation, it compensates these weaknesses partly with extraordinarily well established monitoring mechanisms and sanctions, which it effectively imposes not only on states that have formally committed themselves to comply with the Scheme and later failed to do so, but also on states that have never accepted the Kimberley Process to be applicable to their jurisdiction. Also in terms of precision and delegation does the KPCS reach moderate levels of legalisation. Thus, in the case of the global anti-conflict diamond regime, the transaction cost economics approach has correctly predicted the design of the international institution created to tackle the concerning problem.

7 Small arms and light weapons: The United Nations Programme of Action on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects

The proliferation and accumulation of small arms and light weapons (SALW) provides another illustration of the blurring boundary between crime and war. Weapons of this category kill almost as many people in homicides and suicides as in armed conflicts, and in many cases organised crime groups engage with politically motivated rebels in exchanges of weapons and illicit drugs. A central element of the increasing blur between the criminal and the military side of the small arms and light weapons problem is the growing multiplicity of actors who have access to such arms. During the Cold War era, leading powers equipped allied states and rebel groups with small arms and light weapons in great numbers. Consequently, the *proliferation* of SALW, i.e. the transfer from a handful of producing states to a growing number of recipient states, does not constitute a new phenomenon, whereas their *diffusion*, i.e. the dispersal within societies, certainly does (Klare 1995). The splintering of governmental forces and guerrilla troops contributes to an uncontrolled leakage from firearm stocks, and improved means of transport and communications facilitate the worldwide diffusion of these arms—especially into countries with weak governance capacities (Muggah 2001).

As in the case of conflict diamonds discussed in the previous chapter, international interest into the diffusion of small arms and light weapons arose in the mid-1990s against the backdrop of a decline in regional conflict and superpower confrontation and the simultaneous rise in internal warfare involving irregular troops pitched against governmental forces.

In contrast to the negotiations aimed at curbing the trade in conflict diamonds, which cumulated in the signing of the Kimberley Process Certification Scheme, the Small Arms Light Weapons (SALW) initiative has so far not resulted in a unified agreement, nor are the measures adopted anywhere close to the far-reaching mechanisms developed under

the KPCS. Rather, SALW became a matter of negotiations in a variety of regional and global policy fora, leading to the adoption of over a dozen agreements and protocols dedicated to this topic. The United Nations have been at the centre stage both in pushing this problem onto the international policy agenda and in developing measures to counter it. The cornerstone of the UN efforts is the legally non-binding *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects* (Programme of Action or PoA, in brief), which was adopted at a special United Nations Conference in New York on 20 July 2001.

As the following discussion will show, this fourth and final case study challenges the design hypotheses formulated in the opening chapters of this study more than did any of the previous cases. Specifically, we will find that the predicted institutional design does not match the actual design outcome, as the analysis of the problem constellation leads us to expect a moderate degree of legalisation whereas the PoA remains very weakly legalised. We reach this finding by following the same structure of argument as in the previous case studies. In a first analytic step, the underlying problem constellation is assessed based on our three TCE variables, which allows us to reach certain expectations regarding the optimal design of an institution established to tackle this type of problem. This design expectation is then compared to the actual design of the Programme of Action, which is categorised in a second analytic step based on the three legalisation dimensions obligation, precision and delegation. Again, this two-step analysis is preceded by an opening sub-chapter which presents the scope and nature of the small arms and light weapons phenomenon and provides and overview of the major international initiatives launched to tackle the problems arising from an uncontrolled flow in these weapons. Special attention is paid to the already mentioned Programme of Action.

7.1 Small arms and light weapons as an international policy problem

This first subchapter seeks to prepare the grounds for the later testing of the design hypotheses by positioning the small arms and light weapons phenomenon in its context and by assessing its scope and nature. Subsequently, an overview of major international

initiatives launched to tackle the problems associated with the diffusion of small arms and light weapons will be provided. The third paragraph of this subchapter examines the 2001 United Nations Programme of Action in greater detail.

7.1.1 Scope and nature of the international policy problem

There does not exist a single universally agreed definition of small arms and light weapons. According to the OSCE's working definition—the definition most widely referred to in international policy circles—these two weapon categories include weapons that are 'man-portable, made or modified to military specifications for use as lethal instruments of war' (OSCE 2000, Preamble, paragraph 3). The distinction between small arms and light weapons is based on the number of people typically operating such a weapon. The category of *small arms* comprises 'those weapons intended for use by individual members of armed or security forces', such as revolvers and self-loading pistols, rifles and carbines, sub-machine guns, assault rifles, and light machine guns (European Union 1998, ; OSCE 2000). Hunting rifles, civilian handguns, and weapons considered as collectibles do not fall within this category (Calhoun 2001). *Light weapons*, on the other hand, are designed for use by a small team or crew of armed or security forces (OSCE 2000). This second category includes heavy machine guns, hand held under-barrel and mounted grenade launchers, portable anti-aircraft guns, portable anti-tank guns, recoilless rifles, portable launchers of anti-tank missile and rocket systems, portable launchers of anti-aircraft missile systems, and mortars of calibres less than 100 mm. This definition situates light weapons between the category of small arms and major weapons that are reported to the UN Register of Conventional Arms as established by the United Nations General Assembly resolution 46/36L of 9 December 1991. Anti-personnel landmines, which according to the above definition would fall within the category of small arms, have been addressed with separate international initiatives and are usually not included in the international negotiations focused on SALW. Man-portable air defence systems, so-called MANPADs, have recently gained considerable attention of the inter-

national community and are now often debated separately from other SALW[60]. The United States has taken a particularly strong interest in this weapons category. A 2004 CRS report estimated that 25-30 non-state groups might be in possession of such weapons (Bolkcom, Feickert, and Elias 2004)[61] and be possibly prepared to launch them against civilian aircrafts as occurred in November 2002 when a Kenya based Al-Qaeda cell fired two surface-to-air missiles at an Israeli Boeing 757 jet flying out of Mombassa.

The variety of weapons subsumed under the SALW category is mirrored in the many different types of problems the diffusion and accumulation of these weapons causes. As the following discussion will show, small arms and light weapons affect states in very different ways and to varying degrees. It is thereby not so much the absolute prevalence rate of SALW found in one society that matters but rather the inexistence of governance structures that are strong enough to control the misuse of such weapons. A central aspect is hereby the control over access, which in turn requires effective oversight of the manufacture and trade in small arms and light weapons. This paragraph engages in this discussion by examining in a first step why small arms and light weapons present a problem requiring an international response. In a second step, the discussion sheds light on the production, demand and trafficking patterns found with respect to small arms and light weapons.

7.1.1.1 Scope of the problem

As mentioned briefly in the beginning of this chapter, the diffusion of small arms and light weapons lays right in the intersection between crime and war both in terms of the functions they serve and the actors they involve.

First, small arms—light weapons much less so—are at the centre stage of violent crime. The United Nations Department for Disarmament Affairs (DDA) estimates that ap-

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[60] One example of such a separate MANPAD policy is the "Elements for Export Controls of Man-Portable Air Defence Systems" as adopted by the participating states of the Wassenaar Arrangement in December 2003.

[61] Small Arms Survey puts the number of non-state actors in MANPAD possession to 13 (SAS 2004).

proximately 200,000 people die annually from small arms-inflicted homicides and suicides (DDA 2005). It is thereby of interest to note that empirical studies typically find the correlation between gun ownership and the level of violent crime to be weak. For instance, the average annual number of gun homicides per 100,000 guns varies between 0.5 in Germany to 302 in South Africa (Small Arms Survey 2004). However, the share of violent acts with a deadly outcome tends to be higher in places with a high arms prevalence. Zimring (1995), for instance, notes that while the serious assault rate in the gun-wielding United States was only about 30 percent higher than in the United Kingdom, the homicide rate of the former exceeded that of the latter by a full 530 percent. Killias (1993) confirms this correlation based on a broader country sample.

On the international level, it is generally agreed that the extensive diffusion and an easy availability of small arms and light weapons poses a significant factor in most contemporary armed conflicts (Wezeman 2003). The UN assumes that more than 95 percent of the major violent conflicts in the 1990s were waged with small arms, killing more than four million people[62], 90 percent of which were civilians. Also after an abating of the most deadly civil wars of the 1990s, around 300,000 deaths can still directly be attributed to the use of small arms and light weapons in armed conflicts each year (DDA 2005). The consensus on the impact the diffusion of small arms and light weapons breaks down when it comes to the actual causal mechanisms and to the direction of causation underlying this link. Many UN officials see in the SALW diffusion a factor triggering the outbreak of violence and armed conflict as for instance reflected in the statement by Mervyn Patterson, the UN chief representative in northern Afghanistan: 'There is a universal understanding that if weapons are present it will lead to conflict' (quoted in Oxfam and Amnesty International 2003, 11). In addition to the triggering effect, the UN Department for Disarmament Affairs attributes SALW also a conflict prolonging and aggravating effect when stating that that small arms and light weapons 'destabilise regions; spark, fuel and prolong conflicts; obstruct relief-programmes; undermine peace initia-

[62] The European Commission's estimates are at three million fatalities (European Commission 2001).

tives; exacerbate human rights abuses; hamper development; and foster a 'culture of violence' (DDA 2005). This lumping together of various distinct causal effects is contradicted both inside and outside the UN. The UN Panel of Governmental Experts on Small Arms asserts in its 1997 report that '[w]hile not in themselves causing the conflicts in which they are used, the proliferation of small arms and light weapons affects the intensity and duration of violence and encourages militancy rather than peaceful resolution of unsettled differences. Perhaps most grievously, we see a vicious circle in which insecurity leads to a higher demand for weapons, which itself breeds still greater insecurity, and so on' (UN Panel of Governmental Experts on Small Arms 1997, 2). The United States stresses the position that the primary effect of SALW is that of exacerbating conflicts the causes of which have to be found in 'political, economic, ethnic, and religious differences and disparities' (Calhoun 2001, 10). Also the majority of academic scholars maintains that there is little empirical evidence suggesting that the supply of weapons is either necessary or sufficient to start violent conflict (e.g. Sislin and Pearson 2001). Similar to the weak correlation between the prevalence of gun ownership and the assault rate on the domestic level, we find the relationship between SALW prevalence and the risk of civil or interstate war to be largely spurious. As we will see in the discussion in the next sub-section, small arms and light weapons are significantly more common in stable countries of Western Europe and North America than in most conflict-ridden regions of the world. The risk that small arms and light weapons unfold their deadly potentials in armed conflict can be assumed to be positively correlated not with the prevalence of SALW but with the weakness of domestic governance structures.

7.1.1.2 Demand, supply and trafficking

This paragraph scrutinises the global demand for and supply of small arms and light weapons, and sheds light on both licit and illicit trade in these weapons.

- Demand and prevalence

Worldwide, there are about 500 million small arms and light weapons in circulation[63], with the AK-47 accounting for more than 10 percent of this total. With respect to the distribution of small arms and light weapons, two separate aspects are of interest: the comparison, first, between government controlled stockpiles and private gun ownership and, second, between different world regions.

The independent research institute Small Arms Survey (2003)[64] posits that more than 80 percent of all firearms manufactured around the globe are purchased by civilians, who are supposed to legally possess 59 percent of all firearms. In the European Union of the 15 member states of 2002, around 81 percent of all firearms (or 67 million) were in civilian possession, while 17 percent were hold by police and only 2 percent by military forces. Great disparities existed, however, between different EU member states, with private gun ownership being relatively widespread in Germany, Finland and France, while being considerably more limited in the Netherlands and the United Kingdom. Exact numbers are hard to come by, as public officials throughout the EU acknowledge that unlicensed ownership greatly outnumbers legal ownership. The United States is presumably the country with the greatest number of privately owned small arms, with a prevalence of 238 to 276 million firearms and still growing demand. In many conflict prone regions of the world small arms and light weapons are much less common than generally assumed. Small Arms Survey showed in its 2003 yearbook that, for instance, Afghanistan's actual weapon stockpiles are estimated to contain only between 500,000 and 1.5 million weapons. Also stockpiles in Africa have been greatly exaggerated, with firearm prevalence much lower than in most other world regions. SAS asserts that the 44 sub-Saharan countries account for no more than 30 million firearms (or less than 5 percent of the world total), including those in possession of civilians, insurgents and public

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[63] Estimates range from 100-640 million (Calhoun 2001). Small Arms Survey (2002) puts the total global stockpiles of small arms and light weapons to at least 638 million; the number most widely cited is 500 million.

[64] This paragraph relies extensively on research conducted by SAS, which has established itself as the most trusted source of data on small arms and light weapons.

officials. As these comparisons demonstrate, the total number of small arms is of very limited relevance for understanding the issue of arms and conflict. This phenomenon may be attributed to three major reasons (Wezeman 2003, 20). First, the SALW category is very broad encompassing weapons that vary considerably in terms of their capabilities. Second, most of world's SALW are held by civilians and regular armies, most of which are unlikely to use them in situations other than justifiable violence such as self-defence or peacekeeping operations (Stohl 2005, 20). Third, and finally, in many of today's armed conflicts both the official military and the irregular troops are relatively poorly armed, so that even small-scale transfers of small arms can make an important difference in terms of military capabilities and the development of the conflict. Overall, it is not so much the prevalence of SALW as such that matters but only in relation to a society's capacity to control ownership and regulate use of such arms as already noted above.

- Supply

The manufacturing of small arms and light weapons is dispersed throughout the globe, whereby we need to distinguish between large-scale industrial and craft production. Small Arms Survey (2004) estimates that at least 1,249 companies in more than 90 countries are involved in some aspect of small arms and light weapons production. The geographical distribution of SALW-producing companies is relatively concentrated, with Europe—including the Commonwealth of Independent States (CIS)—accounting for 40 percent of the number all such companies. Also in terms of output levels, can we find a strong geographical concentration. Of the nearly eight million small arms that were presumably produced in 2000, 70 percent originated from the US and the EU (Small Arms Survey 2002). Global SALW production continues to be dominated by only 13 countries[65], although the number of SALW producing countries has doubled between 1960-1999 (Oxfam and Amnesty International 2003, 56), and an increasing number of coun-

[65] Austria, Belgium, Brazil, China, France, Germany, Israel, Italy, the Russian Federation, Spain, Switzerland, the UK, and the US.

tries is becoming self-sufficient in the manufacturing of small arms and related ammunition either through indigenous or licensed production (Calhoun 2001).

An important aspect of SALW manufacturing is craft production, which takes place on a low-scale, and typically involving the recycling of spare parts or remnants of more sophisticated arms (Small Arms Survey 2003). In economic terms, craft production is a minor, but not negligible, segment of global small arms production. However, it is of considerable importance with respect to the destabilising effect of SALW as this type of production predominantly takes place in or close to countries threatened by armed conflict and these hand-made small arms are typically manufactured and sold outside legal frameworks. Ghana, for instance, is an important artisan manufacturer reported to produce up to 200,000 firearms each year (Vines 2005). Other countries with illicit craft production are Pakistan, South Africa, Chile and the Philippines. Growing craft production is also reported from Senegal, Guinea and Nigeria.

- Trafficking

The aspect that is most amenable to international intervention is the trade in small arms and light weapons. The total value of annual global transfers of small arms and light weapons is estimated to measure US$4 billion (Small Arms Survey 2002), which is more than half the estimated US$7 billion global SALW production. Illicit trafficking in SALW is believed to be worth less then US$1 billion a year, accounting for 10-20 percent of global trade in SALW (Small Arms Survey 2001)[66]. According to the UN Guidelines for International Arms Transfers of 1991, illicit trafficking in weapons can be understood as 'international trade in conventional arms which is contrary to the laws of states and/or international law' (Paragraph 7, A/RES/46/36H). The Panel of Governmental Experts on Small Arms refers to this definition directly in its 1997 report (para 57). Despite the apparent simplicity of this definition, the distinction between licit and illicit trade is in

[66] A UN estimate put the share of illicitly acquired small arms to 40-60 percent (Crossette 2001).

practice far from clear, as the overwhelming majority of small arms traded on the black market began as part of the legal trade (Mathiak and Lumpe 2000). An increasing body of empirical evidence supports the hypothesis that the primary channel by which actors obtain arms for misuse is through diversion. According to Small Arms Survey, diversion 'can be authorised, or unauthorised, intentional or unintentional, since in the broadest sense diversion is simply the movement of a weapon from legal origins to the illicit realm' (Small Arms Survey 2002, 128). Four major channels of diversion from the formal to informal sector can be discerned.

First, weapons can become illicit when individuals, companies or states seek to secretly carry out small arms transfers to a non-state party without the official approval of government of the recipient state. In this case, the transfer constitutes an interference in the internal affairs of the state to which the weapons are shipped and is thus an illegal act (UN Panel of Governmental Experts on Small Arms 1997, 51). A contemporary example of this type of illicit transfer is Venezuela's alleged support of FARC in Colombia (Wezeman 2003). Even with the approval of the recipient state, a small arms transfer can become illicit when it is in violation of a regional or international arms embargo targeted against that state or a non-state party operating in its territory. According to estimates of the Small Arms Survey, more than 54 countries can be directly or indirectly linked to SALW transfers in violation of international arms embargoes (Small Arms Survey 2002). For instance, a panel of experts examining the effectives of a weapons embargo imposed on UNITA in 1993 exposed Togo and Burkina Faso as issuing false end-user certificates for weapons which were later diverted to UNITA (S/2000/203 of 10 March 2000). The UN Panel of Experts on Liberia reported illicit transfers between 1998 and 2002 from Serbia to embargoed Liberia, involving surplus weapons such as 5,000 automatic rifles, over four million rounds of rifle ammunition, machine guns, pistols, grenade launchers, and hand grenades. In this case, arms dealers used false documentation to obtain export permits from the Ukrainian and Yugoslav governments to transfer small arms to Nigeria and then to divert the weapons to Liberia (S/2002/1115 of 25 October 2002). In some cases such contraventions of national laws and international sanc-

tions are motivated by political considerations, whereas in other cases they are driven by economic motives. With the end of the Cold War and shrinking defence budgets, many states became increasingly willing to sell weapons for profit, where previously political considerations had prevailed (Lumpe, Meek, and Naylor 2000).

A second important source of diversion consists of weapons that may disappear from government and military weapons stockpiles as a result of mismanagement, corruption among soldiers or other personnel with legal access to government-owned weapons, or theft or raid by criminal organisations or rebel groups. Small Arms Survey estimates indicate that annually over 1 million light weapons are stolen or lost in this way around the world. For instance, Soviet troops are reported to have 'lost' 81,000 tons of ammunition during the withdrawal from East Germany (Smith 1999a). But also in today's Russia, the problem of unexplained losses of arms and weapons from military stockpiles is still prevalent, with the Russian Office of the Chief Military Prosecutor claiming that up to 54,000 firearms disappeared in 2004 (Biting the Bullet 2005). Albania's collapse in 1997 was accompanied by raids of government arsenals with more than half a million weapons flowing into the hands of looting individuals and gangs (Stohl 2005). Iraq provides a more recent example with research by Small Arms Survey suggesting that '[t]he collapse of Saddam Hussein's regime led to the single most significant small arms stockpile transfer the world has known' (Small Arms Survey 2004). According to the same source, Iraqi civilians may have brought 7-8 million small arms in their possession. Cragin and Hoffman (2003) show how most SALW trafficked into Colombia from Ecuador and Peru emanates from stolen military stocks or supplies that have been illegally resold by members of private security firms. In Africa, allegations have been raised against Guinean troops participating in the United Nations Mission in Sierra Leone (UNAMSIL) to have supplied Liberian rebels with weapons on a regular basis—although these allegations have not yet been fully proven (Vines 2005).

Third, it is also quite common for small arms to fall into the hands of criminals or rebel groups as a result of theft from legitimate private owners. In the US, for example, no

safe-storage requirements exist for legal gun ownership (Cook and Leitzel 1998), with the consequence that annually approximately 500,000 small arms enter the black market through this channel (Small Arms Survey 2004). In South Africa, this same figure amounts to almost 25,000 firearms a year (Swart 2005).

A forth and final source of diversion is found in countries with little constraining, ambiguous or ineffective domestic laws concerning the purchase and reselling of small arms. Under such circumstance 'straw purchasers' can buy several weapons at once and then illegally resell them, typically across international borders from one country with rather lax regulations, e.g. United States, to one with comparably strict gun laws, e.g. Mexico and Canada (Fridman and Andreas 1999).

7.1.2 International initiatives

Given the growing concern about the disastrous consequences of the misuse of small arms and light weapons in a great number of intrastate conflicts, a several international initiatives were launched from the second half of the 1990s onwards to tackle the trafficking in these weapons. The UN can be seen as the driving motor behind these efforts, but a number of regional initiatives have emerged alongside the development of a global framework. The following discussion seeks to untangle this patchwork by providing a short overview of the major international and regional initiatives.

The first—and most conventional—type of initiatives to reduce the SALW-inflicted violence in post-Cold War conflicts are mandatory arms embargoes imposed on warring parties—on governmental and/or irregular troops. Arms embargoes imposed by the UNSC prohibit states from transferring arms to the embargoed state or non-state party, and—pursuant to article 25 of the UN Charter—oblige states to adopt the necessary measures to implement and enforce the embargo domestically against individuals and companies within their jurisdiction (Gillard 2000). During the 1990s, the UNSC im-

posed arms embargoes against a total of 13 different parties[67] (Lumpe, Meek, and Naylor 2000). The effectiveness of such arms embargoes is, however, often quite limited. In many cases, states are far too willing to circumvent such embargoes for political or economic reasons, especially since compliance with these embargoes is typically neither monitored nor enforced[68]. Given the limited effectiveness of arms embargoes and their *ex post facto* adoption, the UN started to look for other policy tools, which would tackle the problem at an earlier stage—possibly before the actual outbreak of armed conflict. With its resolution adopted on 12 December 1995 (A/RES/50/70B), the UN General Assembly sparked off a number of international initiatives that sought to curb the illicit trade in SALW. This resolution required the secretary general to scrutinise the small arms problem and to assess possible cures in a report with the assistance of the Panel of Governmental Experts on Small Arms, which this resolution also established. A first such report was published on 27 August 1997 (A/52/298) which presented 24 specific recommendations on SALW reduction and the prevention of their spread. One of these recommendations suggested the convening of a UN conference addressing the issues raised in the report (recommendation k). This recommendation was acted upon with an international conference held in New York between 9th and 20th of July 2001, which culminated in the adaptation of a Programme of Action (PoA) to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (A/CONF.192/15). This Programme of Action presents the core in the establishment of global norms on the trafficking in SALW, and will be discussed further in the next section.

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[67] Including arms embargoes targeted against Afghanistan, Eritrea, Ethiopia, Somalia, UNITA and Yugoslavia.

[68] The United Nations has recently adopted a number of measures to strengthen the effectiveness of embargoes such as (1) the call on states to pass domestic legislation that makes violations of UN embargoes by individuals and companies within their jurisdiction a criminal—not just a civil—offence (S/RES/1196 of 16 September 1998 paragraph 2); (2) the establishment of international commissions to investigate allegations of embargo violations (e.g. Rwanda (S/RES/1013 of 7 September 1995 and S/RES/1161 of 9 April 1998) and UNITA (S/RES/1237 of 7 May 1999); and (3) the imposition of secondary sanctions against non-complying states (e.g. Liberia (S/RES/1343 of 7 March 2001)). The effectiveness of these measures still remains to be seen.

Almost simultaneously to the process that led to the PoA, the Vienna-based UN Commission on Crime Prevention and Criminal Justice started negotiations on a draft *Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition* (hereafter referred to as the Firearms Protocol) (A/RES/55/255) from April 1998 onwards. This Protocol was largely pioneered by the G8 (then still G7) Lyon Group[69] and incorporated in the UN framework as a supplement to the United Nations Convention against Transnational Organised Crime. The protocol entered into force on 3 July 2005 after the minimum threshold of forty ratifications had been passed ninety days prior to that date in accordance with article 18 of the protocol. By end October 2005, a total of 44 states had ratified the protocol, and other 52 states had signed but not yet ratified. Among the bystanders are a number of states with major stakes in this problem such as the Russian Federation, United States, and Israel (UNODC 2005b). The Protocol complements the PoA by addressing the problem of SALW proliferation primarily from a law enforcement perspective targeted against transnational organised crime, while the Programme of Action perceives the *problématique* primarily from a human security view point and seeks to tackle it with arms control and disarmament measures.

The awareness created through the UN Panel of Governmental Experts on Small Arms also gave rise to a large number of regional agreements—whereby marked differences exist between world regions. The African continent is home to the greatest number of agreements that are specifically targeted against the illicit trade in small arms and light weapons. The most far-reaching agreement on SALW is the *Moratorium on the Importation, Exportation and Manufacture of Small Arms and Light Weapons in West Africa*—at least in letter if not so much in practice. This moratorium was adopted by the fourteen states of the Economic Community of Western African States (ECOWAS) in October 1998. In contrast to most other agreements, this moratorium seeks to curb SALW

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[69] The Lyon group is a working group within the G8. It was established at the 1995 Economic Summit in Halifax to address the risks emerging from transnational organised crime.

procurement not only by non-state actors but also by governments, as it prohibits the 'importation, exportation and manufacture of light weapons in ECOWAS member states'. Article 9 of the Code of Conduct Code adopted in Lomé on 10 December 1999 for the implementation of the Moratorium stipulates that the prohibition of imports can only be waived when states or individual obtain an exemption certificate from the ECOWAS secretariat prior to importing weapons. Despite this moratorium, ECOWAS states still continue to import significant amounts of small arms and light weapons from Western and other sources (Small Arms Survey 2004). An important share of these imports takes place in violation of article 9 without the prior authorisation by the ECOWAS secretariat. Alex Vines (2005) demonstrates how Burkina Faso, Côte d'Ivoire, Guinea and Liberia all received numerous arms shipments between 2002 and 2004 without requesting an exemption. Recognising the weakness of the existing moratorium, several ECOWAS member states have lobbied for a legally binding convention on SALW. The current working draft *Protocol Regarding the Fight Against the Proliferation of Small Arms and Light Weapons* is scheduled to be adopted by the end of 2005. Less ambitious in their substantive scope, but legally binding are the *Protocol on Control of Fire Arms, Ammunition and Other Related Materials* adopted by the Southern African Development Community (SADC) in August 2001 and the *Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons* in the Great Lakes Region and the Horn of Africa, which was adopted in 2004. This agreement, signed by the Governments of Burundi, the DRC, Djibouti, Ethiopia, Eritrea, Kenya, Rwanda, the Seychelles, Sudan, Tanzania and Uganda, will be legally binding once ratified by two thirds of signatory states, which has not occurred at the time of writing.

In the Americas, the two most important agreements on small arms and light weapons are the *Inter-American Convention Against the Manufacture and Illicit Trafficking of Firearms, Explosives and Related Materials* (CIFTA) (AG/RES. 1800 (XXXI-O/01)), which entered into force on 1 July, 1998 and the *Model Regulations for the Control of International Movement of Firearms, Their Parts and Components and Ammunition.* Both agreements were concluded under the auspices of the Organisation of American

States (OAS). The focus of these two initiatives is similar to that of the UN Firearms Protocol in the sense that it is primarily concerned about illicit arms trafficking by criminal groups, rather than in the context of security and development. Of the total 34 OAS member states eight have neither signed nor ratified, among them Canada, Colombia and the United States (OAS 2005).

Within the European Union, the core agreement with respect to SALW is the *EU Joint Action on Small Arms* which was adopted on 17 December 1998. The EU pledges in this legally non-binding agreement to work towards the realisation of a series of principles and measures, most important of which is the restriction imposed on exporting countries to supply arms only to governments. This joint action is strongly embedded in the *EU Code of Conduct for Arms Exports*, which the General Affairs Council adopted half a year earlier (8675/2/98 Rev. 2, of 8 June 1998). The EU designed its measures primarily as tools to provide security assistance to regions emerging from conflict rather than as a law enforcement instrument.

Furthermore, a number of transatlantic agreements exist, with the *Document in Small Arms and Light Weapons of the Organisation for Security and Co-operation in Europe* (OSCE) being the most important one. This legally non-binding agreement was adopted by the 55 member states on 24 November 2000 and makes detailed recommendations to exporting countries on the criteria that should be used when evaluating whether a country is to be allowed to import SALW. Although more precise in its recommendations, the OSCE largely overlaps with the PoA in terms of scope.

Still more far-reaching in terms of its geographical reach is the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, which comprises a total 34 member states from the Americas, Asia, Europe and Oceania. On 11-12 December 2002 the Wassenaar states adopted a non-binding *Best Practice Guidelines for Exports of Small Arms and Light Weapons,* which refers directly to UN PoA and the 2000 OSCE Document.

The least active region with respect to SALW regulation remain South Asia and the Middle East. The Association of Southeast Asian Nations (ASEAN) has shown some willingness to discuss small arms, but the strong reluctance against any agreement that could potentially sanction outside interference in internal matters has limited the scope of these initiatives (Small Arms Survey 2001).

A major limitation of almost all these international initiatives on SALW—the ECOWAS moratorium being the sole exception—is their exclusive focus on transfers to non-state parties and their neglect of the equally wide-spread misuse by government officials or by government-backed militias. The Report of the Panel of *Governmental* (sic) Experts on Small Arms of 1997 (A/52/298), for instance, clearly distinguishes between governmental forces which are presented as disciplined troops respecting established norms of international law and irregular forces which make no distinction between a combatant and non-combatant, with the effect of de-legitimising the latter's right to acquired small arms and light weapons.

The 1999 SALW Report (A/54/404 of 24 September 1999) consequently identifies the following categories as recipient of *illicit* small arms trafficking: armed groups, criminal organisations, terrorists, individual criminals, private security services, mercenaries, and private citizens—with governments being conspicuous by absence in this enumeration. This almost exclusive focus of today's global intergovernmental discussion on illicit small arms transfers is highly regrettable as also government officials have a history of misusing SALW (Wezeman 2003). Human rights abuses committed with small arms can either be directly attributed to governmental actors, or governments can be blamed for failing to exercise control over private actors, allowing armed individuals and groups to commit small arms-aided abuses with impunity. In this sense, William Reno is right with his criticism that 'international norms support tyrants because they support the state' (SSRC 2002, 11). A first corrective step was taken in 2003 with the appointment of a UN Special Rapporteur to study the prevention of human rights violations committed with small arms and light weapons.

7.1.3 The UN Programme of Action

The United Nations *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects* (PoA) stands as the central global agreement on preventing and reducing trafficking and proliferation of SALW. This program was the final output of the conference on the *Illicit Trade in Small Arms and Light Weapons in All its Aspects* hosted by the United Nations in New York from 9-20 July 2001. This conference attracted high-level representatives[70] from over 150 countries. The PoA seeks to curb SALW trafficking through a strengthening of export controls, embargo enforcement, arms brokering enforcement, and through the provision of assistance to affected regions. The final document is 87 paragraphs long and structured in four sections. The first section, the Preamble, establishes a consensus on the causes and consequences of the problem and on the general norms and principles needed to solve it. The second section contains 41 paragraphs and forms the core of the Programme, spelling out national, regional, and global measures to prevent, combat, and eradicate the illicit trade in small arms and light weapons. The provisions contained in this section encourage states to adopt preventive measures that allow them to better monitor the manufacture, possession and trade in SALW. On the domestic level, these measures include the record keeping of manufacturers and of officially-held guns, and the establishment of procedures to monitor legal sales, transfer and stockpiling, including laws to regulate arms brokers. The PoA furthermore urges governments to criminalise the illegal manufacture, possession and trade of these weapons. In order to facilitate the identification and tracing of illicitly trafficked weapons states are encouraged to ensure that producers mark small arms and light weapons at point of manufacture. States are also urged to establish controls over the export and transit of small arms and light weapons, including the issuing of end-user certificates for exports and transit and the

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[70] Some representatives were disappointed by what they saw as a poor ministerial level attendance, which they considered to reflect a "lack of commitment to the issue on the part of many countries" (Small Arms Survey 2002, 218). For instance, then foreign secretary Robin Cook was widely criticised for his failure to appear in person at the conference.

notification of the original supplier nation in the case of re-export. As corrective measures, the PoA calls upon states to identify and destroy stocks of surplus weapons and to establish and implement disarmament, demobilization and re-integration programmes of ex-combatants, including the collection and destruction of their weapons. Section three addresses implementation, international co-operation and assistance. While recognising that the prime responsibility for curbing illicit trade in SALW rests upon the individual states, this section emphasises the need for cooperation on the bilateral and multilateral level. Section four, finally, establishes a review process for the PoA. Most importantly, paragraph 1 (a) stipulates that states endorsing the PoA should convene a conference no later than 2006 to review progress made in the implementation of the Programme.

Three aspects proved to be particularly controversial in the negotiations leading to the PoA. First, the EU, Canada, Costa Rica, and some African states lobbied for a mentioning in the Programme's Preamble of the link between the illicit trade and the excessive accumulation of SALW on the one hand, and violations of human rights and of international humanitarian law on the other (Small Arms Survey 2002). This position met, however, fierce opposition from a number of countries, including China, which stated firmly that they would not agree to a document that referred to human rights violations in any way. This position finally prevailed with the PoA evading any references to human rights violations. Second, the United States aired strong objections against any provisions that could potentially circumscribe the possession of small arms by civilians. As Herbert L. Calhoun, one of the US negotiators at the UN SALW conference and then-deputy division chief in the Office of Policy, Plans and Analysis at the State Department's Bureau of Political-Military Affairs made it plain: 'We had warned the international community as far as nine months out of the conference that we could not accept any controls on civilian possession of firearms, because we consider that beyond the UN mandate for the conference' (cited in Kellerhals 2001). As will be discussed further below, the question of civilian possession was of particular importance to the US, where the constitution grants its citizens the right to bear arms and a strong pro-gun lobby—

the National Rifle Association (NRA)—was very successful in making its voice heard high up in the political hierarchy. A third and final point that stirred up considerable controversy was the question of whether to aim for a full ban on arms sales to all non-state groups. This point will also be subject to further discussion below.

7.2 Problem constellation

After this overview of the nature and scope of the SALW problem and of various international initiatives launched to tackle it, we can now embark on a systematic analysis of the problem constellation underlying in this issue. As in previous chapters, this examination is guided by the three transaction cost economics variables—asset specificity, behavioural uncertainty and environmental uncertainty—which have already been introduced in chapter 3. The animating question behind this analysis is again to see which institutional design mechanisms have to be incorporated in order to optimally support the substantive measures deemed necessary for tackling the problem at hand. The analysis below suggests a moderate degree of legalisation as the optimal institutional design for tacking the SALW *problématique*.

7.2.1 Asset specificity

As in previous chapters, the first of our problem constellation variables—asset specificity—refers, first, to the extent significant incentives exist for states to shirk from the obligations spelled out in an agreement and, second, to the severity of losses that would result for states from a later breakdown of the agreement. As before, we assume that states' incentive to shirk as well as the losses they potentially incur are determined by the cost-benefit structure they face when establishing an institution to tackle a global problem, here the illicit trafficking in small arms and light weapons. We will start the analysis of asset specificity with the examination of the distribution of direct and indirect implementation costs of the PoA followed by a discussion of the benefits such an initiative generates for different categories of states. As in the previous case studies, the qualitative assessment of the costs and benefits is based on the scenario that all states inter-

pret and implement the substantive provisions of the agreement *bona fides,* i.e. as they would do if they were genuinely interested in solving the problem as stated. A particular challenge in the assessment of the asset specificity associated with the implementation of the UN Programme of Action arises from the fact that the Programme is embedded in a network of other international and regional initiatives with a similar focus, many of which were launched prior to the PoA. This simultaneity of initiatives makes it difficult to determine whether a state's increased efforts to control small arms is to be attributed to the Programme of Action or reflects a broader process of bringing its practices in line with international and regional norms and legal requirements (Stott 2005). Similarly, it is difficult to determine the 'value added' of the Programme on the benefit side. For this reason, the following analysis will seek to distinguish in what ways the Programme of Action goes beyond international initiatives that were already adopted at the time policymakers negotiated the final version of the PoA in July 2001. When the PoA was adopted, it surpassed other international SALW policies in one ways. The PoA extended the geographical reach of international SALW policies to include virtually all states of the world, whereas the pre-existing initiatives were only regional (e.g. ECOWAS) or interregional (e.g. OSCE, Wassenaar Arrangement). Most importantly, it covered countries and regions (in particular South East Asia and Arab states), which had not previously been part of any international SALW agreement. For these states, all the substantive provisions of the PoA are relevant in determining the costs and benefits they derive from this agreement. For states, which had already endorsed one or several of the earlier initiatives, only those substantive provisions of the PoA are relevant for the determination of costs and benefits which go beyond the recommendations of earlier initiatives.

The following discussion of the costs and benefits resulting from the UN Programme of Action draws heavily upon two reports which assess the implementation of the PoA. The first report was compiled by Kytömäki and Yaneky-Wayne for the UNIDIR in 2004 and the second one by the NGO-platform Biting the Bullet, which brings together people associated with the two British NGOs International Alert and Saferworld as well as with

the University of Bradford. These two reports present to date the most comprehensive assessment of the impact the PoA has had so far.

7.2.1.1 Costs

The following analysis of the distribution of implementation costs resulting from the PoA distinguishes between direct costs in terms of dedicated human resources, legislative costs, and implementation costs (including financial and technical assistance provided to other countries) and indirect costs which arise from negative consequences in the realm of national security, foreign and domestic policy.

- Direct costs

The following discussion of the direct implementation costs resulting from the Programme of Action is structured along the four dimensions human resource related costs, legislative costs, domestic implementation costs and assistance to other countries.

In terms of dedicated human capacities, the PoA calls upon states to undertake only low asset specific investments. Section II paragraph 4 asks states to establish or designate a national coordination agency in charge of co-ordinating small arms policies and activities within the state. In most countries, this function is assumed by a single desk officer (e.g. Germany and France) or by a commission composed of government officials with related portfolios (e.g. Benin). In most countries, the SALW coordinator assumes this role only as a part of a wider work portfolio. For instance, for the desk officer in charge of this dossier in New Zealand and Australia SALW coordination accounts for only ten to twenty percent of his or her total workload (Biting the Bullet 2005). This national coordination agency presented a novelty for most states, since of all the international SALW agreements that predated the PoA only the ECOWAS moratorium of 1998 contained a provision on the establishment of such an agency. In that sense, Section I paragraph 4 of the PoA did indeed involve some human asset specific costs, albeit to an almost negligible extent.

Section II paragraph 5 calls upon states to establish or dedicate a national point of contact whose mission it is to ensure the exchange of information with other states and international and regional organisations on national practices and systems for SALW and to coordinate the implementation of SALW policies with other states. In most countries, this function was already being assumed by government officials dealing with the control of conventional arms and weapons or arms control and disarmament (Kytömäki and Yankey-Wayne 2004). Furthermore, the OSCE states already agreed under Section VI paragraph 1 of the 2000 OSCE Document on Small Arms to establish such a point of contact for SALW related matters. Consequently, for most states the implementation of paragraph 5 did not result in any additional human asset specific investments. In sum, the human asset specificity of the PoA's call for national coordination agencies and national points of contact is very limited and comparable to that resulting from KPCS' Section II paragraph (b), which requires states to designate an importing and an exporting authority.

In terms of legislative costs, the direct costs created by the PoA are more significant than the costs in terms of dedicated human resources. Since the adoption of the UN Programme of Action, 54 states have reviewed at least some of their domestic laws and/or procedures controlling international SALW transfers in order to bring them in line with Section II paragraph 2 (Biting the Bullet 2005). Among these states are also some important SALW exporters like Russia and Bulgaria, as well as states, which were not part of any pre-existing regional SALW agreement, as for instance Sri Lanka. Furthermore, approximately 47 states have reviewed at least some of their laws and/or procedures on civilian possession of SALW, the domestic SALW trade and SALW manufacturing. The same report also finds that 11 states have reviewed their standards and procedures for the management and security of stockpiles since 2001. Legislative reform was also an important feature in Africa, where—prior to the UN Conference—a number of countries like Niger and Senegal were still operating under regulation and laws dating from the years of independence (Sall 2005).

Apart from legislative reform, the Programme of Action also calls upon states to take very practical measures to reduce the risk of diversion and trafficking of small arms and light weapons. One pillar in this respect are paragraph 16 and 19 of Section II which ask states to destroy confiscated, seized or collected small arms and light weapons (paragraph 16) as well as surplus small arms and light weapons (paragraph 19). According to data from the OSCE Conflict Prevention Centre, OSCE states have considerably stepped up their efforts in the destruction of small arms and light weapons either deemed surplus or seized from illicit trafficking (referred to in Biting the Bullet 2005). Whereas 35 OSCE states destroyed a total of almost half a million of SALW units in 2001, the annual destruction rate more than tripled by 2003 to a total of 1,747,264 units. It is difficult to determine to what extent the PoA has contributed to this notable expansion of weapons destruction programmes. But also states outside the OSCE have taken significant steps in this direction. For example, in Argentina 3,131 firearms were destroyed at a public event in 2002 and another 4,265 the year after (Kytömäki and Yankey-Wayne 2004), and in Cambodia over 120,000 confiscated and surplus weapons were publicly destroyed by burning between 2001 and end 2004 (Biting the Bullet 2005).

Section II Paragraph 35 and 36 and several paragraphs under Section III encourage states to support SALW-related capacity building in other states either directly or by supporting international organisations like Interpol, the UNIDIR and DDA in their efforts. Although not setting any specific target, the PoA has still unleashed considerable financial transfers in support of SALW-related activities. For instance, Japan provided US$1.03 million to the UNDP SALW program in Kosovo in April 2003 and another US$3.35 million to UN DDA and UNIDIR for SALW related work. The United States donated US$125,000 to Interpol to enhance the organization's Weapons and Explosives Tracking System (IWETS), while the Canadian Government supported the continuation of this programme with Can$300,000. The Finish government donated a total of €504,564 to the United Nations Regional Centre for Peace and Disarmament in Africa as seed-money for this Centre's Small Arms Transparency and Control Regime programme, which was launched in October 2003. Direct assistance to specific projects in individual

countries was even more considerable. For instance, Japan donated a total of US$35 million for Disarmament, Demobilisation, and Reintegration (DDR) programmes in Afghanistan and has been a very active supporter of various SALW programmes in Cambodia. The US dedicated a total of US$2 million in 2001 for small arms destruction programmes around the world (US State Department 2001). The British government established a dedicated Small Arms Destruction Fund within the Foreign Office, which together with a £13.25 million contribution from DFID's Global Conflict Prevention Pool has funded weapons destruction projects in Latin America, East Africa, the Caribbean, Southern Africa and Eastern and South Eastern Europe (Biting the Bullet 2005). The UNIDIR emphasised in particular the SALW-related contributions made by the following nineteen states: Australia, Belgium, Canada, Finland, France, Germany, Ireland, Italy, Japan, the Netherlands, New Zealand, Norway, Poland, South Africa, Spain, Sweden, Switzerland, United Kingdom, and United States of America, plus the EU (Kytömäki and Yankey-Wayne 2004).

- Indirect costs

More important than the direct implementation costs are a number of very different types of indirect costs. The following discussion will first highlight the indirect costs states fear to incur from a global small arms and light weapons agreement in terms of additional constraints on their national security policy. Second, we will see that states are also concerned about retaining sovereignty over the use of small arms transfers as a means to foster their foreign policy goals. Third, the discussion will gauge the economic implications of a strict implementation of the PoA and find them to be of lesser importance than in the previous cases. Fourth, and finally, we will assess the extent to which the implementation of this global agreement creates domestic tensions and see how it clashes in some countries with well-entrenched political values.

One major obstacle to global efforts to regulate the manufacturing and trading of small arms and light weapons is the tension any such efforts create with states' national security interests. Article 51 of the Charter of the United Nations establishes the right of

states for individual and collective self-defence. This article is commonly referred to as establishing the legal basis for the right to manufacture and trade armament. This right is explicitly and unambiguously recognised in paragraph 45 of the 1997 Panel of Experts and reaffirmed in the Preamble of the PoA as the 'right of each State to manufacture, import and retain small arms and light weapons for its self-defence and security needs'. Especially states with underdeveloped domestic production capacities were worried that a global agreement on trafficking in SALW might limit their ability to procure SALW for their national defence (Small Arms Survey 2002). Even some countries which had been or still were suffering severely under internal SALW-induced armed conflicts considered these concerns about their unconstrained access to arms as outweighing the pacifying effect a tighter regulation could have on their country, as for instance Angola.

Some states, in particular the United States, Russia and China, feared that important foreign policy objectives would be jeopardised by a far-reaching agreement, which represented a second category of important indirect costs of a global SALW institution. Although the practice of (covert) weapons transfers in support of one or the other warring party was scaled back after the end of the Cold War, it continues to serve a number of important foreign policy objectives. For instance, Russia allegedly supported insurgents in Georgia and Moldova as a means to convince the governments of those countries that it was not in their interest to act against Moscow's will (Mathiak and Lumpe 2000). In the United States, covert arms transfers are explicitly authorised by the National Security Act of 1947. Section 505 of the act requires the government agency involved, typically the Central Intelligence Agency (CIA), to notify the congressional committees responsible for the oversight of US intelligence community activities. However, this notification requirement only applies to transfers valued US$1 million or more. Given the relatively low value of small arms and light weapons, substantial SALW shipments can be made below this threshold. Examples of the application of this act include long-running clandestine military transfers to the *contras* in Nicaragua in the 1980s, to

UNITA from 1974 to 1992, to various *mujahideen* factions in Afghanistan from 1979 to 1991, and, and more recently to opposition groups in Iraq from 1998[71] to 2002 (Mathiak and Lumpe 2000). US official Herbert Calhoun explained his country's opposition to a general ban on SALW transfers to non-state parties with the following words: 'We thought it would preclude being able to give arms to oppressed groups, such as victims of genocide, and it violated traditions of the American Constitution. We were sort of a non-state actor group when we founded this country' (cited in Kellerhals 2001). The US view on this point contrasted sharply with that of the African bloc, which wanted the circle of recipients of SALW-transfers to be limited to states. In the end, the former position prevailed, and the paragraph in the draft Programme which limited small arms exports to governmental actors alone was dropped altogether (Small Arms Survey 2002).

The economic implications the implementation of the Program of Action presented a potential third source of indirect costs. However, in contrast to the previous case studies, this aspect was only of minor importance with respect to small arms and light weapons. Although a great number of states is engaged in the production of small arms and light weapons, the economic impact of this sector remains of minor importance to all of them. Whereas the export value of opium accounted for 60 percent of the total value of exports of the world-leading opium producer, i.e. Afghanistan (UNODC 2005c), the corresponding figure amounts to no more than 0.2 percent for the world's largest SALW exporter, i.e. the United States (AJIL 2001). The production of small arms and light weapons is of local importance in some states, as for example in Germany where the SALW producing companies Heckler & Koch and Carl Walther absorb almost the entire workforce of the small towns in which they are located. But this local economic interests had little bearing on the formulation of the German SALW position. In Ghana, small-scale blacksmith production of small arms presents an important, though illicit, addition to smiths' meagre income. However, the illicit status of this activity severely undermines the lobbying

[71] At least with the passage by the US Congress of the Iraq Liberation Act in 1998, the arms transfers which had reportedly already been started earlier, were adopted as an official policy.

position of the blacksmiths on this issue. In sum, we can conclude that economic considerations were of only secondary order for almost all states.

A fourth and final category of indirect costs is found in the tensions a strict implementation of a global SALW regulatory agreement may stir up on the domestic level. This aspect of a global SALW agreement was probably the most important reason for the United States' strong opposition. The question of civilian possession proved hereby to be the neuralgic point of much of the international negotiations. In contrast to most other countries, the United States has a long and well-established tradition of civilian possession of small arms, which is guarded by the country's constitution. The Second Amendment of the US constitution stipulates that '[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed'. This right is based on the belief that that widespread ownership of firearms tends to deter criminals or even tyrants—a belief that enjoyed as much support in the times of the Founding Fathers as today (Cook and Leitzel 1998). This political credo in the socially beneficial functions of private gun ownership is vigorously kept alive by the National Rifle Association (NRA), arguably one of the most influential non-profit interest groups in the United States. The NRA launched a concerted campaign against any UN agreement months before the start of Conference in July 2001, arguing that gun control was exclusively an internal affair. The NRA succeeded in establishing the question of civilian possession as the greatest concern of the US delegation during the negotiations in the run-up to the UN Programme of Action. The US delegation to the conference argued vehemently that it would reject any agreement that would abrogate the right of US civilians to bear arms as guaranteed by the Second Amendment. John Bolton, the head of the US delegation at the UN SALW Conference therefore made it clear at several occasions that '[t]he United States believes that the responsible use of firearms is a legitimate aspect of national life' (quoted in AJIL 2001). South Africa declared in contrast that the inclusion of some kind of reference problematising the civilian possession presented a *sine qua non* for its support of the Programme. Based on the Report of the 1999 Group, an earlier draft of the Programme made such as reference by asking states to 'seriously

consider the prohibition of unrestricted trade and private ownership of small arms and light weapons specifically designed for military purposes' (UNGA, 2001a, sec. II, paragraph 20). Despite the fact that also in the United States private ownership of weapons is already now restricted (e.g. excluding minors, and convicted criminals), the US delegation—echoing the National Rifle Association's orchestrated lobbying campaign—still insisted that it would reject any mention of the term 'civilian possession' in the text, no matter how general or meagre in commitment (SAS 2002, p.224). As all efforts to reach a compromise on this issue failed, the final document evades the question of civilian possession all together.

7.2.1.2 Benefits

Given the global nature of SALW trafficking one of the major benefits of the Programme of Action is its global reach, which includes world regions which had previously not been part of any regional SALW initiatives and whose domestic legislation and control over small arms and light weapons was very weak. Most important in that respect is the inclusion of the Middle East, a region that has long been a major recipient of SALW transfers. As a considerable part of the weapons destabilising weak states are not directly imported from (Western) producing countries but 'recycled' among various conflicts within a region, any initiative focussing exclusively on major producing states—as does for instance the Wassenaar Arrangement—is indispensable but insufficient to tackle the problem in its complexity. The UN Programme of Action recognises that—given the poor or inadequate governance capacities of a number of states emerging from conflict—it is of particular importance to adopt global measures that help these states more directly in their efforts to gain control over the diffusion and trafficking of small arms and light weapons and to strengthen cooperation within the affected regions. As already discussed above from the costs perspective, the Programme of Action does indeed include significant provisions specifically addressing these aspects.

The main beneficiaries of SALW-related capacity building efforts are weak or fragile states, mainly in sub-Saharan Africa. For instance, Kytötmäki and Yankey-Wayne

(2004) note that a number of states of this region received support to either establish national coordination authorities and/or national points of contact or national action plans to implement the PoA. For instance, the government of Burundi requested and was granted assistance for the dispatch of a inter-agency fact-finding mission whose task it was to determine the nature and extent of Burundi's SALW problem and to assess how the government and the UN could best counter this problem (A/60/161 of 25 July 2005). Also located within the fragile and weapons saturated Great Lake region, Uganda has also pinned great hopes on closer international cooperation and control of international SALW trafficking which it sees as indispensable for pacifying the ongoing conflict with the Lords Resistance Army in the North of the county. Similarly, its Western neighbour Kenya hopes that an internationally supported arms regime will mitigate some of its problems associated with armed crime, fluctuating levels of violent conflict (often associated with cattle rustling), poaching and terrorism. In Western Africa, Ghana hopes that a strengthened international regime on small arms and light weapons will help to reverse or at least stall the marked rise in firearms-related violence it experienced in recent years as a result of an uncontrolled increase in domestic crafts production in SALW and of a negative spill-over from its unstable immediate neighbours Côte d'Ivoire and Togo.

Outside the African continent, the main beneficiaries of a thorough implementation of the PoA around the globe are countries emerging from conflict such as Cambodia, the SALW-related projects of which rely heavily on the support provided by the EU and Japan and Sri Lanka, where the 2002 ceasefire in the long-running conflict between the national government and the Liberation Tigers of Tamil Eelam (LTTE) is still very fragile.

A number of countries, first and foremost the EU member states plus Canada, Japan, Norway, and Switzerland were active promoters of a global SALW agreement with strong commitments especially on issues such as transparency measures, marking and tracing, strengthened export and re-export controls and tighter limits on civilian possession. The anti-SALW position of these states can largely be attributed to the strong hu-

manitarian interest they share in a number of countries suffering severely under the uncontrolled influx and diffusion of small arms and light weapons. Many of these states argued that many of the development projects they sponsor in these conflict-ridden states were jeopardised by the widespread misuse of these arms.

7.2.1.3 Comparison of costs and benefits

The discussion above revealed that PoA participants can be grouped into four distinct groups (see Figure 7.1). First, countries emerging from conflict or located in a conflict-ridden region like Burundi, Uganda, and Cambodia are the clear beneficiaries from the programme as the stability of these countries is considerably threatened by the uncontrolled diffusion and accumulation of small arms and light weapons. They benefit from a global SALW regime both as it would help to stem the uncontrolled influx of small arms and light weapons into their territories and to strengthen their governance capacity through technical assistance and financial support. While gaining substantial benefits from the global regulation of SALW trafficking, countries in the first group only face a low level of costs, as they are no major producers of SALW. These states therefore face a moderate level of potential loss, in case the PoA is not implemented properly. This loss is reflected in the foregone benefits a reduction in the scale of SALW incited violence that the PoA may help to achieve. The reason why the potential loss is moderate and not high is lies in the fact that these countries only face a low level of costs. Hence, the ex-post break down of the PoA will cause the loss of benefits, but not so much of futile investments. Overall, conflict ridden states are expected to lobby hard for at least a moderate degree of legalisation for the PoA primarily in order to protect their potential benefits from the relatively high propensity to shirk a second group of states experiences.

In contrast, a second group of non-conflict ridden countries can gain only low benefits from regulating the SALW trade, while facing comparably high costs. These costs originate from the importance these countries ascribe to their sovereign rights to arm themselves without undue scrutiny (especially the Arab countries), to their right to use arms transfers to other states and non-state actors as a means of their foreign and security

policy (especially Russia and China) and to their right to regulate domestic civilian possession without any outside interference (especially USA). Taken direct and indirect costs together, the United States emerges as the country incurring the greatest asset specific costs from a thorough implementation of the PoA as it is an important exporter of small arms and light weapons and expected to support generously SALW-related capacity building projects around the globe while, on the domestic front, incurring high indirect costs from a likely clash with the National Rifle Association and its strongly organised and politicised membership base. This second group of countries have a high incentive to shirk from any obligation set forward in the PoA.

For European SALW producing countries, the implementation of the SALW is associated with a moderate level of costs and a moderate level of benefits. The costs are primarily caused indirect economic costs and a decrease in their ability to use SALW exports as a secretive instrument of foreign policy. Their benefits are derived from strong humanitarian interests with respect to conflict ridden states.

Finally, a fourth group of countries neither derives benefits nor incurs costs from implementing the PoA, as for instance Uruguay, since they neither suffer significantly under SALW-related violence nor do SALW play neither and important economic nor political role in these countries.

This constellation of costs and benefits associates the Programme of Action with a moderate degree of asset specificity.

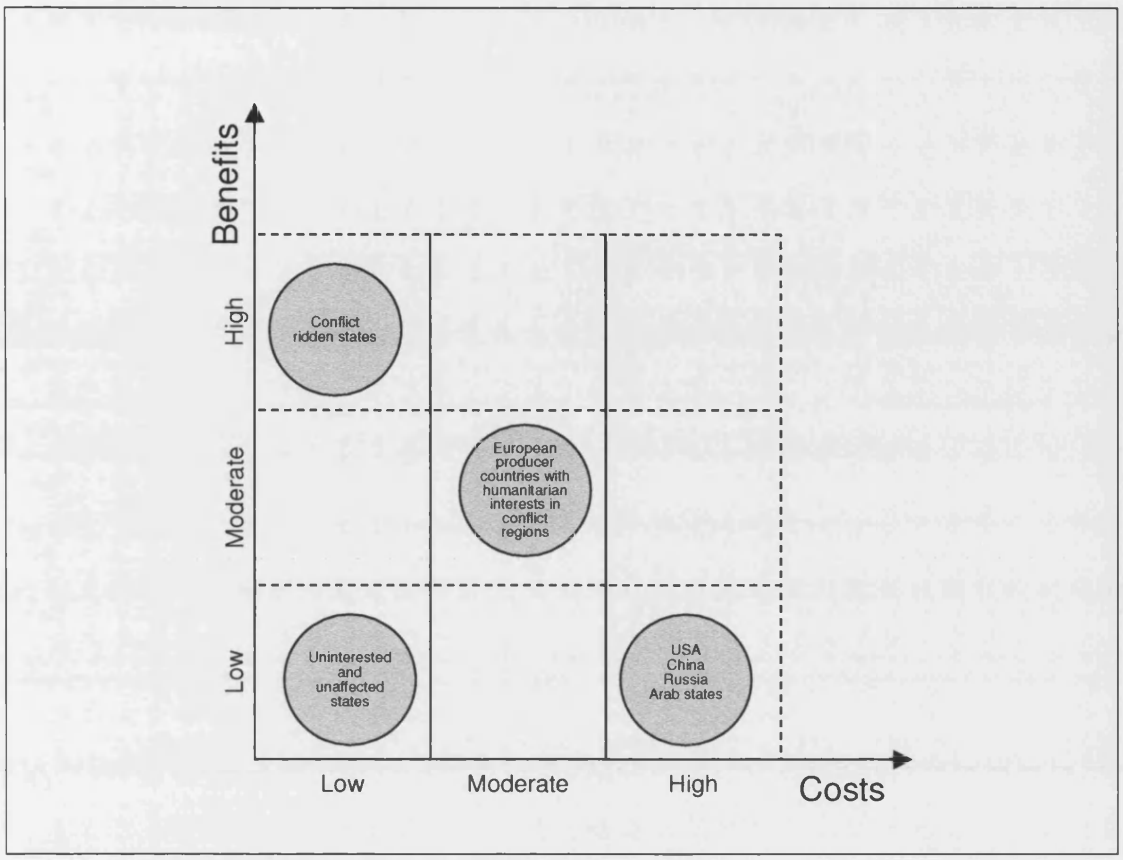

Figure 7.1 The distribution of costs and benefits amongst countries participating in the Programme of Action.

7.2.2 Behavioural uncertainty

The discussion above highlighted that some states have moderate incentives to shirk from implementing the measures they officially endorsed with the Programme of Action. The risk that shirking will actually occur does not only depend on the intensity of the incentives to do so but also on the likelihood of such behaviour being detected by other states. This aspect of shirking is captured by our second TCE variable—behavioural uncertainty. As in the case studies presented in the preceding chapters, we will examine to what extent the nature of the problem lends itself to surreptitious shirking. This analysis is based on the three indicators—governance incapacity, the relative reliance of governmental monitoring and industry opacity. All three of these indicators will be found to allow states to shirk with a moderate risk of detection.

7.2.2.1 Governance incapacity

This first element of behavioural uncertainty—governance incapacity—refers to involuntary non-compliance resulting from a state's insufficient capacity to implement a policy, which it genuinely endorses. The question therefore arises to what extent the success of a global institution relies on substantive contributions by states with weak governance capacities. In the case of SALW, we find considerable variance in the ability of governments to control the inflow, outflow and possession of small arms and light weapons within their jurisdiction. The most important SALW producing regions, namely Western Europe and North America, possess bureaucracies well-disposed to effectively regulate and control small arms and light weapons. The United States, Germany and the United Kingdom all fall within the top decile of the World Bank's rule of law indicator of 2004.

In addition to some exporting countries' insufficient ability to make their SALW export policies prevail throughout the country, the severe problems the diffusion and accumulation of SALW cause in a great number of developing countries can also be attributed to large extent to these developing countries' inability to prevent unapproved SALW imports. International initiatives were launched exactly for this very reason, seeking to compensate these countries' governance incapacity through a coordinated international response. If the SALW problem was only a matter of small arms and light weapons being (illicitly) exported from a developed producing country to a specific country of the developing world, behavioural uncertainty could be assumed to be low to moderate, as the problem could largely be tackled if the exporting countries were truly willing to deploy their bureaucratic resources to control the outflow of SALW from their territories. But as already touched upon in the previous sections, the export of small arms and light weapons from the western world to developing countries only covers one part of the problem. More important is the uncontrolled flow of used weapons from transitional states to developing states and from one developing state to another. For instance, Muggah and Berman note that '[t]he lax, even non-existent, control and oversight over national stockpiles in a hypermilitarised region [Kenya, Uganda, Sudan, Ethiopia, and Somalia]—coupled with the traditionally porous constitution of the countries' borders— have led to

a situation where small arms are continuously circulated within a 'conflict system" (2001, 10). Similar observations have been made on the Latin American subcontinent, where arms used by the *Farabundo Marti National Liberation Front* (FMLN) in El Salvador and by the *Contras* and *Sandanistas* in Nicaragua during the 1980s have been traced to the civil war in Colombia (US State Department 2001). Also, many former Soviet states are emerging as important SALW exporters while making only modest progress in the establishment of the rule of law. Russia and Ukraine both fall within bottom third decile of the World Bank's 2004 rule of law index (29.5 and 23.2, respectively); and Belarus' weak rule of law relegates it to the bottom decile (7.2), well below many developing countries. Consequently, the government incapacity of all these states tends to be rather high, thereby increasing the risk of inadvertent non-compliance and consequently of behavioural uncertainty.

Whereas in the case of money laundering the lion share of illicit flows went through financial centres based in countries with effective governance mechanisms, we find that with respect to SALW both states with strong and weak governance structures play a role as countries of origin or transhipment. Consequently, the level of governance incapacity in the present case is to be assessed as being of moderate degree.

7.2.2.2 Relative reliance on governmental monitoring

The second element of behavioural uncertainty captures the idea that the risk of surreptitious shirking is reduced when civil society organisations are actively monitoring activities related to the policy issue in question, thereby facilitating 'naming and shaming' as an potentially important enforcement mechanism. With respect to the small arms and light weapons *problématique,* a number of specialised and well-funded think tanks, NGOs and activist networks have been launched since the late 1990s, complemented by existing organisations, which adopted SALW as a new focus of their work. Most respected and referred to is undoubtedly the already mentioned Small Arms Survey, which was launched in 1999 as an independent research project located at the Graduate Institute of International Studies in Geneva, Switzerland. Its yearbook, published since 2001,

working papers and its database on government documents and statements, voting records and implementation records constitute one of the most important sources of information not only for the media and researchers but also for government officials. The work of Small Arms Survey is complemented by a handful of other think tanks which are either fully specialised in SALW, like the Norwegian Initiative on Small Arms (NISAT), or have made this topic one of their main research missions, like the Belgian *Groupe de recherche et d'information sur la paix et la sécurité* (GRIP), the South African Institute for Security Studies (ISS), the Bonn International Center for Conversion (BICC), or the US American Center for Defense Information (CDI).

A wide range of non-governmental organisations around the globe have also taken a strong interest in the issue and added SALW to their existing portfolio, like Oxfam, Amnesty International or Human Rights Watch—and more specialised, Saferworld and International Alert. In order to co-ordinate the efforts of this growing number and diversity of organisations researching on or campaigning for SALW control, the International Action Network on Small Arms (IANSA) was founded in 1998. This network currently provides an umbrella for more than 500 member organisations.

The interest of civil society organisations in small arms and light weapons is incomparably greater than the one we observed with respect to money laundering, and appears at first sight to be as strong as in the conflict diamond case. This second impression needs to be modified when engaging in a direct comparison between the two civil society organisations that are leading the debate in each issue are, i.e. between Small Arms Survey and Global Witness. Small Arms Survey relies on secondary data to a much greater extent than does Global Witness, which gathers most of its data through their own members of staff deployed in the field. Government statistics constitute the lion share of the secondary data used by Small Arms Survey, which decreases the independence of their work and increases the relative reliance on governmental monitoring. Consequently, the behavioural uncertainty in the case of SALW stemming from the relative reliance on

governmental monitoring falls between that observed in the money laundering and in the conflict diamond case, and can thus be considered as of moderate degree.

7.2.2.3 Industry opacity

Industry opacity is the third element that determines the risk of detection a shirking state faces. In the case of SALW, this variable has to be extended to include the opacity of SALW-related *governmental* action, as—compared to previous cases—governments play a significantly more active role in this type of illicit flows. While some corrupt government official may be implicated in the flow of conflict diamonds through the issuing of an export certificate for diamonds of dubious origin, the facilitation of such illicit exports does not present an official governmental policy comparable to covert arms shipments as practiced by a non-negligible number of states. The assessment of the degree of industry opacity will therefore be followed by a discussion of the opacity surrounding governmental action in this field.

In order to assess industry opacity with respect to SALW, we need to distinguish between the opacity surrounding the legal and the illicit segment of the industry. As mentioned above, illicit trafficking in SALW accounts for 10-20 percent of the total trade in this category. By its very nature, this segment of the trade is marked by a high degree of opacity, as it could not exist otherwise in states with at least a minimum law enforcement capacity. With respect to the 80 percent which account for the legal part of the SALW business, we can note that most states have at least some laws or regulations controlling production, possession, export and import of SALW, although the scope and stringency of these laws and procedures is very uneven.

For instance, the United States does not keep a central, government-controlled register of who buys and resells small arms. Instead, records of commercial trafficking are kept by the manufacturers. In Switzerland, no centralized register exists either, and sales or non-monetary exchanges of small arms between private individuals can be conducted without any kind of records (NZZ 2005b). In England, Scotland and Wales, civilian gun

ownership is controlled through the mandatory requirement of all firearms dealers to register with their local Police Constabulary.

The opacity of arms transfers is often deplored, and diversion is not an uncommon phenomenon (see above). This is little surprising, as security and foreign policy interests require secrecy about specific transfers in some circumstances. Importing states, for instance, may have an incentive to exaggerate their military capacities, which also requires a manipulation of arms import data, in order to deter potential attackers. Small Arms Survey, for instance, attributes the huge discrepancy they found between the size of SALW stockpiles in many African countries according to their own research compared to the size one could deduce from various statements and data provided by African government officials to deliberate misinformation motivated by security calculations of this kind (Small Arms Survey 2001). Exporting states, on the other hand, may favour secrecy about certain arms transfers, as these transfers might violate international embargoes or stir up political controversy at home. The US Iran-Contra affair of the mid-1980s provides just one illustration out of many. In this case, the Reagan administration diverted proceeds from an arms sale to Iran to purchase arms for the Contras, a Nicaraguan anti-Communist rebel group, thereby circumventing an amendment passed by the US Congress in 1982 that prohibited such activities. The revelation of these arrangements in 1986 plunged the administration in a serious crisis and cost the posts of several high-level officials.

However, important progress has been made in this field. This progress can be attributed to several national and international initiatives aiming towards greater openness in arms transfers (including major weapons systems and small arms) that followed the end of the Cold War and towards a general increase in transparency with respect to all governmental activities (as for instance required in the United States by the Freedom of Information Act (amended in 1996) or its British counterpart o 2000). As Haug et al observe (2002), an increasing number of governments are now reporting openly on the monetary value of weapons shipments they are authorizing or delivering, usually on a

country-by-country basis. Exemplary in this respect is the United States, which provides a highly detailed annual report breaking down exports by destination and weapon type and also providing information on the quantity and value of exports. Also France, Germany and the United Kingdom are now providing highly detailed reports of their small arms exports.

In addition, a number of publicly available data sets on international arms transfers compiled by intergovernmental organisations and non-governmental organisations now exist. Although these data sets all have their own limitations, taken together, they still allow the vigilant observer to obtain a rough idea of the direction and volume of transfers.

An important step towards greater transparency in arms transfers in this direction is the UN Register of Conventional Arms as established by the UN General Assembly resolution 46/36L in 1991. This legally non-binding resolution calls upon all member states to submit annually relevant data on imports and exports of conventional arms to be included in the Register. UN member states are also invited to report on their military holdings and on procurement from domestic production. This information is compiled by the UN DDA and made publicly available on its website[72]. Although the Register does not include small arms, it has still contributed greatly to consolidate the idea that transparency on arms transfers can contribute to the maintenance of peace and stability (Vines 2005). Togo, which had previously attracted serious international criticism for its arms policy (Fowler report) decided to use its 2001 submission to the UN Register as an opportunity to demonstrate exemplary transparency. It submitted on 3 July 2001 an inventory of weapons, including small arms, which was more detailed than any other report the Register had ever received from a state (Wezeman 2003).

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[72] The website of the Department for Disarmament Affairs can be accessed at http://disarmament.un.org:8080/cab/register.html.

The possibility of an extension of the scope of this register so as to include SALW has been raised, however, but no definite decision has yet been reached (A/55/281 o 9 August 2000).

Another important source states can use in order to assess whether other states are complying with their SALW commitments is the information-sharing process established by the 2000 OSCE SALW document. Although reporting within this framework is confidential, Germany, Spain and Belarus decided to publicize their submissions in the spirit of public transparency.

A third publicly available source of information on international trade in small arms and light weapons is the COMTRADE database. This database, which is managed by the UN Statistics Division, compiles customs data on both imports and exports of seven different harmonized categories of arms and weapons (Haug et al. 2002).

Based on the internationally uneven regulation of the SALW industry and the important direct involvement of states in SALW transfers we can assess the degree of opacity surrounding this policy issue to be moderate.

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In, sum the behavioural uncertainty associated with a global institution regulating the production and trafficking of SALW is moderate, with the three subcomponents of behavioural (governance incapacity, reliance on governmental monitoring and industry opacity) all reaching a moderate level. This judgement is based on the finding that on the one hand a large amount of official data on SALW exists, but on the other hand, these figures tend to be and often are manipulated for strategic reasons both in exporting and importing countries. Also, on the one hand, government incapacity tends to be low in producing countries, but on the other hand high in destination countries. While a number of NGOs and UN bodies monitor the situation of SALW, they do not rely on similarly accurate and proprietary data as in the case of, for example, conflict diamonds.

7.2.3 Environmental uncertainty

Environmental uncertainty constitutes the third and final variable we use in our assessment of the problem constellation. As in the previous case studies, we will distinguish two sub-components of this variable: first, the relevant policy experience upon which policymakers were able to draw when negotiating and adopting the Programme of Action in 2001, and second, the innovativeness with which the illicit SALW sector seeks to evade tighter control. As developed earlier in this study, the underlying hypothesis states that, *ceteris paribus*, the greater the novelty of the policy issue, the greater the degree of environmental uncertainty. Additionally, the more the problem is subject to significant change due to technological advances or other reasons, the greater, *ceteris paribus*, the environmental uncertainty. High levels of environmental uncertainty require, in turn, flexible international institutions and thus soft legalisation.

As the following analysis will show, the SALW issue was neither particularly novel to policymakers when they gathered for the UN Conference in 2001, nor is SALW trafficking marked by a high level of innovativeness. When only considering this third transaction cost economics variable, we could therefore expect a high degree of legalisation to be incorporated in an international institution created to tackle SALW-associated problems.

7.2.3.1 Novelty of policy issue

When the diffusion of small arms and light weapons was first raised in the UN in 1995 as a factor undermining human and national security, the topic was perceived as completely novel by the overwhelming majority of policymakers, and the discussion built upon little previous experience in this field. However, by the time the final version of the UN Programme of Action was negotiated and adopted in July 2001, policymakers felt they had gained sufficient experience and confidence in this issue matter. This considerable reduction in the novelty of the issue in only six years can be attributed to three major reasons.

First, the SALW initiative was able to build upon the experience gained with disarmament and transfer control measures related to major conventional weapons. Unlike SALW, major conventional weapons already became the topic of international negotiations during the Cold War. In the 1970s, the United States and the Soviet Union held four rounds of Conventional Arms Transfer (CAT) talks to agree on ways to limit the growing conventional arms trade. These talks prepared the grounds for a number of bilateral and multilateral agreements that followed later, most important of which was the Treaty on Conventional Armed Forces in Europe signed in 1990. The experience gained in relation to these initiatives on conventional weapons system provided an important knowledge base for the acquisition of the expertise needed for handling SALW. This knowledge transfer was facilitated by the fact that many of the desk officers who were assigned the SALW dossier in the run-up to the UN Conference of 2001 had previously been working on major conventional weapons issues. An important limitation to this knowledge transfer presented the fact that negotiations on major weapons systems were almost exclusively limited to government officials whereas the anti-SALW campaign involved a great diversity of stakeholders.

The experience in negotiating security related issues with a great number of civil society representatives, including NGOs and industry officials, was gained in another related policy initiative: the movement to ban landmines which culminated in the signing of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Convention) in 1997. The landmine initiative is closely related to the SALW initiative. First, landmines fall technically speaking within the small arms category. Second, and more importantly, we can observe a great similarity between the NGO campaigns in the two areas. In fact, the enthusiastic embracement by a large numbers of NGOs the SALW initiative enjoyed in the late 1990s and first years of 2000 was spurred on by the success of the anti-landmine campaign. Many NGO representatives who had previously worked on the landmines dossier got personally engaged in the SALW campaign, and the above-mentioned International Action Network on Small Arms (IANSA) was directly modelled on the International Cam-

paign to Ban Landmines (ICBL). Policy makers dealing with the SALW campaign therefore already largely knew most of the players of the game and understood its dynamics.

Third, by the time the PoA was concluded in July 2001, six major intergovernmental SALW initiatives outside the UN framework had already been implemented (see 7.1.2). The 2000 OSCE Document thereby served as the strongest source of inspiration for the PoA. It possessed particular authority as it represented a compromise between a great number of states with major and diverse stakes in the issue—either as important exporters of SALW or as states seriously affected by the proliferation and misuse of these weapons. The reason why the PoA as it was finally adopted did not follow the OSCE model more closely, is not so much a reflection of policymakers' doubts about the viability or effectiveness of this agreement, but quite the opposite. Some OSCE states, in bvstory and used it as evidence that the best level to tackle the SALW problem was regional rather than global, thus declaring the UN efforts in this field futile or even counter-productive.

Given the considerable experience government officials brought to the negotiation table of the UN SALW conference in 2001, environmental uncertainty stemming from the novelty of the issue can be categorised as minor.

7.2.3.2 Innovativeness of criminal field

The innovativeness of the criminal field can be disaggregated into the two subcomponents product innovation and process innovation. The following analysis will show that also this second source of environmental uncertainty remains at a low level with respect to international efforts to stem the illicit trade in small arms and light weapons.

- Product innovation

Product innovation refers to innovation stemming from technological advances, which allows individuals and organisations involved in the illicit transfer of SALW to defy the grip of the regulator and of law enforcement agents. Although not completely absent, technological innovation is not a driving factor in the SALW issue. The technology applied in the manufacture of small arms and light weapons has not changed significantly over the last 50 years (Small Arms Survey 2003). For instance, the design of the 0.50 calibre Browning heavy machine gun, a staple in the inventories of military forces around the world, has hardly changed since it was first introduced early in the twentieth century (Hart Ezell 2002). This stagnation results only partially from low or inexistent investment in research and development and more from the fact that the industry is currently stuck on a technological plateau. Small Arms Survey expects that '[i]n the absence of unforeseen innovation, small arms technology is likely to remain on this plateau for years to come' (Small Arms Survey 2003, 34).

The few technological developments that have taken place increase simultaneously the necessity for state control and the potential effectiveness of such measures. On the one hand, technological advances have enhanced the overall lethality of military small arms through increased accuracy—resulting from improved laser aiming devices, penetration, and rate of fire. On the other hand, some recent technological developments in the industry could help to make gun control more effective in the future. One promising technology is the development of so-called intelligent firearms, which can be discharged only by a given individual identified by fingerprints or a special ring worn on a finger. This technology could render stolen guns unusable.

However, both these fronts of product innovation are only of subordinate relevance with respect to the core problems international initiatives on small arms and light weapons seek to solve, i.e. the misuse of these weapons in conflict regions. This is the case because 'majority of the small arms and light weapons being used in conflicts [...] are not newly produced', as the UN Panel of Governmental Experts noted in its report (1997,

14). Small arms Survey shares this assessment and concludes that the market tends to be dominated by the 'oldest and cheapest' weapons (2004).

- Process innovation

Traffickers of small arms and light weapons can seek to circumvent tighter regulation and control in two major ways. A first strategy small arms and light weapons traders might adopt in response to policies aimed at curbing the illicit trafficking in this weapons is geographical diversion. There is little in the nature of small arms and light weapons as such that prevents traffickers from redirecting their trafficking routes in ways to evade countries with tighter controls. As already noted, SALW are very easy to conceal, can easily be dissembled and reassembled so as to make concealment still easier and have in general few logistical requirements. Again, one counter-measure policymakers can adopt against such geographical diversion is the drafting of an agreement that enjoys the endorsement of the greatest possible number of states.

Second, tighter regulation on exports and imports of small arms and light weapons can be circumvented by an increase in domestic production. In terms of industrial production, this strategy is—at least from an economic perspective—little attractive as SALW demand in most countries is insufficient to sustain domestic production without heavy subsidies. The great dramatic restructuring the SALW industry of Central and Easter Europe faced during the 1990s provides a good illustration of this point (Small Arms Survey 2003). Domestic craft production in many developing countries may, in contrast, be strengthened through international efforts to curb illicit SALW trafficking. Although of only minor importance in terms of output levels, craft production is a factor of concern as it takes place in many countries most at risk of large-scale violence.

7.2.4 In sum: institutional preferences based on problem constellation

The above analysis has revealed a moderate degree of asset specificity and of behavioural uncertainty for problems arising from an uncontrolled diffusion of small arms and light

weapons. Consequently, these two variables point towards a moderate level of legalisation as the optimal institutional design, as soft legalisation would be insufficient to prevent participating states from shirking. The low level of environmental uncertainty found in the previous section suggests that policymakers should endow an international institution created to tackle SALW trafficking with a high degree of legalisation. The combination of moderate asset specificity and behavioural uncertainty plus low environmental uncertainty raises the overall expectation of a moderate to high level of legalisation as the optimal institutional design. However, adopting the refinement of the design hypothesis as developed in the case study on money laundering (chapter 5) we can argue that the environmental uncertainty variable in itself never pushes towards harder forms of legalisation, but only exerts a 'softening' influence on an institutional design with hard legalisation resulting from high asset specificity and behavioural uncertainty. The adoption of this refined understanding of environmental uncertainty leads us to expect an overall moderate level of legalisation to be chosen as the design of an international institution on small arms and light weapons.

Table 7.1 below summarises the core findings of the above analysis of the problem constellation underlying the small arms and light weapons issue. In its bottom row it also indicates the expected institutional design outcome we derived from this analysis. The remainder of this chapter sets out to determine whether or not this design expectation corresponds with the actual design outcome of the United Nations Programme of Action of 2001.

Problem attribute	Level	Arguments
1. Asset specificity	**Moderate**	
A. Potential loss	Moderate	▪ In case of an ex post breakdown of a SALW agreement, conflict ridden states would lose a potentially effective instrument to reduce the uncontrolled influx of SALW, which is often seen as an important destabilising factor.
B. Propensity to shirk	Moderate	▪ A number of important countries do not benefit directly from a functioning SALW agreement, while incurring a moderate—primarily indirect—implementation costs in the form of a curtailment of their ability to purchase SALW on international markets (especially the Arab countries) and to use (clandestine) SALW transfers as a foreign policy instrument (e.g. Russia) or to continue a very liberal domestic policy of private gun ownership (especially USA).

2. Behavioural uncertainty	**Moderate**	
A. Governance incapacity	Moderate	▪ The most important SALW exporting countries have an effective system to regulate this sector (North America, Western Europe). ▪ Many states that belong to the second most important group of SALW exporters have a moderate to poor capacity to enforce the rule of law within their territories (e.g. former Soviet states). ▪ Countries most affected by SALW related problems have typically poor record on the maintenance of the rule of law, as they are weakened by an ongoing or recently concluded conflict.
B. Relative reliance on governmental monitoring	Moderate	▪ Publicly available data sets compiled my multiple UN agencies and non-governmental agencies but typically building on data reported by states.
C. Industry opacity	Moderate	▪ Producer countries have the ability to track trafficking, but often keep information secret for security purposes or for fearing negative public reaction. ▪ Many countries make SALW stockpiles public, but figures are sometimes purposefully distorted for strategic reasons. ▪ Monitoring and estimation of true stockpile figures by NGOs and UN agencies.
3. Environmental uncertainty	**Low**	
A. Novelty of policy issue	Low	▪ Experience on regulating other types of weapons applicable to SALW ▪ Several anti-SALW initiatives adopted prior to the UN SALW conference.
B. Innovativeness		
a. Product innovation	Low	▪ Technology applied in the production of SALW has not changed significantly over the past half century. ▪ SALW used in most armed conflicts are typically of older generations of production.
b. Process innovation	Moderate	▪ Increasing domestic production can help circumvent rules on trafficking.

Table 7.1 Summary of the assessment of the constellation of the problem of the international trafficking of small arms and light weapons.

7.3 Degree of legalisation

The degree of obligation enshrined in the UN Programme of Action on Small Arms and Light Weapons will be assessed along the three dimensions already used in the preceding case studies—namely obligation, precision and delegation. As the following discussion will show, the PoA is consistently weak with respect to all three of these elements, thus constituting an illustrative example of an international agreement with considerably soft legalisation.

7.3.1 Obligation

The degree of obligation created by the Programme of Action will be assessed based on the three criteria already introduced earlier—namely, the agreement's legal bindingness,

the extent to which it includes provisions that attenuate the degree of obligation of the agreement such as reservations, safeguards and escape clauses, and the extent to which the agreement makes provisions for monitoring and enforcement. It will be shown that the level of obligation of the PoA is low.

7.3.1.1 Legal bindingness

There can be little doubt about the PoA's lack of legal bindingness. The question of whether or not the final document should be legally or only politically binding was subject of considerable controversy among the negotiating parties. EU member states, Canada, Switzerland and, to a lesser extent, SADC states lobbied hard in favour of a legally binding small arms treaty, in particular with regard to arms brokering and the marking and tracing of weapons. This position was fiercely opposed by the US, China, the Arab group, and a few other key states from the South (Small Arms Survey 2002). The latter group prevailed, and the final agreement was designed to be of politically binding nature only—to the great disappointment of the NGO community, which had also pressed hard for a legally binding treaty. The legally non-binding nature of the agreement is reflected in its name 'Programme' rather than 'Convention' or 'Treaty'. Binding formulations such as 'shall' are carefully avoided, with the paragraph on self-determination and territorial integrity in the Preamble (paragraph 11) being the sole exception. Instead, considerably weaker formulations such as the declaratory 'We, the States participating in this Conference, ... undertake the following measures' (e.g. section II paragraph 1), or the hortatory 'States are encourage to ...' (e.g. section III paragraph 12) and recommendation for action 'on a voluntary basis' were chosen. The agreement was adopted by consensus among the states participating at the conference and formally welcomed by the UN General Assembly in its resolution A/RES/56/24 V of 24 December 2001. No ratification process followed on the national level. Furthermore, no provisions on procedural issues such as accession, ratification, reservations, and withdrawal that are typically included in legally binding treaties, exist in the PoA, which confirms the agreement's non-binding character. Also, the PoA is not registered under article 102 of the UN Charter.

7.3.1.2 Tenacity of obligation

Although the agreement does not create any binding obligations, it still includes a number of formulations that can be seen as safeguards, which states can use to excuse a certain behaviour that seems to violate the recommendations contained in the PoA. For instance, the introduction of section II acknowledges explicitly the 'different situations, capacities and priorities of States and regions' thus allowing for a non-uniform application of the 41 measures that are suggested thereafter. Paragraph 23 of the national recommendations of section II point into the same direction when relativising the call for international information exchange with the reference 'in accordance with national practices'.

7.3.1.3 Compliance mechanisms

Also with respect to the third and final element of obligation the PoA presents a 'soft' outcome. It does not contain any reference to potential consequences of non-compliance, nor has the praxis that has developed around the PoA since its adoption made any progress on this issue.

Monitoring mechanisms are not developed much further either. All monitoring rests strictly upon government self-reporting. All recommendations regarding the sharing of information come with considerable qualifications such as in paragraph 23 of section II which asks states 'to submit, *on a voluntary basis*, to relevant regional and international organisations and *in accordance with their national practices*, information on ...' (emphasis added) or in section III paragraph 13, which posits that 'States are encouraged to exchange information on a *voluntary basis* on their national marking systems on small arms and light weapons' (emphasis added).

The PoA creates very limited mechanisms to review the progress on implementing the steps outlined in the PoA (Klare and Stohl 2003). Section III paragraph 1 letter b stipulates biennial meetings to be held on a regional level. This has resulted in a number of conferences, meetings, and discussions since the PoA's adoption in 2001. Section IV

paragraph 1 letter (a) of this section recommends the General Assembly 'to convene a conference no later than 2006 to review progress made in the implementation of the Programme of Action'. This provision is weaker than many negotiators had wanted as they favoured a more direct obligation to hold such a review conference. The US delegation opposed such a review process which they viewed as 'automatic and empty' and therefore undesirable. By insisting on a preceding approval by the General Assembly they preserved the possibility to obstruct such a review conference at a later stage.

Overall, few would agree with the judgment by a US negotiator's judgment that this follow-up mechanism was 'strong' and 'aggressive' (Calhoun quoted in Kellerhals 2001).

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In sum, the degree of obligation created by the Programme of Action is very modest, as it is only politically binding, contains several safeguards and no real monitoring nor enforcement mechanisms.

7.3.2 Precision

Also with respect to the second dimension of legalisation, i.e. precision, does the UN Programme of Action on Small Arms and Light Weapons remain at the lower end of the spectrum, whereby a weak degree of determinacy of the agreement's formulations renders it almost impossible to assess its degree of coherence.

- Determinacy

The PoA leaves wide margins for states to exercise discretion or interpretation both as a result of a failure to provide definitions of central terms and of the frequent use of ambiguous expressions.

Conspicuous by absence is the definition of small arms and light weapons. This non-inclusion of a definition of these two central terms resulted from unbridgeable differ-

ences among the participants of the UN SALW conference on the scope of the definition. Whereas some states, including India, Sri Lanka, and some African states, lobbied in favour of using the definition developed by the 1997 Panel of Experts, the United States—adopting the NRA's concern about any UN infringement on civilian possession of arms—advocated a more narrow definition focused on weapons of strictly military types. A third camp was against the inclusion of any definition all together, arguing that precision was not necessary as the document was of non-legally binding nature (SAS 2002, 221). As these differences could not be settled by the end of the Conference, the participating states adopted a Programme of Action which evades defining its very object—small arms and light weapons.

The second source of indeterminacy stems from the liberal use of vague clauses such as 'where applicable', 'as appropriate', or 'where needed'. The second formulation, 'as appropriate' appears no less than 38 times, which is on average almost in every other paragraph, with a disproportionate, but telling, accumulation in section II on steps to be undertaken by states on the national, regional and global level—with an increasing tendency towards higher hierarchical levels.

An illustrative example of the vague and non-obliging spirit of the Programme of Action is paragraph 35 of section II, which declares that participating states will undertake measures '[t]o encourage the United Nations Security Council to consider, on a case-by-case basis, the inclusion, where applicable, of relevant provisions for disarmament, demobilisation and reintegration in the mandates and budgets of peacekeeping operations'.

- Coherence

Coherence is not so much of an issue with regard to the Programme of Action. It does not contain any paragraphs that are in direct contradiction with each other or with any other existing international agreement on small arms and light weapons. However, this seemingly high degree of coherence can be largely attributed to the PoA's low precision,

as many formulations are vague enough to allow for both an interpretation which is in line with, for instance, the considerably more precise OSCE document on SALW as well as for the an interpretation which is in contradiction with it.

7.3.3 Delegation

The degree of delegation established by the UN Programme of Action is very low. Section III paragraph 1 emphasises explicitly that 'the primary responsibility for solving the problems associated with the illicit trade in small arms and light weapons in all its aspects falls on all States'. The Programme of Action does not create any new body commissioned to implement or monitor the Programme of Action, but refers a very limited number of times to existing ones, namely the UN secretary general (once) and the UN general assembly (four times). Section II paragraph 33 requests the secretary general, through the Department for Disarmament Affairs (DDA), 'to collate and circulate data and information provided by States on a voluntary basis and including national reports, on implementation by those States of the Programme of Action'. However, this case of delegation is severely circumscribed by the very limited scope of the delegated task (low centralisation) and by the refusal of the participating states to grant the DDA the necessary means to add any independent value to this task (low independence). The very same paragraph states explicitly that the DDA has to assume this function 'within existing resources'. With respect to the General Assembly, delegation goes slightly further in terms of centralisation but is weaker in terms of independence. Section IV paragraph 1 recommends the General Assembly to undertake four steps for the effective follow-up of the Conference. First, it asks the General Assembly to decide when and where a follow-up conference ought to be held in 2006 (letter a)—as already discussed above under 7.3.1.3.

Second, letter b of the same paragraph asks the UNGA to 'convene a meeting of States on a biennial basis to consider the national, regional and global implementation of the Programme of Action'. Third, letter c of section IV paragraph 1 asks the UNGA further to conduct a study 'examining the feasibility of developing an international instrument to enable States to identify and trace in a timely and reliable manner illicit small arms and

light weapons'. This sub-paragraph was included as a 'consolation' for states, in particular France and Switzerland, which had advocated strongly in favour of a legally binding agreement on these aspects. The final sub-paragraph grants the UNGA the right to 'consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons'. This formulation reflects the noncommittal nature and limited scope of this right, which falls clearly short in comparison, for instance, with the right granted by the Vienna Convention to the International Narcotics Control Board and to the Commission on Narcotic Drugs to present suggestions and recommendations.

Whereas section IV establishes a certain, although very limited, degree of delegation in terms of centralisation, the degree of independence resulting from this delegation is nil—for two major reasons. First, no independence in terms of personnel exists, as all member states are represented in the General Assembly and decisions are only politically binding, sot that these provisions do not constitute a real case of delegation as no independence between the General Assembly and the participating states exists. Second, there exists no degree of financial independence either, as letter c of section IV paragraph 1 states explicitly that the UN has to assume these functions 'within existing resources'.

7.3.4 In sum: institutional design

The above analysis has shown—and Table 7.2 summarises—that the overall degree of legalisation enshrined in the UN Programme of Action on Small Arms and Light Weapons has to be qualified as low. With respect to all three dimensions—obligation, precision and delegation—does the PoA remain a soft agreement.

The agreement's failure to establish stronger forms of legalisation were the main reason for the widespread dissatisfaction of NGOs who decried the outcome of the UN Conference on Small Arms and Light Weapons as a Programme of *In*action.

Indicator	Level	Argument
1. Obligation	**Low**	
A. Legal bindingness		
a. Language	Low	▪ Agreement is referred to as 'Programme', not 'Convention' or 'Treaty'. ▪ Agreement text uses horatory formulations such as 'encouraged'.
b. Procedural provisions	Low	▪ Agreement not required to go through national ratification procedures. ▪ The PoA is not registered under article 102 of the UN Charter
B. Tenacity of obligation	Low	▪ PoA contains several safeguard-like provisions. ▪ Agreement accepts non-uniform implementation by acknowledging 'different situations, capacities and priorities of states'.
C. Compliance mechanisms		
a. Monitoring	Low	▪ States provide data on a voluntary basis. ▪ Agreement does not provide for an automatic review, solely recommends a review to be called by the UN secretary general/UNGA.
b. Enforcement	Low	▪ Nor the agreement text nor subsequent practice provide for measures to rectify non-compliance.
2. Precision	**Low**	
A. Determinacy	Low	▪ Key terms not defined by agreement text (such as the terms small arms and light weapons). ▪ Frequent use of vague terms such as 'appropriate', which appears in half of all paragraphs.
B. Coherence	n/a	▪ Coherence cannot be assessed because of the low degree of precision.
3. Delegation	**Low**	
A. Independence		
a. Human resources	Low	▪ Decision makers are delegates of signatories in the UN General Assembly. ▪ DDA independent from signatories
b. Financial resources	Low	▪ The agreement does not provide agents with additional funding to fulfil delegated tasks.
c. Decision making	Low	▪ Decisions are delegated to the UN General Assembly.
B. Centralisation		
a. Rule making	Low	▪ Department for Disarmament Affairs is requested to collate and circulate data and information provided by states. ▪ UN General Assembly is requested to decide whether a follow-up conference is needed.
b. Implementation	Low	▪ Solely states are in charge of implementation.
c. Dispute resolution and enforcement	Low	▪ Solely states are in charge of enforcement.

Table 7.2 Summary of the assessment of the level of legalisation of the Programme of Action on the Illicit Trade in Small Arms and Light Weapons.

7.4 Comparing expectations and reality

The analysis of the institutional design of the Unite Nations Programme of Action revealed only a low degree of legalisation. The PoA remains weak on all three dimensions of legalisation—obligation, precision and delegation. This reliance on soft legalisation contrasts with the design expectations we derived from the analysis of the problem constellation underlying SALW as a global policy issue. The moderate level of asset specific-

ity and behavioural uncertainty combined with a low level of environmental uncertainty suggested a moderate degree of legalisation as the optimal institutional design to cater for the specific contractual risks associate with a problem of this constellation and, thus, a harder institutional design than was incorporated in the PoA. This apparent failure to predict the correct design outcome casts serious doubts on the explanatory power of the TCE approach applied in this study. Before rejecting this approach entirely, it might, however, be worthwhile taking a second look at possible reasons that might explain why the UN Programme of Action adopted only low levels of legalisation.

The most promising starting point to search for a potential explanation is to take a closer look at the negations in the run-up to and during the UN Conference on Small Arms and Light Weapons. As already mentioned in the introductory part of this chapter, these negotiations were marked by strong controversies between two camps. On the one side were a number of developing states that were severely suffering under the diffusion of small arms light weapons and therefore pressing on a global agreement with deep substance and an institutional design which ensured that these far-reaching measures would indeed be implemented by all states. These states were supported by the European Union, Norway, Switzerland, Japan and Canada and by a large pool of non-governmental organisation. On the other side were a handful of powerful states, including the US, Russia and China, which fiercely resisted any such move. The primary role the US played at the Conference was often described as that of an 'obstructionist' (Small Arms Survey 2002, 219), and at several occasions the US delegation came close at blocking agreement on the action programme (Stohl 2001). The critics of a strong UN sponsored SALW agreement largely prevailed in the end, which becomes manifest not so much in the PoA's substance being insufficient but rather in the insufficient institutional support given to this substance in terms of too low levels of legalisation. First and foremost, the substantive provisions are mostly formulated in very vague terms. Consequently, although a benevolent interpretation of these vague provisions would result in significant benefits for SALW-affected states, the vagueness provides too easy an excuse for passivity for a number of states who are not truly concerned about solving the prob-

lem. Inexistent monitoring and delegation do nothing to counterbalance this tendency. From this perspective, the mismatch of form and substance in the PoA appears as a deliberate design decision imposed by those powerful states that were opposed to the creation of an effective global regime to curb the trafficking of small arms and light weapons.

This speculative explanation of the reasons why the TCE framework failed to reach a correct design prediction in the case of UN Programme on small arms and light weapons highlights an important lacuna of this approach. As all functionalist theories, it fails to incorporate power asymmetries as a potentially important explanation. The preceding three case studies provided examples of situations where existing power asymmetries did not distort the design outcome predicted on the basis of our TCE approach. As these cases suggest, TCE and power asymmetries may be reconcilable in two scenarios. First, power asymmetries between participating states may not invalidate the TCE approach when—for humanitarian or ideological reasons—powerful states do not throw in their weight against an international agreement from which they do not directly benefit, as in the case of the Kimberley Process. Second, our TCE framework might also generate valid design expectations when a powerful state is among those states facing a high degree of asset specificity as in the case of illicit drugs, where the USA hoped to shift much of the regulatory burden to the drug-producing countries. The concluding chapter will take a deeper look at these theoretical issues, discuss the merits and weaknesses the case studies have revealed of the TCE approach and examine the extent to which modifications might help to overcome the challenges exposed by this final case study.

8 Conclusion

As the cases studied above demonstrated, states design international institutions in very different ways. The central question animating this study has been why states opt for such a variety in institutional designs. The study has sought to contribute to the emerging institutional design literature by testing the explanatory power of one of the three competing design theories that are emerging in the international relations literature. After the detailed presentation of the four cases of illicit drugs trafficking, money laundering, conflict diamonds and the trafficking in small arms and light weapons, this concluding chapter embarks on a number of tasks. First, it summarises the data and examines whether we can find a correlation between the three components of the dependent variable in these four cases. Second, this concluding chapter assesses the explanatory power of the functionalist framework developed and tested here by critically examining in which cases the design predictions corresponded well with the actual design outcome and in which cases and for what reasons the predictions failed. This discussion is the foundation of the development of conjectures in the third and final section of this chapter on how the framework might be adapted and extended in order to increase its explanatory power. Given the small number of cases studied here, no definite answers can be reached. But understanding social science research as an iterative and cumulative process, it is hoped that this study can provide a template for future *small-n* and a *large-n* studies.

8.1 Summary of data

This first subchapter provides a summary of the dependent variable describing the design of international institutions and of the independent variables characterising the underlying problem constellations. This summary helps to recall the major characteristics of the four cases analysed in this study and thereby to prepare the grounds for the subsequent discussion of the patterns and interactions between the variables.

8.1.1 Degree of legalisation

As discussed in the introduction, the cases covered by this study were purposefully selected so as to span the full spectrum from low to high levels of legalisation. While this selection was based on the overall level of legalisation, the tabular synopsis provided below also shows the full variance in the three constituent elements of legalisation—namely obligation, precision and delegation. Table 8.1 provides the basis for the next sub-chapter, which embarks on the examination of the interaction between these three variables. This discussion is motivated by the conjecture that the three component of the design variable may not be fully independent but may rather present complements to or substitutes for each other.

Indicator	Drugs	Money L	Diamonds	SALW
1. Obligation	**High**	**Moderate**	**Moderate**	**Low**
A. Legal bindingness	High	Low	Low	Low
a. Language	High	Low	Low	Low
b. Procedural provisions	High	Low	Low	Low
B. Tenacity of obligation	High	n/a	n/a	n/a
C. Compliance mechanisms	Moderate	High	High	Low
a. Monitoring	Moderate	High	High	Low
b. Sanctions	Moderate	High	High	Low
2. Precision	**Moderate**	**Moderate**	**High**	**Low**
A. Determinacy	Moderate	Moderate	High	Low
B. Coherence	High	High	Moderate	n/a
3. Delegation	**High**	**Moderate**	**Low**	**Low**
A. Independence	High	Moderate	Low	Low
a. Human resources	High	Moderate	Low	Low
b. Financial resources	Moderate	Moderate	Low	Low
c. Decision making	High	Low	Low	Low
B. Centralisation	High	Low	Low	Low
a. Rule making	High	Low	Low	Low
b. Implementation	High	Moderate	Low	Low
c. Dispute resolution and enforcement	Low	Low	Low	Low
Overall level of legalisation	**High**	**Moderate**	**Moderate**	**Low**

Table 8.1 Detailed summary of the level of legalisation of the four international institutions assessed in this study.

8.1.2 Problem constellation

Table 8.2 shows the summary of the problem constellation of the four cases analysed by this study, whereby the three independent variables asset specificity, behavioural uncertainty and environmental uncertainty are presented in a disaggregated form to allow the reader to recapitulate how the assessment of these variables was reached. The three TCE variables and their subcomponents are assumed to be independent. This is assumption

is an indispensable requirement, as the model would otherwise face problems with multicollinearity.

The bottom row of the table shows the level of legalisation functionalist hypotheses suggest as the optimal design option for institutions set up to tackle the individual policy problems. The analysis of the problem characteristics of the four cases suggested a high level of legalisation as the optimal institutional design in one case (drugs trafficking), while in two cases (conflict diamonds and small arms and light weapons) a moderate level of legalisation was the expected design outcome. In the case of money laundering, the model failed to generate a clear design expectation as the simultaneously high levels of asset specificity and environmental uncertainty led to conflicting design predictions—a high degree of legalisation to cater for the opportunistic risks stemming from pronounced asset specificity on the one hand, and soft legalisation so as to remain flexible enough to adjust to a highly uncertain environment, on the other. The discussion of the extent to which these design expectations corresponded with the real design outcomes will be subject of the next sub-chapter.

Problem attribute	Drugs	Money L	Diamonds	SALW
1. Asset specificity	**High**	**High**	**Moderate**	**Moderate**
A. Potential loss	High	High	Moderate	Moderate
B. Propensity to shirk	High	High	Moderate	Moderate
2. Behavioural uncertainty	**High**	**Moderate**	**Moderate**	**Moderate**
A. Governance incapacity	High	Low	High	Moderate
B. Relative reliance on governmental monitoring	High	High	Low	Moderate
C. Industry opacity	High	Low	High	Moderate
3. Environmental uncertainty	**Low**	**High**	**Moderate**	**Low**
A. Novelty of policy issue	Low	Moderate	High	Low
B. Innovativeness	Low	High	Low	Low
a. Product innovation	Low	High	Low	Low
b. Process innovation	Moderate	High	Moderate	Low
Expected level of legalisation	**High**	**?**	**Moderate**	**Moderate**

Table 8.2 Summary of the characteristics of the constellations of the four international policy problems covered by this study.

8.2 Interactions between the components of the dependent variable

In reaction to the publication of the concept of legalisation in 2000, a number of scholars have engaged in analysing potential interactions between the three components of

the aggregated design variable legalisation, namely obligation, precision and delegation. The central questions in this debate are whether some design combinations are more likely than others and whether one component may serve as a complement or supplement for another.

This section seeks to make a contribution to this discussion by analysing, based on the four cases studied in part two, whether there is any correlation between the three components of legalisation. As the number of cases is very limited it is impossible to reach any definite answer to the questions raised above. Table 8.3 summarises the data with regard to the correlation between three pairs of components: obligation-precision, obligation-delegation and precision-delegation. For each of the four international institutions analysed in this study, each cell contains the level of the component indicated in the top row—followed by a hyphen and—followed by the level of the component indicated in the first column. In each cell, the top entry relates to the Vienna Convention, followed by the Forty Recommendations, the KPCS and finally the PoA.

	Obligation	**Precision**	**Delegation**
Obligation			
Precision	H-M M-M M-H L-L		
Delegation	H-H M-M M-L L-L	M-H M-M H-L L-L	

Table 8.3 Analysis of a potential correlation between the three components of legalisation.

The table shows that there is no perfect correlation between any of the three components. However, in three out of four cases, the level of obligation is equal to the level of delegation. This is true in the case of all international institutions except the KPCS. The correlation between obligation and precision on the one hand, and between precision and delegation on the other hand is weaker, because the extent of these component variables only matches is two out of four cases.

8.3 Does form follow function? Empirical verification of theoretical model

The main task this study set out to tackle was to test functionalist design hypotheses in four specific cases which represent the full range of institutional design options. It is therefore of central interest to see in how many of these cases the functionalist framework was indeed able to generate an accurate prediction of the institutional design outcome. This subchapter summarises the central findings on the (mis)match of design and problem structure as they emerged from the case studies presented in part two of this study. As the predictive power of the model was far from absolute the question arises why the TCE model was able to generate accurate design predictions in two cases but failed in the other two. This discussion will suggest, first, a more disaggregated analysis of the explanatory power of the individual independent variables and, second, a qualification and extension of the model.

8.3.1 Matches and mismatches

The functionalist design hypotheses this study derived from transaction cost economics generated accurate design predictions in two of the four case studies, namely with respect to the 1988 Vienna Convention on drugs trafficking and the Kimberley Process Certification Scheme of 2002 on conflict diamonds (see Table 8.4). In the former case, the model suggested high levels of legalisation as the optimal design option. All three independent variables pointed in the same direction: high levels of asset specificity and of behavioural uncertainty required 'harder' institutions, while the low level of environmental uncertainty did not provide any reason why this push towards the upper end of the legalisation spectrum should be lessened. The expected high level of legalisation corresponded well with the high level of obligation and delegation and the moderate level of precision that characterise the actual design of the Vienna Convention.

In the case of the Kimberley Process Certification Scheme we found, in contrast, all three TCE variables to be of moderate degree, thus suggestion an institution with a moderate level of legalisation as best suitable for tackling the problem of conflict diamonds. This

prediction matched well the actual design of the KPCS, which presents a moderate level of obligation combined with great precision and hardly any delegation, thus leading to an overall moderate level of legalisation.

More intriguing is the case of money laundering. In this case, the TCE framework failed to produce any clear design expectation as two of the three independent variables, namely asset specificity and environmental uncertainty, pointed in diametrically opposed directions. While the high level of asset specificity involved in anti-money laundering efforts suggests international institutions with high levels of legalisation as the optimal design option, the high degree of environmental uncertainty associated with the problem requires instead highly flexible institutions and thus low levels of legalisation. The moderate level of behavioural uncertainty did not tilt the balance in favour of any of the two directions. Consequently, we were unable to formulate any design expectation in this case, thus, making it impossible to judge whether or not the overall moderate level of legalisation found in the Forty Recommendations of 2003 does represent an optimal design match for the given problem constellation.

While the result of the money laundering case study is inconclusive, the design expectations generated in the final case study on small arms and light weapons is outright wrong. The problem constellation found in association with SALW trafficking is characterised by a moderate level of asset specificity and a moderate level of behavioural uncertainty. Together with the low level of environmental uncertainty we would expect an institution with at least a moderate degree of legalisation, whereas in fact the UN Programme of Action displays very low levels of obligation, precision and delegation, and thus a very soft institution. In brief, we find the actual level of legalisation in the PoA to be lower than deemed optimal for the given problem constellation.

	Drugs	Money L	Diamonds	SALW
Expected level of legalisation	High	Inconclusive	Moderate	Moderate
Realised level of legalisation	High	Moderate	Moderate	Low
Match expectation & realisation	Yes	n/a	Yes	No

Table 8.4 Summary of the explanatory power of the functionalist model developed in this study.

Especially given the very limited number of cases studied here, a fifty percent 'success rate' of the TCE model is little satisfactory. Has this study therefore shown that this model needs to be dismissed as possessing insufficient explanatory power? The answer to this question strongly depends on whether promising adaptations to this functionalist design model can be made that cater for the reasons why it failed in the two cases. The next subsection therefore takes a closer look at these two failed cases, in order to better understand why the model may have reached no —in the case of money laundering—or the wrong—in the case of SALW—design prediction.

8.3.2 Taking a second look at failed predictions

This section is dedicated to the detailed discussion of the two cases where the TCE model was unable to generate an accurate design prediction, in order to reach a conclusion on whether the model merits further refinement and investigation. First, the money laundering case will be re-examined. By reverting to the rich body of empirical literature on TCE in business settings, this re-examination leads us to a nuanced understanding of the interaction between the independent variables and of their relative strength. As will be shown below, a refinement of the model along these lines helps us to reach design predictions in seemingly inconclusive problem constellations as found in money laundering. Second, the re-examination of the case of trafficking in small arms and light weapons brings up a question already touched upon in chapter 3 of this study: the validity of the efficiency assumption underlying all functionalist theories. As will emerge from the discussion under 8.3.2.2, international efforts to combat the trafficking in small arms and light weapons present an insight-full example of a case where this assumption breaks down and power imposes itself as the overriding factor.

8.3.2.1 Tensions, dynamics, and biases

The money laundering case study confronts us with the paradoxical situation that, on the one hand, high levels of asset specificity increase the risk of opportunism which needs to be mitigated by institutions with hard legalisation, and that on the other hand

great environmental uncertainty requires flexible institutions with soft legalisation. The high degree of asset specificity is caused by significant potential losses for off-shore financial centres and their high propensity to shirk from their obligations. The environment of anti-money laundering efforts is markedly uncertain because, first, an ever expanding list of predicate offences associated with money laundering constantly confronts policymakers and law enforcement agencies with new problems, and, second, because the nature of the offence allows for considerable innovativeness. As behavioural uncertainty is only of moderate degree, it does not allow us to decide whether the asset specificity-induced pull towards the higher end of the legalisation spectrum or the environmental uncertainty-induced pull towards the lower end of the spectrum determines which design is to be deemed optimal for this type of problem constellation. The question of how to handle such inconclusive problem constellations gives rise to two more far-reaching considerations.

One way of managing the contradictory design expectations is by assuming that one variable outweighs the other or that the effect of one explanatory variable may depend on another explanatory variable. This possibility has been raised in a number of recent empirical studies on transaction cost economics in business settings[73]. For instance, it emerges from Buvik and John's study (2000) that the effect of environmental uncertainty may depend on the level of asset specificity. Following the argument presented by Masten, Meehan and Snyder (1991), one can assume low levels of integration (i.e. spot markets) to be the default governance structure for business transactions as vertical integration or internal organisation is associated with considerable costs. Economic actors are only willing to shoulder these costs if tighter integration helps them to reduce risks of opportunism arising from high levels of asset specificity and if this outweighs the integration costs. In the context of IR, the analogous assumption is widespread which maintains that *ad hoc* coalitions are the preferred mode of cooperation as they involve

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[73] One of the few non-economists addressing this issue—although not from an empirical but from a theoretical perspective—is Kal Raustiala (2004, 26).

the least sovereignty costs (Abbott and Snidal 1998) States only consider higher degrees of legalisation when so-designed international institutions reduce the risk that other states shirk from their obligation and thereby inflict considerable losses for the other participating states, as it is the case in the presence of significant asset specific investments combined with considerable behavioural uncertainty.

Two consequences for the efficacy of the three explanatory variables follow from assuming low levels of legalisation as the 'default' design option. First, behavioural uncertainty alone cannot be expected to lead to a deviation from the default design, i.e. from soft legalisation. Even if states find it easy to cheat surreptitiously from the obligations created by a certain institution, such a high level of behavioural uncertainty remains inconsequential if (a) states have little incentive to exploit this situation and if (b) such a breach does not result in any significant loss or harm for other states. Both the incentives to shirk and the level of harm inflicted on other participating states by such behaviour influence the asset specificity of a certain cooperative project. Hence, only when asset specificity has passed a certain threshold, increasing behavioural uncertainty can—*ceteris paribus*—be expected to motivate states to choose higher levels of legalisation. The inverse is equally true, as states will see little need in creating an institution with high levels of legalisation and, for instance, delegate monitoring and sanctioning authority when they feel that they themselves can easily detect non-compliance of other states.

Similar to behavioural uncertainty, the effect of environmental uncertainty can be assumed to depend on the level of asset specificity. Only when a non-trivial level of asset specificity is involved, can we assume that decreasing levels of environmental uncertainty are correlated with harder forms of legalisation. But in contrast to behavioural uncertainty, environmental uncertainty never exerts a pull towards higher levels of legalisation as low environmental uncertainty simply means that flexibility (and thus soft legalisation) is not of major importance, but not that harder legalisation is necessary. In other words, environmental uncertainty can only drag the optimal level of legalisation

down—as it is expected in the money laundering case where high environmental uncertainty requires a flexible design—but never push it up.

This brings us to the second question the inconclusive problem constellation underlying the money laundering case raises: *by how much* does the high level of environmental uncertainty reduce the optimal level of legalisation? Are the effects of high asset specificity and high environmental uncertainty of equal strength? If we assume this to be the case, the 'pull' exerted by asset specificity towards the higher end of the legalisation spectrum and by environmental uncertainty towards the lower end neutralise each other. Behavioural uncertainty then becomes the determinant factor, and—as it is of moderate degree—requires an institutional design of moderate legalisation. As the actual design of the 2003 FATF Recommendations has been classified as representing a moderate degree of legalisation, this assumption leads us to an accurate design prediction and to the temptation to consider the puzzle fully resolved.

However, a closer look at the practises evolving around the Forty Recommendations suggests that this would be a premature conclusion. As discussed in chapter 5, the FATF has changed its practices considerably over the last few years, especially with regard to monitoring and sanctioning, although without these changes having been explicitly reflected in the Forty Recommendations. Most important in this regard is the black-listing of the so-called noncompliant countries and territories, a monitoring and sanctioning mechanism the FATF adopted in 2000. By substituting the previously practised white-listing approach with a black-listing approach the anti-money laundering institution strengthened its obligatory dimension, thus leading to a move from low to moderate levels of legalisation. However, the FATF is currently engaged in reviewing this practice as it feels that the black-listing exercise is too cost-intensive and restrictive for dealing with a policy issue that is marked by considerable environmental uncertainty. The likely suspension of this practice would re-assign the anti-money laundering institution to the lower end of the legalisation spectrum.

These frequent policy reversals which directly alter the institutional design may be a reflection of the tensions emanating from a contradictory problem constellation as found in the case of money laundering. We may therefore conjecture that contradictory problem constellations marked by simultaneously high levels of asset specificity and environmental uncertainty may hinder the establishment of a stable design equilibrium. It would be worthwhile examining whether a similar dynamic can be found in other international institutions which are tackling problems with contradictory constellations.

Summarising the discussion above, we can expect to find institutions with low levels of legalisation whenever asset specificity is insignificant, independent of the values of behavioural and environmental uncertainty. This discussion of the possible interactions among the independent variables leads us to a revision of the design hypothesis developed in part one of this study. The revised hypotheses are summarised in Table 8.5 below.

Design (level of legalisation)	Problem constellation			Number of different problem constellations leading to the same design outcome
	Asset specificity	Behavioural uncertainty	Environmental uncertainty	
Low	Low	Any value	Any value	9
Moderate	Moderate	Any value	Any value	
Moderate	High	Any value	Moderate	Total for moderate = 14
Moderate	High	Moderate or Low	Low	
Unstable	High	Any value	High	3
High	High	High	Low	1

Table 8.5 Revised hypotheses regarding the relationship between levels of legalisation and problem characteristics.

When assuming that three variables representing the problem constellation are equally distributed, these hypotheses suggest a strong bias in the distribution of design outcomes towards the middle and lower end of the legalisation spectrum. Given the small number of cases studied here, such a bias is mere speculation and needs further testing based on a large-n sample of international institutions. If such a study confirmed the skew towards soft legalisation it would be well in line with the realist position which stresses the rarity of deep cooperation among states (e.g. Downs, Rocke, and Barsoom 1996).

8.3.2.2 Power and efficiency, power versus efficiency

The efficiency assumption is one of the central pillars of transaction cost economics theory. The central tenet of TCE states that actors choose among alternative governance structures that allow them to carry out their transaction in most efficient ways. This assumption has attracted considerable and sustained criticism from scholars associated with a wide range of theoretical orientations and disciplines—within IR namely, historical institutionalists, constructivists, and realists. While the first-mentioned see path-dependency and isomorphism as the central explanatory design factors, the second-mentioned emphasise the importance of norms and shared believes about appropriate ways of tackling a given problem, and the last-mentioned focus on the role powerful states have in imposing their design preferences upon others. Oliver Williamson himself, the 'founding father' of transaction cost economics, recognised that the efficiency assumption may not be absolute. Adopting an evolutionist line of reasoning, he argues that not all organisational structures found at a given time present an optimal fit for the underlying problem constellation, but that 'more efficient modes will eventually supplant less efficient modes—though entrenched power interests can sometimes delay the displacement' (Williamson 1985, 236). This quote states implicitly that powerful interests may obstruct the establishment of efficient governance structures. The case of small arms and light weapons can be seen as a paradigmatic example of such a situation where power outweighs efficiency. In this case, a powerful actor, namely the United States[74], strongly opposed any international institution which incorporated anything more than soft legalisation. In its cost-benefit analysis, the US reached the conclusion that if it endorsed an international institution with considerable powers over SALW trading and trafficking the resulting costs would outweigh the benefits considerably. Costs would have arisen almost exclusively in the form of domestic political costs by incurring the wrath of the well-organised and powerful National Rifle Association—a risk that was considered more significant than the potential domestic benefits in terms of a reduction

[74] As discussed in chapter 7, two other powerful states—Russia and China—were equally opposed, but they largely contended themselves with band-wagoning on the US opposition campaign.

in gun crime. Given the US' strong opposition to a draft international institution with a moderate level of legalisation, which the TCE-based analysis presented here as the optimal design option for this type of problem, those states that were truly interested in establishing an effective solution for this problem found themselves confronted with a difficult trade-off. They had to choose between pressing for an international institution with the optimal level of legalisation which would have led to the renunciation by an instrumental country—the US—, and accepting an international institution whose design was softer than deemed optimal for the given problem constellation. Using the terminology developed by Abbot and Snidal, the choice was between opting for a 'plurilateral pathway', where actors 'begin with an agreement that includes deep substantive commitments and is highly legalised, but has a limited membership, and expand participation in the agreement over time' (2004, 58) and the 'soft law pathway' with wider participation but lower levels of legalisation. This situation reminded us very much of the trade-off the international community found itself confronted with in the run-up to the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Convention). In contrast to this earlier case, the coalition of states most strongly interested in an international solution to the problems caused by the trafficking in SALW opted for the soft law pathway rather than the plurilateral pathway.

In the light of this discussion, transaction cost economics may have to qualify its claim of providing a framework for explaining the design of international institutions by acknowledging that its predictions can only be expected to be valid when no powerful actor, or a powerful group of actors, is opposed to the establishment of an institution adequately designed for tackling the problem in question. This was for instance the case with regard to conflict diamonds where—although not directly concerned—powerful states backed the efforts of less powerful states to create an international solution to this problem. We also found a match between expected and actual institutional design in the case of the Vienna Convention, but in this case the design outcome was primarily a reflection of the design preference of the powerful states which were considerably and di-

rectly concerned about the problem. When, in contrast, a powerful actor opposes the establishment of an international institution designed to tackle a problem efficiently, the design outcome becomes more dependent on bargaining strategies than on efficiency considerations. In this case, transaction cost economics may provide a useful analytic instrument for predicting the design preferences of the initiators of international efforts to tackle the problem but not of the actual outcome of these efforts, as TCE has little to say on bargaining strategies and outcomes.

8.4 Outlook

The insights and limitations of this study suggest four promising avenues for further research. First, from the discussion of the interaction between the design variables obligation, precision and delegation it emerged that the first and third-mentioned might be complementary to each other, whereas the level of precision seems not to be correlated with the other two design components. Future studies could contribute to this unsettled discussion by engaging in a large-n study of international institutions that sets out to test specifically whether such a correlation does indeed exist. Such studies would benefit from not limiting themselves to a 'snap-shot' of the design of international institutions at a given time but to follow the evolution of the design of these institutions over time, as the currently popular view of a 'hardening' of institutions over time is still far from firmly established.

Second, as discussed in chapter three, the main goal of this study—like that of most functionalist design studies—was to detect regularity patterns between problem constellations and institutional designs. This analysis was guided by the assumption that transacting actors seek to adopt governance structures that are best apt for dealing with the specific hazards that arise from a given problem constellation. However, the moderately good explanatory power of the transaction cost economics framework developed here does not provide any grounds to judge whether this efficiency assumption is justified, i.e. whether institutions with 'matching' designs are indeed more efficient or more effective in tackling the policy problem they were created for. It would present a significant con-

tribution to the further development of functionalist design theories to test this efficiency hypothesis explicitly in a separate study.

Closely related to this second open research question is the third question of whether alternative approaches may not be equally strong or even stronger in explaining the observed variance between this study's three independent variable asset specificity, behavioural uncertainty and environmental uncertainty and its dependent variables obligation, precision and delegation. Promising candidates for such an alternative test may be derived, for instance, from historic institutionalism[75] ('form follows form'), or from legal scholars like Slaughter (2004b) and Raustiala (2004) who suggest that certain epochs favour certain types of institutional designs ('form follows fashion'). The latter hypothesise that the 21st century is supplanting the 20th century's inclination towards formal international agreements with a trend towards an increasing reliance on transgovernmental networks and on legally non-binding and often unwritten understandings.

Fourth and finally, the findings of this study suggest that transaction cost economics may provide a valuable analytic tool for predicting the design preferences of actors who are truly interested in finding the optimal institutionalised solution to a given problem. Whether or not the design preference of these actors finally holds the upper hand depends on the relative bargaining power—which may be based on normative or material sources—these actors possess. It seems therefore indispensable for future functionalist studies on institutional design to pay greater attention to the analysis of the divergence in interests and the distribution of bargaining power. Such an extension of the model would present a promising step towards a more integrated design theory, which brings together the realist, functionalist and constructivist approaches to institutional design. If this study has presented a first step in this direction it has achieved more than it had ever hoped for.

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[75] A first attempt in this direction has been undertaken by the economists Hughes, Lesley and McHale (1997).

Appendix 1: List of UN resolutions and reports

General Assembly

- Resolutions

A/RES/39/141	Resolution 'International campaign against traffic in narcotic drugs' of 14 December 1984
A/RES/46/36 H	Resolution 'International arms transfers' of 6 December 1991
A/RES/46/36 L	Resolution 'Transparency in armaments' of 9 December 1991
A/RES/50/70B	Resolution 'Small Arms' of 12 December 1995
A/RES/55/56	Resolution 'The role of diamonds in fuelling conflict' of 1 December 2000
A/RES/55/255	Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime of 8 June 2001
A/RES/56/24 V	Resolution 'The illicit trade in small arms and light weapons in all its aspects' of 24 December 2001
A/RES/56/263	Resolution 'The role of diamonds in fuelling conflict' of 13 March 2002

- Reports & conference

A/8028	Declaration of Principles concerning Friendly Relations among States in accordance with the Charter of the United Nations of 24 October 1970
A/52/298	Report of the Panel of Governmental Experts on Small Arms of 27 August 1997
A/CONF. 183/9	Rome Statute of the International Criminal Court of 17 July 1998
A/54/404	Report of the Secretary-General on Small Arms of 24 September 1999
A/55/281	Report of the Group of Governmental Experts on the Continuing Operation of the UN Register of Conventional Arms and its Further Development of 9 August 2000
A/CONF.192/15	Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects of 9 – 20 July 2001
A/60/161	Report of the Secretary-General 'Assistance to States for curbing illicit traffic in small arms and collecting them' of 25 July 2005

Security Council

- Resolutions

S/RES/1013	Resolution on Rwanda establishing an international commission of inquiry of 7 September 1995
S/RES/1161	Resolution on Rwanda re-instating the international commission of inquiry for the investigation of illegal weapon supplies of 9 April 1998
S/RES/1196	Resolution on the monitoring of arms embargoes of 16 September 1998
S/RES/1237	Resolution establishing an independent Panel of Experts on Angola of 7 May 1999
S/RES/1295	Resolution on sanctions against UNITA of 18 April 2000
S/RES/1306	Resolution on sanctions against import of diamonds from Sierra Leone of 5 July 2000
S/RES/1343	Resolution on sanctions and embargoes on Liberia of 7 March 2001
S/RES/1448	Resolution on the termination of all sanctions against UNITA of 9 December 2002
S/RES/1607	Resolution renewing the trade embargo on rough diamonds from Liberia of 1 June 2005

- Reports

S/2000/203	Final Report of the UN Panel of Experts on Violations of Security Council Sanctions against UNITA of 10 March 2000 ['Fowler Report']
S/2000/1195	Report of the Panel of Experts on Sierra Leone of 20 December 2000.
S/2001/357	Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo of 12 April 2001
S/2005/176	Preliminary report of the Panel of Experts on Liberia of 17 March 2005
S/2002/1053	Report of the Secretary-General on Small Arms of 20 September 2005
S/2002/1115	Report of the Panel of Experts on Liberia of 25 October 2002

Appendix 2: United Nations Convention against Illicit Traffic In Narcotic Drugs and Psychotropic Substances

THE PARTIES TO THIS CONVENTION,

DEEPLY CONCERNED by the magnitude of and rising trend in the illicit production of, demand for and traffic in narcotic drugs and psychotropic substances, which pose a serious threat to the health and welfare of human beings and adversely affect the economic, cultural and political foundations of society,

DEEPLY CONCERNED ALSO by the steadily increasing inroads into various social groups made by illicit traffic in narcotic drugs and psychotropic substances, and particularly by the fact that children are used in many parts of the world as an illicit drug consumers market and for purposes of illicit production, distribution and trade in narcotic drugs and psychotropic substances, which entails a danger of incalculable gravity,

RECOGNIZING the links between illicit traffic and other related organized criminal activities which undermine the legitimate economies and threaten the stability, security and sovereignty of States,

RECOGNIZING ALSO that illicit traffic is an international criminal activity, the suppression of which demands urgent attention and the highest priority,

AWARE that illicit traffic generates large financial profits and wealth enabling transnational criminal organizations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business, and society at all its levels,

DETERMINED to deprive persons engaged in illicit traffic of the proceeds of their criminal activities and thereby eliminate their main incentive for so doing,

DESIRING to eliminate the root causes of the problem of abuse of narcotic drugs and psychotropic substances, including the illicit demand for such drugs and substances and the enormous profits derived from illicit traffic,

CONSIDERING that measures are necessary to monitor certain substances, including precursors, chemicals and solvents, which are used in the manufacture of narcotic drugs and psychotropic substances, the ready availability of which has led to an increase in the clandestine manufacture of such drugs and substances,

DETERMINED to improve international co-operation in the suppression of illicit traffic by sea,

RECOGNIZING that eradication of illicit traffic is a collective responsibility of all States and that, to that end, co-ordinated action within the framework of international co-operation is necessary,

ACKNOWLEDGING the competence of the United Nations in the field of control of narcotic drugs and psychotropic substances and desirous that the international organs concerned with such control should be within the framework of that Organization,

REAFFIRMING the guiding principles of existing treaties in the field of narcotic drugs and psychotropic substances and the system of control which they embody,

RECOGNIZING the need to reinforce and supplement the measures provided in the Single Convention on Narcotic Drugs, 1961, that Convention as amended by the 1972 Proto-

col Amending the Single Convention on Narcotic Drugs, 1961, and the 1971 Convention on Psychotropic Substances, in order to counter the magnitude and extent of illicit traffic and its grave consequences,

RECOGNIZING also the importance of strengthening and enhancing effective legal means for international co-operation in criminal matters for suppressing the international criminal activities of illicit traffic,

DESIRING to conclude a comprehensive, effective and operative international convention that is directed specifically against illicit traffic and that considers the various aspects of the problem as a whole, in particular those aspects not envisaged in the existing treaties in the field of narcotic drugs and psychotropic substances,

HEREBY AGREE AS FOLLOWS:

Article 1

Definitions

Except where otherwise expressly indicated or where the context otherwise requires, the following definitions shall apply throughout this Convention:

a) "Board" means the International Narcotics Control Board established by the Single Convention on Narcotic Drugs, 1961, and that Convention as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961;

b) "Cannabis plant" means any plant of the genus Cannabis;

c) "Coca bush" means the plant of any species of the genus Erythroxylon;

d) "Commercial carrier" means any person or any public, private or other entity engaged in transporting persons, goods or mails for remuneration, hire or any other benefit;

e) "Commission" means the Commission on Narcotic Drugs of the Economic and Social Council of the United Nations;

f) "Confiscation", which includes forfeiture where applicable, means the permanent deprivation of property by order of a court or other competent authority;

g) "Controlled delivery" means the technique of allowing illicit or suspect consignments of narcotic drugs, psychotropic substances, substances in Table I and Table II annexed to this Convention, or substances substituted for them, to pass out of, through or into the territory of one or more countries, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of offences established in accordance with article 3, paragraph 1 of the Convention;

h) "1961 Convention" means the Single Convention on Narcotic Drugs, 1961;

i) "1961 Convention as amended" means the Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961;

j) "1971 Convention" means the Convention on Psychotropic Substances, 1971;

k) "Council" means the Economic and Social Council of the United Nations;

l) "Freezing" or "seizure" means temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or a competent authority;

m) "Illicit traffic" means the offences set forth in article 3, paragraphs 1 and 2, of this Convention;

n) "Narcotic drug" means any of the substances, natural or synthetic, in Schedules I and II of the Single Convention on Narcotic Drugs, 1961, and that Convention as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961;

o) "Opium poppy" means the plant of the species Papaver somniferum L;

p) "Proceeds" means any property derived from or obtained, directly or indirectly, through the commission of an offence established in accordance with article 3, paragraph 1;

q) "Property" means assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets;

r) "Psychotropic substance" means any substance, natural or synthetic, or any natural material in Schedules I, II, III and IV of the Convention on Psychotropic Substances, 1971;

s) "Secretary-General" means the Secretary-General of the United Nations;

t) "Table I" and "Table II" mean the correspondingly numbered lists of substances annexed to this Convention, as amended from time to time in accordance with article 12,

u) "Transit State" means a State through the territory of which illicit narcotic drugs, psychotropic substances and substances in Table I and Table II are being moved, which is neither the place of origin nor the place of ultimate destination thereof.

Article 2

Scope of the Convention

1. The purpose of this Convention is to promote co-operation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension. In carrying out their obligations under the Convention, the Parties shall take necessary measures, including legislative and administrative measures, in conformity with the fundamental provisions of their respective domestic legislative systems.

2. The Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

3. A Party shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Party by its domestic law.

Article 3

Offences and Sanctions

1. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:

a)

i) The production, manufacture, extraction; preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch

in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;

ii) The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;

iii) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in i) above;

iv) The manufacture, transport or distribution of equipment, materials or of substances listed in Table I and Table II, knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;

v) The organization, management or financing of any of the offences enumerated in i), ii), iii) or iv) above;

b)

i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;

ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph a) of this paragraph or from an act of participation in such an offence or offences;

c) Subject to its constitutional principles and the basic concepts of its legal system:

i) 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 or from an act of participation in such offence or offences;

ii) The possession of equipment or materials or substances listed in Table I and Table II, knowing that they are being or are to be used in or for the illicit cultivation, production or

iii) Publicly inciting or inducing others, by any means, to commit any of the offences established in accordance with this article or to use narcotic drugs or psychotropic substances illicitly;

iv) Participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

2. Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.

3. 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.

4.

a) Each Party shall make the commission of the offences established in accordance with paragraph 1 of this article liable to sanctions which take into account the grave nature of these offences, such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation.

b) The Parties may provide, in addition to conviction or punishment, for an offence established in accordance with paragraph 1 of this article, that the offender shall undergo measures such as treatment, education, aftercare, rehabilitation or social reintegration.

c) Notwithstanding the preceding subparagraphs, in appropriate cases of a minor nature, the Parties may provide, as alternatives to conviction or punishment, measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare.

d) The Parties may provide, either as an alternative to conviction or punishment, or in addition to conviction or punishment of an offence established in accordance with paragraph 2 of this article, measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender.

5. The Parties shall ensure that their courts and other competent authorities having jurisdiction can take into account factual circumstances which make the commission of the offences established in accordance with paragraph l of this article particularly serious, such as:

a) The involvement in the offence of an organized criminal group to which the offender belongs;

b) The involvement of the offender in other international organized criminal activities;

c) The involvement of the offender in other illegal activities facilitated by commission of the offence;

d) The use of violence or arms by the offender;

e) The fact that the offender holds a public office and that the offence is connected with the office in question;

f) The victimization or use of minors;

g) The fact that the offence is committed in a penal institution or in an educational institution or social service facility or in their immediate vicinity or in other places to which school children and students resort for educational, sports and social activities;

h) Prior conviction, particularly for similar offences, whether foreign or domestic, to the extent permitted under the domestic law of a Party.

6. The Parties shall endeavour to ensure that any discretionary legal powers under their domestic law relating to the prosecution of persons for offences established in accordance with this article are exercised to maximize the effectiveness of law enforcement measures in respect of those offences, and with due regard to the need to deter the commission of such offences.

7. The Parties shall, ensure that their courts or other competent authorities bear in mind the serious nature of the offences enumerated in paragraph l of this article and the circumstances enumerated in paragraph 5 of this article when considering the eventuality of early release or parole of persons convicted of such offences.

8. Each Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in ac-

cordance with paragraph 1 of this article, and a longer period where the alleged offender has evaded the administration of justice.

9. Each Party shall take appropriate measures, consistent with its legal system, to ensure that a person charged with or convicted of an offence established in accordance with paragraph 1 of this article, who is found within its territory, is present at the necessary criminal proceedings.

10. For the purpose of co-operation among the Parties under this Convention, including, in particular, co-operation under articles 5, 6, 7 and 9, offences established in accordance with this article shall not be considered as fiscal offences or as political offences or regarded as politically motivated, without prejudice to the constitutional limitations and the fundamental domestic law of the Parties.

11. Nothing contained in this article shall affect the principle that the description of the offences to which it refers and of legal defences thereto is reserved to the domestic law of a Party and that such offences shall be prosecuted and punished in conformity with that law.

Article 4

Jurisdiction

1. Each Party:

a) Shall take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when:

i) The offence is committed in its territory;

ii) The offence is committed on board a vessel flying its flag or an aircraft which is registered under its laws at the time the offence is committed;

b) May take such measures as maybe necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when:

i) The offence is committed by one of its nationals or by a person who has his habitual residence in its territory;

ii) The offence is committed on board a vessel concerning which that Party has been authorized to take appropriate action pursuant to article 17, provided that such jurisdiction shall be exercised only on the basis of agreements or arrangements referred to in paragraphs 4 and 9 of that article;

iii) The offence is one of those established in accordance with article 3, paragraph 1, subparagraph c) iv), and is committed outside its territory with a view to the commission, within its territory, of an offence established in accordance with article 3, paragraph 1.

2. Each Party:

a) Shall also take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when the alleged offender is present in its territory and it does not extradite him to another Party on the ground:

i) That the offence has been committed in its territory or on board a vessel flying its flag or an aircraft which was registered under its law at the time the offence was committed; or

ii) That the offence has been committed by one of its nationals;

b) May also take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when the alleged offender is present in its territory and it does not extradite him to another Party.

3. This Convention does not exclude the exercise of any criminal jurisdiction established by a Party in accordance with its domestic law.

Article 5

Confiscation

1. Each Party shall adopt such measures as may be necessary to enable confiscation of:

a) Proceeds derived from offences established in accordance with article 3, paragraph 1, or property the value of which corresponds to that of such proceeds;

b) Narcotic drugs and psychotropic substances, materials and equipment or other instrumentalities used in or intended for use in any manner in offences established in accordance with article 3, paragraph 1.

2. Each Party shall also adopt such measures as may be necessary to enable its competent authorities to identify, trace, and freeze or seize proceeds, property, instrumentalities or any other things referred to in paragraph 1 of this article, for the purpose of eventual confiscation.

3. In order to carry out the measures referred to in this article, each Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. A Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

4.

a) Following a request made pursuant to this article by another Party having jurisdiction over an offence established in accordance with article 3, paragraph 1, the Party in whose territory proceeds, property, instrumentalities or any other things referred to in paragraph 1 of this article are situated shall:

i) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such order is granted, give effect to it; or

ii) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by the requesting Party in accordance with paragraph 1 of this article, in so far as it relates to proceeds, property, instrumentalities or any other things referred to in paragraph 1 situated in the territory of the requested Party.

b) Following a request made pursuant to this article by another Party having jurisdiction over an offence established in accordance with article 3, paragraph 1, the requested Party shall take measures to identify, trace, and freeze or seize proceeds, property, instrumentalities or any other things referred to in paragraph l of this article for the purpose of eventual confiscation to be ordered either by the requesting Party or, pursuant to a request under subparagraph a) of this paragraph, by the requested Party.

c) The decisions or actions provided for in subparagraphs a) and b) of this paragraph shall be taken by the requested Party, in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral treaty, agreement or arrangement to which it may be bound in relation to the requesting Party.

d) The provisions of article 7, paragraphs 6 to 19 are applicable mutatis mutandis. In addition to the information specified in article 7, paragraph 10, requests made pursuant to this article shall contain the following:

i) In the case of a request pertaining to subparagraph a) i) of this paragraph, a description of the property to be confiscated and a statement of the facts relied upon by the requesting Party sufficient to enable the requested Party to seek the order under its domestic law;

ii) In the case of a request pertaining to subparagraph a) ii), a legally admissible copy of an order of confiscation issued by the requesting Party upon which the request is based, a statement of the facts and information as to the extent to which the execution of the order is requested;

iii) In the case of a request pertaining to subparagraph b), a statement of the facts relied upon by the requesting Party and a description of the actions requested.

e) Each Party shall furnish to the Secretary-General the text of any of its laws and regulations which give effect to this paragraph and the text of any subsequent changes to such laws and regulations.

f) If a Party elects to make the taking of the measures referred to in subparagraphs a) and b) of this paragraph conditional on the existence of a relevant treaty, that Party shall consider this Convention as the necessary and sufficient treaty basis.

g) The Parties shall seek to conclude bilateral and multilateral treaties, agreements or arrangements to enhance the effectiveness of international co-operation pursuant to this article.

5.

a) Proceeds or property confiscated by a Party pursuant to paragraph 1 or paragraph 4 of this article shall be disposed of by that Party according to its domestic law and administrative procedures.

b) When acting on the request of another Party in accordance with this article, a Party may give special consideration to concluding agreements on:

i) Contributing the value of such proceeds and property, or funds derived from the sale of such proceeds or property, or a substantial part thereof, to intergovernmental bodies specializing in the fight against illicit traffic in and abuse of narcotic drugs and psychotropic substances;

ii) Sharing with other Parties, on a regular or case-by-case basis, such proceeds or property, or funds derived from the sale of such proceeds or property, in accordance with its domestic law, administrative procedures or bilateral or multilateral agreements entered into for this purpose.

6.

a) If proceeds have been transformed or converted into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

b) If proceeds have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to seizure or freezing, be liable to confiscation up to the assessed value of the intermingled proceeds. c) Income or other benefits derived from:

i) Proceeds;

ii) Property into which proceeds have been transformed or converted; or

iii) Property with which proceeds have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds.

7. Each Party may consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation, to the extent that such action is consistent with the principles of its domestic law and with the nature of the judicial and other proceedings.

8. The provisions of this article shall not be construed as prejudicing the rights of bona fide third parties.

9. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a Party.

Article 6

Extradition

1. This article shall apply to the offences established by the Parties in accordance with article 3, paragraph 1.

2. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between Parties. The Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

3. If a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of any offence to which this article applies. The Parties which require detailed legislation in order to use this Convention as a legal basis for extradition shall consider enacting such legislation as may be necessary.

4. The Parties which do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.

5. Extradition shall be subject to the conditions provided for by the law of the requested Party or by applicable extradition treaties, including the grounds upon which the requested Party may refuse extradition.

6. In considering requests received pursuant to this article, the requested State may refuse to comply with such requests where there are substantial grounds leading its judicial or other competent authorities to believe that compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions, or would cause prejudice for any of those reasons to any person affected by the request.

7. The Parties shall endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.

8. Subject to the provisions of its domestic law and its extradition treaties, the requested Party may, upon being satisfied that the circumstances so warrant and are urgent, and at the request of the requesting Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his presence at extradition proceedings.

9. Without prejudice to the exercise of any criminal jurisdiction established in accordance with its domestic law, a Party in whose territory an alleged offender is found shall:

a) If it does not extradite him in respect of an offence established in accordance with article 3, paragraph l, on the grounds set forth in article 4, paragraph 2, subparagraph a), submit the case to its competent authorities for the purpose of prosecution, unless otherwise agreed with the requesting Party;

b) If it does not extradite him in respect of such an offence and has established its jurisdiction in relation to that offence in accordance with article 4, paragraph 2, subparagraph b), submit the case to its competent authorities for the purpose of prosecution, unless otherwise requested by the requesting Party for the purposes of preserving its legitimate jurisdiction.

10. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested Party, the requested Party shall, if its law so permits and in conformity with the requirements of such law, upon application of the requesting Party, consider, the enforcement of the sentence which has been imposed under the law of the requesting Party, or the remainder thereof.

11. The Parties shall seek to conclude bilateral and multilateral agreements to carry out or to enhance the effectiveness of extradition.

12. The Parties may consider entering into bilateral or multilateral agreements, whether ad hoc or general, on the transfer to their country of persons sentenced to imprisonment and other forms of deprivation of liberty for offences to which this article applies, in order that they may complete their sentences there.

Article 7

Mutual Legal Assistance

1. The Parties shall afford one another, pursuant to this article, the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offences established in accordance with article 3, paragraph 1.

2. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

a) Taking evidence or statements from persons;

b) Effecting service of judicial documents;

c) Executing searches and seizures;

d) Examining objects and sites;

e) Providing information and evidentiary items;

f) Providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records;

g) Identifying or tracing proceeds, property, instrumentalities or other things for evidentiary purposes.

3. The Parties may afford one another any other forms of mutual legal assistance allowed by the domestic law of the requested Party.

4. Upon request, the Parties shall facilitate or encourage, to the extent consistent with their domestic law and practice, the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings.

5. A Party shall not decline to render mutual legal assistance under this article on the ground of bank secrecy.

6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual legal assistance in criminal matters.

7. Paragraphs 8 to 19 of this article shall apply to requests made pursuant to this article if the Parties in question are not bound by a treaty of mutual legal assistance. If these Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the Parties agree to apply paragraphs 8 to 19 of this article in lieu thereof.

8. Parties shall designate an authority, or when necessary authorities, which shall have the responsibility and power to execute requests for mutual legal assistance or to transmit them to the competent authorities for execution. The authority or the authorities designated for this purpose shall be notified to the Secretary-General. Transmission of requests for mutual legal assistance and any communication related thereto shall be effected between the authorities designated by the Parties; this requirement shall be without prejudice to the right of a Party to require that such requests and communications be addressed to it through the diplomatic channel and, in urgent circumstances, where the Parties agree, through channels of the International Criminal Police Organization, if possible.

9. Requests shall be made in writing in a language acceptable to the requested Party. The language or languages acceptable to each Party shall be notified to the Secretary-General. In urgent circumstances, and where agreed by the Parties, requests may be made orally, but shall be confirmed in writing forthwith.

10. A request for mutual legal assistance shall contain:

a) The identity of the authority making the request;

b) The subject matter and nature of the investigation, prosecution or proceeding to which the request relates, and the name and the functions of the authority conducting such investigation, prosecution or proceeding;

c) A summary of the relevant facts, except in respect of requests for the purpose of service of judicial documents;

d) A description of the assistance sought and details of any particular procedure the requesting Party wishes to be followed;

e) Where possible, the identity, location and nationality of any person concerned;

f) The purpose for which the evidence, information or action is sought.

11. The requested Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

12. A request shall be executed in accordance with the domestic law of the requested Party and, to the extent not contrary to the domestic law of the requested Party and where possible, in accordance with the procedures specified in the request.

13. The requesting Party shall not transmit nor use information or evidence furnished by the requested Party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested Party.

14. The requesting Party may require that the requested Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting Party.

15. Mutual legal assistance may be refused:

a) If the request is not made in conformity with the provisions of this article;

b) If the requested Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;

c) If the authorities of the requested Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or proceedings under their own jurisdiction;

d) If it would be contrary to the legal system of the requested Party relating to mutual legal assistance for the request to be granted.

16. Reasons shall be given for any refusal of mutual legal assistance.

17. Mutual legal assistance may be postponed by the requested Party on the ground that it interferes with an ongoing investigation, prosecution or proceeding. In such a case, the requested Party shall consult with the requesting Party to determine if the assistance can still be given subject to such terms and conditions as the requested Party deems necessary.

18. A witness, expert or other person who consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting Party, shall not be prosecuted, detained, punished or subjected to any other restriction of his personal liberty in that territory in respect of acts, omissions or convictions prior to his departure from the territory of the requested Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days, or for any period agreed upon by the Parties, from the date on which he has been officially informed that his presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory or, having left it, has returned of his own free will.

19. The ordinary costs of executing a request shall be borne by the requested Party, unless otherwise agreed by the Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the Parties shall consult to determine the terms and conditions under which the request will be executed as well as the manner in which the costs shall be borne.

20. The Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of this article.

Article 8

Transfer of Proceedings

The Parties shall give consideration to the possibility of transferring to one another proceedings for criminal prosecution of offences established in accordance with article 3, paragraph 1, in cases where such transfer is considered to be in the interests of a proper administration of justice.

Article 9

Other Forms of Co-operation and Training

1. The Parties shall co-operate closely with one another, consistent with their respective domestic legal and administrative systems, with a view to enhancing the effectiveness of law enforcement action to suppress the commission of offences established in accordance with article 3, paragraph 1. They shall, in particular, on the basis of bilateral or multilateral agreements or arrangements:

a) Establish and maintain channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information concerning all aspects of offences established in accordance with article 3, paragraph 1, including, if the Parties concerned deem it appropriate, links with other criminal activities;

b) Co-operate with one another in conducting enquiries, with respect to offences established in accordance with article 3, paragraph 1, having an international character, concerning:

i) The identity, whereabouts and activities of persons suspected of being involved in offences established in accordance with article 3, paragraph 1;

ii) The movement of proceeds or property derived from the commission of such offences;

iii) The movement of narcotic drugs, psychotropic substances, substances in Table I and Table II of this Convention and instrumentalities used or intended for use in the commission of such offences;

c) In appropriate cases and if not contrary to domestic law, establish joint teams, taking into account the need to protect the security of persons and of operations, to carry out the provisions of this paragraph. Officials of any Party taking part in such teams shall act as authorized by the appropriate authorities of the Party in whose territory the operation is to take place; in all such cases, the Parties involved shall ensure that the sovereignty of the Party on whose territory the operation is to take place is fully respected;

d) Provide, when appropriate, necessary quantities of substances for analytical or investigative purposes;

e) Facilitate effective co-ordination between their competent agencies and services and promote the exchange of personnel and other experts, including the posting of liaison officers.

2. Each Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its law enforcement and other personnel, including customs, charged with the suppression of offences established in accordance with article 3, paragraph 1. Such programmes shall deal, in particular, with the following:

a) Methods used in the detection and suppression of offences established in accordance with article 3, paragraph 1;

b) Routes and techniques used by persons suspected of being involved in offences established in accordance with article 3, paragraph 1, particularly in transit States, and appropriate countermeasures;

c) Monitoring of the import and export of narcotic drugs, psychotropic substances and substances in Table I and Table II;

d) Detection and monitoring of the movement of proceeds and property derived from, and narcotic drugs, psychotropic substances and substances in Table I and Table II, and instrumentalities used or intended for use in, the commission of offences established in accordance with article 3, paragraph 1;

e) Methods used for the transfer, concealment or disguise of such proceeds, property and instrumentalities;

f) Collection of evidence;

g) Control techniques in free trade zones and free ports;

h) Modem law enforcement techniques.

3. The Parties shall assist one another to plan, and implement research and training programmes designed to share expertise in the areas referred to in paragraph 2 of this article and, to this end, shall also, when appropriate, use regional and international conferences and seminars to promote co-operation and stimulate discussion on problems of mutual concern, including the special problems and needs of transit States.

Article 10

International Co-operation and Assistance for Transit States

1. The Parties shall co-operate, directly or through competent international or regional organizations, to assist and support transit States and, in particular, developing countries in need of such assistance and support, to the extent possible, through programmes of technical co-operation on interdiction and other related activities.

2. The Parties may undertake, directly or through competent international or regional organizations, to provide financial assistance to such transit States for the purpose of augmenting and strengthening the infrastructure needed for effective control and prevention of illicit traffic.

3. The Parties may conclude bilateral or multilateral agreements or arrangements to enhance the effectiveness of international co-operation pursuant to this article and may take into consideration financial arrangements in this regard.

Article 11

Controlled Delivery

1. If permitted by the basic principles of their respective domestic legal systems, the Parties shall take the necessary measures, within their possibilities, to allow for the appropriate use of controlled delivery at the international level, on the basis of agreements or arrangements mutually consented to, with a view to identifying persons involved in offences established in accordance with article 3, paragraph 1, and to taking legal action against them.

2. Decisions to use controlled delivery shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the Parties concerned.

3. Illicit consignments whose controlled delivery is agreed to may, with the consent of the Parties concerned, be intercepted and allowed to continue with the narcotic drugs or psychotropic substances intact or removed or replaced in whole or in part.

Article 12

Substances Frequently Used in the Illicit Manufacture of Narcotic Drugs of Psychotropic Substances

1. The Parties shall take the measures they deem appropriate to prevent diversion of substances in Table I and Table II used for the purpose of illicit manufacture of narcotic drugs or psychotropic substances, and shall co-operate with one another to this end.

2. If a Party or the Board has information which in its opinion may require the inclusion of a substance in Table I or Table II, it shall notify the Secretary-General and furnish him with the information in support of that notification. The procedure described in paragraphs 2 to 7 of this article shall also apply when a Party or the Board has information

justifying the deletion of a substance from Table I or Table II, or the transfer of a substance from one Table to the other.

3. The Secretary-General shall transmit such notification, and any information which he considers relevant, to the Parties, to the Commission, and, where notification is made by a Party, to the Board. The Parties shall communicate their comments concerning the notification to the Secretary-General, together with all supplementary information which may assist the Board in establishing an assessment and the Commission in reaching a decision.

4. If the Board, taking into account the extent, importance and diversity of the licit use of the substance, and the possibility and ease of using alternate substances both for licit purposes and for the illicit manufacture of narcotic drugs or psychotropic substances, finds:

a) That the substance is frequently used in the illicit manufacture of a narcotic drug or psychotropic substance;

b) That the volume and extent of the illicit manufacture of a narcotic drug or psychotropic substance creates serious public health or social problems, so as to warrant international action,

it shall communicate to the Commission an assessment of the substance, including the likely effect of adding the substance to either Table I or Table II on both licit use and illicit manufacture, together with recommendations of monitoring measures, if any, that would be appropriate in the light of its assessment.

5. The Commission, taking into account the comments submitted by the Parties and the comments and recommendations of the Board, whose assessment shall be determinative as to scientific matters, and also taking into due consideration any other relevant factors, may decide by a two-thirds majority of its members to place a substance in Table I or Table II.

6. Any decision of the Commission taken pursuant to this article shall be communicated by the Secretary-General to all States and other entities which are, or which are entitled to become, Parties to this Convention, and to the Board. Such decision shall become fully effective with respect to each Party one hundred and eighty days after the date of such communication.

7.

a) The decisions of the Commission taken under this article shall be subject to review by the Council upon the request of any Party filed within one hundred and eighty days after the date of notification of the decision. The request for review shall be sent to the Secretary-General, together with all relevant information upon which the request for review is based.

b) The Secretary-General shall transmit copies of the request for review and the relevant information to the Commission, to the Board and to all the Parties, inviting them to submit their comments within ninety days. All comments received shall be submitted to the Council for consideration.

c) The Council may confirm or reverse the decision of the Commission. Notification of the Council's decision shall be transmitted to all States and other entities which are, or which are entitled to become, Parties to this Convention, to the Commission and to the Board.

8.

a) Without prejudice to the generality of the provisions contained in paragraph 1 of this article and the provisions of the 1961 Convention, the 1961 Convention as amended and the 1971 Convention, the Parties shall take the measures they deem ap-

propriate to monitor the manufacture and distribution of substances in Table I and Table Il which are carried out within their territory.

b) To this end, the Parties may:

i) Control all persons and enterprises engaged in the manufacture and distribution of such substances;

ii) Control under licence the establishment and premises in which such manufacture or distribution may take place;

ii) Require that licensees obtain a permit for conducting the aforesaid operations;

iv) Prevent the accumulation of such substances in the possession of manufacturers and distributors, in excess of the quantities required for the normal conduct of business and the prevailing market conditions.

9. Each Party shall, with respect to substances in Table I and Table II, take the following measures:

a) Establish and maintain a system to monitor international trade in substances in Table I and Table II in order to facilitate the identification of suspicious transactions. Such monitoring systems shall be applied in close co-operation with manufacturers, importers, exporters, wholesalers and retailers, who shall inform the competent authorities of suspicious orders and transactions.

b) Provide for the seizure of any substance in Table I or Table II if there is sufficient evidence that it is for use in the illicit manufacture of a narcotic drug or psychotropic substance.

c) Notify, as soon as possible, the competent authorities and services of the Parties concerned if there is reason to believe that the import, export or transit of a substance in Table I or Table II is destined for the illicit manufacture of narcotic drugs or psychotropic substances, including in particular information about the means of payment and any other essential elements which led to that belief.

d) Require that imports and exports be properly labelled and documented. Commercial documents such as invoices, cargo manifests, customs, transport and other shipping documents shall include the names, as stated in Table I or Table II, of the substances being imported or exported, the quantity being imported or exported, and the name and address of the exporter, the importer and, when available, the consignee.

e) Ensure that documents referred to in subparagraph d) of this paragraph are maintained for a period of not less than two years and may be made available for inspection by the competent authorities.

10.

a) In addition to the provisions of paragraph 9, and upon request to the Secretary-General by the interested Party, each Party from whose territory a substance in Table I is to be exported shall ensure that, prior to such export, the following information is supplied by its competent authorities to the competent authorities of the importing country:

i) Name and address of the exporter and importer and, when available, the consignee;

ii) Name of the substance in Table I;

iii) Quantity of the substance to be exported;

iv) Expected point of entry and expected date of dispatch;

v) Any other information which is mutually agreed upon by the Parties.

b) A Party may adopt more strict or severe measures of control than those provided by this paragraph if, in its opinion, such measures are desirable or necessary.

11. Where a Party furnishes information to another Party in accordance with paragraphs 9 and 10 of this article, the Party furnishing such information may require that the Party receiving it keep confidential any trade, business, commercial or professional secret or trade process.

12. Each Party shall furnish annually to the Board, in the form and manner provided for by it and on forms made available by it, information on:

a) The amounts seized of substances in Table I and Table II and, when known, their origin;

b) Any substance not included in Table I or Table II which is identified as having been used in illicit manufacture of narcotic drugs or psychotropic substances, and which is deemed by the Party to be sufficiently significant to be brought to the attention of the Board;

c) Methods of diversion and illicit manufacture.

13. The Board shall report annually to the Commission on the implementation of this article and the Commission shall periodically review the adequacy and propriety of Table I and Table II.

14. The provisions of this article shall not apply to pharmaceutical preparations, nor to other preparations containing substances in Table I or Table II that are compounded in such a way that such substances cannot be easily used or recovered by readily applicable means.

Article 13

Materials and Equipment

The Parties shall take such measures as they deem appropriate to prevent trade in and the diversion of materials and equipment for illicit production or manufacture of narcotic drugs and psychotropic substances and shall co-operate to this end.

Article 14

Measures to Eradicate Illicit Cultivation of Narcotic Plants and to Eliminate Illicit Demand for Narcotic Drugs and Psychotropic Substances

1. Any measures taken pursuant to this Convention by Parties shall not be less stringent than the provisions applicable to the eradication of illicit cultivation of plants containing narcotic and psychotropic substances and to the elimination of illicit demand for narcotic drugs and psychotropic substances under the provisions of the 1961 Convention, the 1961 Convention as amended and the 1971 Convention.

2. Each Party shall take appropriate measures to prevent illicit cultivation of and to eradicate plants containing narcotic or psychotropic substances, such as opium poppy, coca bush and cannabis plants, cultivated illicitly in its territory. The measures adopted shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use, as well as the protection of the environment.

3.

a) The Parties may co-operate to increase the effectiveness of eradication efforts. Such co-operation may, inter alia, include support, when appropriate, for integrated

rural development leading to economically viable alternatives to illicit cultivation. Factors such as access to markets, the availability of resources and prevailing socio-economic conditions should be taken into account before such rural development programmes are implemented. The Parties may agree on any other appropriate measures of co-operation.

b) The Parties shall also facilitate the exchange of scientific and technical information and the conduct of research concerning eradication.

c) Whenever they have common frontiers, the Parties shall seek to co-operate in eradication programmes in their respective areas along those frontiers.

4. The Parties shall adopt appropriate measures aimed at eliminating or reducing illicit demand for narcotic drugs and psychotropic substances, with a view to reducing human suffering and eliminating financial incentives for illicit traffic. These measures may be based, inter alia, on the recommendations of the United Nations, specialized agencies of the United Nations such as the World Health Organization, and other competent international organizations, and on the Comprehensive Multidisciplinary Outline adopted by the International Conference on Drug Abuse and Illicit Trafficking, held in 1987, as it pertains to governmental and non-governmental agencies and private efforts in the fields of prevention, treatment and rehabilitation. The Parties may enter into bilateral or multilateral agreements or arrangements aimed at eliminating or reducing illicit demand for narcotic drugs and psychotropic substances.

5. The Parties may also take necessary measures for early destruction or lawful disposal of the narcotic drugs, psychotropic substances and substances in Table I and Table II which have been seized or confiscated and for the admissibility as evidence of duly certified necessary quantities of such substances.

Article 15

Commercial Carriers

1. The Parties shall take appropriate measures to ensure that means of transport operated by commercial carriers are not used in the commission of offences established in accordance with article 3, paragraph 1; such measures may include special arrangements with commercial carriers.

2. Each Party shall require commercial carriers to take reasonable precautions to prevent the use of their means of transport for the commission of offences established in accordance with article 3, paragraph 1. Such precautions may include:

a) If the principal place of business of a commercial carrier is within the territory of the Party:

i) Training of personnel to identify suspicious consignments or persons;

ii) Promotion of integrity of personnel;

b) If a commercial carrier is operating within the territory of the Party:

i) Submission of cargo manifests in advance, whenever possible;

ii) Use of tamper-resistant, individually verifiable seals on containers;

iii) Reporting to the appropriate authorities at the earliest opportunity all suspicious circumstances that may be related to the commission of offences established in accordance with article 3, paragraph 1.

3. Each Party shall seek to ensure that commercial carriers and the appropriate authorities at points of entry and exit and other customs control areas co-operate, with a view to

preventing unauthorized access to means of transport and cargo and to implementing appropriate security measures.

Article 16

Commercial Documents and Labelling Exports

1. Each Party shall require that lawful exports of narcotic drugs and psychotropic substances be properly documented. In addition to the requirements for documentation under article 31 of the 1961 Convention, article 31 of the 1961 Convention as amended and article 12 of the 1971 Convention, commercial documents such as invoices, cargo manifests, customs, transport and other shipping documents shall include the names of the narcotic drugs and psychotropic substances being exported as set out in the respective Schedules of the 1961 Convention, the 1961 Convention as amended and the 1971 Convention, the quantity being exported, and the name and address of the exporter, the importer and, when available, the consignee.

2. Each Party shall require that consignments of narcotic drugs and psychotropic substances being exported be not mislabelled.

Article 17

Illicit Traffic by Sea

1. The Parties shall co-operate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea.

2. A Party which has reasonable grounds to suspect that a vessel flying its flag or not displaying a flag or marks of registry is engaged in illicit traffic may request the assistance of other Parties in suppressing its use for that purpose. The Parties so requested shall render such assistance within the means available to them.

3. A Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law, and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures in regard to that vessel.

4. In accordance with paragraph 3 or in accordance with treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those Parties, the flag State may authorize the requesting State to, inter aria:

a) Board the vessel;

b) Search the vessel;

c) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.

5. Where action is taken pursuant to this article, the Parties concerned shall take due account of the need not to endanger the safety of life at sea, the security of the vessel and the cargo or to prejudice the commercial and legal interests of the flag State or any other interested State.

6. The flag State may, consistent with its obligations in paragraph 1 of this article, subject its authorization to conditions to be mutually agreed between it and the requesting Party, including conditions relating to responsibility.

7. For the purposes of paragraphs 3 and 4 of this article, a Party shall respond expeditiously to a request from another Party to determine whether a vessel that is flying its

flag is entitled to do so, and to requests for authorization made pursuant to paragraph 3. At the time of becoming a Party to this Convention, each Party shall designate an authority or, when necessary, authorities to receive and respond to such requests. Such designation shall be notified through the Secretary-General to all other Parties within one month of the designation.

8. A Party which has taken any action in accordance with this article shall promptly inform the flag State concerned of the results of that action.

9. The Parties shall consider entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of this article.

10. Action pursuant to paragraph 4 of this article shall be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

11. Any action taken in accordance with this article shall take due account of the need not to interfere with or affect the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea.

Article 18

Free Trade Zones and Free Ports

1. The Parties shall apply measures to suppress illicit traffic in narcotic drugs, psychotropic substances and substances in Table I and Table II in free trade zones and in free ports that are no less stringent than those applied in other parts of their territories.

2. The Parties shall endeavour:

a) To monitor the movement of goods and persons in free trade zones and free ports, and, to that end, shall empower the competent authorities to search cargoes and incoming and outgoing vessels, including pleasure craft and fishing vessels, as well as aircraft and vehicles and, when appropriate, to search crew members, passengers and their baggage;

b) To establish and maintain a system to detect consignments suspected of containing narcotic drugs, psychotropic substances and substances in Table I and Table II passing into or out of free trade zones and free ports;

c) To establish and maintain surveillance systems in harbour and dock areas and at airports and border control points in free trade zones and free ports.

Article 19

The Use of the Mails

1. In conformity with their obligations under the Conventions of the Universal Postal Union, and in accordance with the basic principles of their domestic legal systems, the Parties shall adopt measures to suppress the use of the mails for illicit traffic and shall co-operate with one another to that end.

2. The measures referred to in paragraph 1 of this article shall include, in particular:

a) Co-ordinated action for the prevention and repression of the use of the mails for illicit traffic;

b) Introduction and maintenance by authorized law enforcement personnel of investigative and control techniques designed to detect illicit consignments of narcotic drugs, psychotropic substances and substances in Table I and Table II in the mails;

c) Legislative measures to enable the use of appropriate means to secure evidence required for judicial proceedings.

Article 20

Information to be Furnished by the Parties

1. The Parties shall furnish, through the Secretary-General, information to the Commission on the working of this Convention in their territories and, in particular:

a) The text of laws and regulations promulgated in order to give effect to the Convention;

b) Particulars of cases of illicit traffic within their jurisdiction which they consider important because of new trends disclosed, the quantities involved, the sources from which the substances are obtained, or the methods employed by persons so engaged.

2. The Parties shall furnish such information in such a manner and by such dates as the Commission may request.

Article 21

Functions of the Commission

The Commission is authorized to consider all matters pertaining to the aims of this Convention and, in particular.

a) The Commission shall, on the basis of the information submitted by the Parties in accordance with article 20, review the operation of this Convention;

b) The Commission may make suggestions and general recommendations based on the examination of the information received from the Parties;

c) The Commission may call the attention of the Board to any matters which may be relevant to the functions of the Board;

d) The Commission shall, on any matter referred to it by the Board under article 22, paragraph 1 b), take such action as it deems appropriate;

e) The Commission may, in conformity with the procedures laid down in article 12, amend Table I and Table II;

f) The Commission may draw the attention of non-Parties to decisions and recommendations which it adopts under this Convention, with a view to their considering taking action in accordance therewith.

Article 22

Functions of the Board

1. Without prejudice to the functions of the Commission under article 21, and without prejudice to the functions of the Board and the Commission under the 1961 Convention, the 1961 Convention as amended and the 1971 Convention:

a) If, on the basis of its examination of information available to it, to the Secretary-General or to the Commission, or of information communicated by United Nations organs, the Board has reason to believe that the aims of this Convention in matters related to its competence are not being met, the Board may invite a Party or Parties to furnish any relevant information;

b) With respect to articles 12, 13 and 16:

i) After taking action under subparagraph a) of this article, the Board if satisfied that it is necessary to do so, may call upon the Party concerned to adopt such remedial measures as shall seem under the circumstances to be necessary for the execution of the provisions of articles 12, 13 and 16;

ii) Prior to taking action under iii) below, the Board shall treat as confidential its communications with the Party concerned under the preceding subparagraphs;

iii) If the Board finds that the Party concerned has not taken remedial measures which it has been called upon to take under this subparagraph, it may call the attention of the Parties, the Council and the Commission to the matter. Any report published by the Board under this subparagraph shall also contain the views of the Party concerned if the latter so requests.

2. Any Party shall be invited to be represented at a meeting of the Board at which a question of direct interest to it is to be considered under this article.

3. If in any case a decision of the Board which is adopted under this article is not unanimous, the views of the minority shall be stated.

4. Decisions of the Board under this article shall be taken by a two-thirds majority of the whole number of the Board.

5. In carrying out its functions pursuant to subparagraph 1 a) of this article, the Board shall ensure the confidentiality of all information which may come into its possession.

6. The Board's responsibility under this article shall not apply to the implementation of treaties or agreements entered into between Parties in accordance with the provisions of this Convention.

7. The provisions of this article shall not be applicable to disputes between Parties falling under the provisions of article 32.

Article 23

Reports of the Board

1. The Board shall prepare an annual report on its work containing an analysis of the information at its disposal and, in appropriate cases, an account of the explanations, if any, given by or required of Parties, together with any observations and recommendations which the Board desires to make. The Board may make such additional reports as it considers necessary. The reports shall be submitted to the Council through the Commission which may make such comments as it sees fit.

2. The reports of the Board shall be communicated to the Parties and subsequently published by the Secretary-General. The Parties shall permit their unrestricted distribution.

Article 24

Application of Stricter Measured than those Required by this Convention

A Party may adopt more strict or severe measures than those provided by this Convention if, in its opinion, such measures are desirable or necessary for the prevention or suppression of illicit traffic.

Article 25

Non-derogation from Earlier Treaty Rights and Obligations

The provisions of this Convention shall not derogate from any rights enjoyed or obligations undertaken by Parties to this Convention under the 1961 Convention, the 1961 Convention as amended and the 1971 Convention.

Article 26

Signature

This Convention shall be open for signature at the United Nations Office at Vienna, from 20 December 1988 to 28 February 1989, and thereafter at the Headquarters of the United Nations at New York, until 20 December 1989, by:

a) All States;

b) Namibia, represented by the United Nations Council for Namibia;

c) Regional economic integration organizations which have competence in respect of the negotiation, conclusion and application of international agreements in matters covered by this Convention, references under the Convention to Parties, States or national services being applicable to these organizations within the limits of their competence.

Article 27

Ratification, Acceptance, Approval or Act of Formal Confirmation

1. This Convention is subject to ratification, acceptance or approval by States and by Namibia, represented by the United Nations Council for Namibia, and to acts of formal confirmation by regional economic integration organizations referred to in article 26, subparagraph c). The instruments of ratification, acceptance or approval and those relating to acts of formal confirmation shall be deposited with the Secretary-General.

2. In their instruments of formal confirmation, regional economic integration organizations shall declare the extent of their competence with respect to the matters governed by this Convention. These organizations shall also inform the Secretary-General of any modification in the extent of their competence with respect to the matters governed by the Convention.

Article 28

Accession

1. This Convention shall remain open for accession by any State, by Namibia, represented by the United Nations Council for Namibia, and by regional economic integration organizations referred to in article 26, subparagraph c). Accession shall be effected by the deposit of an instrument of accession with the Secretary-General.

2. In their instruments of accession, regional economic integration organizations shall declare the extent of their competence with respect to the matters governed by this Convention. These organizations shall also inform the Secretary-General of any modification in the extent of their competence with respect to the matters governed by the Convention.

Article 29

Entry into Force

1. This Convention shall enter into force on the ninetieth day after the date of the deposit with the Secretary-General of the twentieth instrument of ratification, acceptance, approval or accession by States or by Namibia, represented by the Council for Namibia.

2. For each State or for Namibia, represented by the Council for Namibia, ratifying, accepting, approving or acceding to this Convention after the deposit of the twentieth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the ninetieth day after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

3. For each regional economic integration organization referred to in article 26, subparagraph c) depositing an instrument relating to an act of formal confirmation or an instrument of accession, this Convention shall enter into force on the ninetieth day after such deposit, or at the date the Convention enters into force pursuant to paragraph 1 of this article, whichever is later.

Article 30

Denunciation

1. A Party may denounce this Convention at any time by a written notification addressed to the Secretary-General.

2. Such denunciation shall take effect for the Party concerned one year after the date of receipt of the notification by the Secretary-General.

Article 31

Amendments

1. Any Party may propose an amendment to this Convention. The text of any such amendment and the reasons therefor shall be communicated by that Party to the Secretary-General, who shall communicate it to the other Parties and shall ask them whether they accept the proposed amendment. If a proposed amendment so circulated has not been rejected by any Party within twenty-four months after it has been circulated, it shall be deemed to have been accepted and shall enter into force in respect of a Party ninety days after that Party has deposited with the Secretary-General an instrument expressing its consent to be bound by that amendment.

2. If a proposed amendment has been rejected by any Party, the Secretary-General shall consult with the Parties and, if a majority so requests, he shall bring the matter, together with any comments made by the Parties, before the Council which may decide to call a conference in accordance with Article 62, paragraph 4, of the Charter of the United Nations. Any amendment resulting from such a Conference shall be embodied in a Protocol of Amendment. Consent to be bound by such a Protocol shall be required to be expressed specifically to the Secretary-General.

Article 32

Settlement of Disputes

1. If there should arise between two or more Parties a dispute relating to the interpretation or application of this Convention, the Parties shall consult together with a view to the settlement of the dispute by negotiation, enquiry, mediation, conciliation, arbitra-

tion, recourse to regional bodies, judicial process or other peaceful means of their own choice.

2. Any such dispute which cannot be settled in the manner prescribed in paragraph 1 of this article shall be referred, at the request of any one of the States Parties to the dispute, to the International Court of Justice for decision.

3. If a regional economic integration organization referred to in article 26, subparagraph c) is a Party to a dispute which cannot be settled in the manner prescribed in paragraph 1 of this article, it may, through a State Member of the United Nations, request the Council to request an advisory opinion of the International Court of Justice in accordance with Article 65 of the Statute of the Court, which opinion shall be regarded as decisive.

4. Each State, at the time of signature or ratification, acceptance or approval of this Convention or accession thereto, or each regional economic integration organization, at the time of signature or deposit of an act of formal confirmation or accession, may declare that it does not consider itself bound by paragraphs 2 and 3 of this article. The other Parties shall not be bound by paragraphs 2 and 3 with respect to any Party having made such a declaration.

5. Any Party having made a declaration in accordance with paragraph 4 of this article may at any time withdraw the declaration by notification to the Secretary-General.

Article 33

Authentic Texts

The Arabic, Chinese, English, French, Russian and Spanish texts of this Convention are equally authentic.

Article 34

Depositary

The Secretary-General shall be the depositary of this Convention.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed this Convention.

DONE AT VIENNA, in one original, this twentieth day of December one thousand nine hundred and eighty-eight.

Appendix 3: The Forty Recommendations

A. LEGAL SYSTEMS

Scope of the criminal offence of money laundering

1. Countries should criminalise money laundering on the basis of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (the Vienna Convention) and the United Nations Convention against Transnational Organized Crime, 2000 (the Palermo Convention).

Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences. Predicate offences may be described by reference to all offences, or to a threshold linked either to a category of serious offences or to the penalty of imprisonment applicable to the predicate offence (threshold approach), or to a list of predicate offences, or a combination of these approaches.

Where countries apply a threshold approach, predicate offences should at a minimum comprise all offences that fall within the category of serious offences under their national law or should include offences which are punishable by a maximum penalty of more than one year's imprisonment or for those countries that have a minimum threshold for offences in their legal system, predicate offences should comprise all offences, which are punished by a minimum penalty of more than six months imprisonment.

Whichever approach is adopted, each country should at a minimum include a range of offences within each of the designated categories of offences[76].

Predicate offences for money laundering should extend to conduct that occurred in another country, which constitutes an offence in that country, and which would have constituted a predicate offence had it occurred domestically. Countries may provide that the only prerequisite is that the conduct would have constituted a predicate offence had it occurred domestically.

Countries may provide that the offence of money laundering does not apply to persons who committed the predicate offence, where this is required by fundamental principles of their domestic law.

2. Countries should ensure that:

a) The intent and knowledge required to prove the offence of money laundering is consistent with the standards set forth in the Vienna and Palermo Conventions, including the concept that such mental state may be inferred from objective factual circumstances.

b) Criminal liability, and, where that is not possible, civil or administrative liability, should apply to legal persons. This should not preclude parallel criminal, civil or administrative proceedings with respect to legal persons in countries in which such forms of liability are available. Legal persons should be subject to effective, proportionate and dissuasive sanctions. Such measures should be without prejudice to the criminal liability of individuals.

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[76] See the definition of "designated categories of offences" in the Glossary.

Provisonal measures and confiscation

3. Countries should adopt measures similar to those set forth in the Vienna and Palermo Conventions, including legislative measures, to enable their competent authorities to confiscate property laundered, proceeds from money laundering or predicate offences, instrumentalities used in or intended for use in the commission of these offences, or property of corresponding value, without prejudicing the rights of bona fide third parties.

Such measures should include the authority to: (a) identify, trace and evaluate property which is subject to confiscation; (b) carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property; (c) take steps that will prevent or void actions that prejudice the State's ability to recover property that is subject to confiscation; and (d) take any appropriate investigative measures.

Countries may consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction, or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law.

B. MEASURES TO BE TAKEN BY FINANCIAL INSTITUTIONS AND NON-FINANCIAL BUSINESSES AND PROFESSIONS TO PREVENT MONEY LAUNDERING AND TERRORIST FINANCING

4. Countries should ensure that financial institution secrecy laws do not inhibit implementation of the FATF Recommendations.

Customer due diligence and record-keeping

5.* Financial institutions should not keep anonymous accounts or accounts in obviously fictitious names.

Financial institutions should undertake customer due diligence measures, including identifying and verifying the identity of their customers, when:

- establishing business relations;
- carrying out occasional transactions: (i) above the applicable designated threshold; or (ii) that are wire transfers in the circumstances covered by the Interpretative Note to Special Recommendation VII;
- there is a suspicion of money laundering or terrorist financing; or x the financial institution has doubts about the veracity or adequacy of previously obtained customer identification data.

The customer due diligence (CDD) measures to be taken are as follows:

a) Identifying the customer and verifying that customer's identity using reliable, independent source documents, data or information.[77]

b) Identifying the beneficial owner, and taking reasonable measures to verify the identity of the beneficial owner such that the financial institution is satisfied that it knows who the beneficial owner is. For legal persons and arrangements this should include financial institutions taking reasonable measures to understand the ownership and control structure of the customer.

c) Obtaining information on the purpose and intended nature of the business relationship.

d) Conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds.

Financial institutions should apply each of the CDD measures under (a) to (d) above, but may determine the extent of such measures on a risk sensitive basis depending on the type of customer, business relationship or transaction. The measures that are taken should be consistent with any guidelines issued by competent authorities. For higher risk categories, financial institutions should perform enhanced due diligence. In certain circumstances, where there are low risks, countries may decide that financial institutions can apply reduced or simplified measures.

Financial institutions should verify the identity of the customer and beneficial owner before or during the course of establishing a business relationship or conducting transactions for occasional customers. Countries may permit financial institutions to complete the verification as soon as reasonably practicable following the establishment of the relationship, where the money laundering risks are effectively managed and where this is essential not to interrupt the normal conduct of business.

Where the financial institution is unable to comply with paragraphs (a) to (c) above, it should not open the account, commence business relations or perform the transaction; or should terminate the business relationship; and should consider making a suspicious transactions report in relation to the customer.

These requirements should apply to all new customers, though financial institutions should also apply this Recommendation to existing customers on the basis of materiality and risk, and should conduct due diligence on such existing relationships at appropriate times.

6.* Financial institutions should, in relation to politically exposed persons, in addition to performing normal due diligence measures:

a) Have appropriate risk management systems to determine whether the customer is a politically exposed person.

b) Obtain senior management approval for establishing business relationships with such customers.

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[77] Reliable, independent source documents, data or information will hereafter be referred to as "identification data".

* Recommendations marked with an asterisk should be read in conjunction with their Interpretative Note.

c) Take reasonable measures to establish the source of wealth and source of funds.

d) Conduct enhanced ongoing monitoring of the business relationship.

7.Financial institutions should, in relation to cross-border correspondent banking and other similar relationships, in addition to performing normal due diligence measures:

a) Gather sufficient information about a respondent institution to understand fully the nature of the respondent's business and to determine from publicly available information the reputation of the institution and the quality of supervision, including whether it has been subject to a money laundering or terrorist financing investigation or regulatory action.

b) Assess the respondent institution's anti-money laundering and terrorist financing controls.

c) Obtain approval from senior management before establishing new correspondent relationships.

d) Document the respective responsibilities of each institution.

e) With respect to "payable-through accounts", be satisfied that the respondent bank has verified the identity of and performed on-going due diligence on the customers having direct access to accounts of the correspondent and that it is able to provide relevant customer identification data upon request to the correspondent bank.

8. Financial institutions should pay special attention to any money laundering threats that may arise from new or developing technologies that might favour anonymity, and take measures, if needed, to prevent their use in money laundering schemes. In particular, financial institutions should have policies and procedures in place to address any specific risks associated with non-face to face business relationships or transactions.

9.* Countries may permit financial institutions to rely on intermediaries or other third parties to perform elements (a) – (c) of the CDD process or to introduce business, provided that the criteria set out below are met. Where such reliance is permitted, the ultimate responsibility for customer identification and verification remains with the financial institution relying on the third party.

The criteria that should be met are as follows:

a) A financial institution relying upon a third party should immediately obtain the necessary information concerning elements (a) – (c) of the CDD process. Financial institutions should take adequate steps to satisfy themselves that copies of identification data and other relevant documentation relating to the CDD requirements will be made available from the third party upon request without delay.

b) The financial institution should satisfy itself that the third party is regulated and supervised for, and has measures in place to comply with CDD requirements in line with Recommendations 5 and 10.

It is left to each country to determine in which countries the third party that meets the conditions can be based, having regard to information available on countries that do not or do not adequately apply the FATF Recommendations.

10.* Financial institutions should maintain, for at least five years, all necessary records on transactions, both domestic or international, to enable them to comply swiftly with information requests from the competent authorities. Such records must be sufficient to permit reconstruction of individual transactions (including the amounts and types of currency involved if any) so as to provide, if necessary, evidence for prosecution of criminal activity.

Financial institutions should keep records on the identification data obtained through the customer due diligence process (e.g. copies or records of official identification documents like passports, identity cards, driving licenses or similar documents), account files and business correspondence for at least five years after the business relationship is ended.

The identification data and transaction records should be available to domestic competent authorities upon appropriate authority.

11.* Financial institutions should pay special attention to all complex, unusual large transactions, and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose. The background and purpose of such transactions should, as far as possible, be examined, the findings established in writing, and be available to help competent authorities and auditors.

12.* The customer due diligence and record-keeping requirements set out in Recommendations 5, 6, and 8 to 11 apply to designated non-financial businesses and professions in the following situations:

a) Casinos – when customers engage in financial transactions equal to or above the applicable designated threshold.

b) Real estate agents - when they are involved in transactions for their client concerning the buying and selling of real estate.

c) Dealers in precious metals and dealers in precious stones - when they engage in any cash transaction with a customer equal to or above the applicable designated threshold.

d) Lawyers, notaries, other independent legal professionals and accountants when they prepare for or carry out transactions for their client concerning the following activities:

- buying and selling of real estate;
- managing of client money, securities or other assets;
- management of bank, savings or securities accounts;
- organisation of contributions for the creation, operation or management of companies;
- creation, operation or management of legal persons or arrangements, and buying and selling of business entities.

e) Trust and company service providers when they prepare for or carry out transactions for a client concerning the activities listed in the definition in the Glossary.

Reporting of suspicious transactions and compliance

13.* If a financial institution suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity, or are related to terrorist financing, it should be required, directly by law or regulation, to report promptly its suspicions to the financial intelligence unit (FIU).

14.* Financial institutions, their directors, officers and employees should be:

a) Protected by legal provisions from criminal and civil liability for breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, if they report their suspicions in good faith to the

FIU, even if they did not know precisely what the underlying criminal activity was, and regardless of whether illegal activity actually occurred.

b) Prohibited by law from disclosing the fact that a suspicious transaction report (STR) or related information is being reported to the FIU.

15.* Financial institutions should develop programmes against money laundering and terrorist financing. These programmes should include:

a)The development of internal policies, procedures and controls, including appropriate compliance management arrangements, and adequate screening procedures to ensure high standards when hiring employees.

b) An ongoing employee training programme.

c) An audit function to test the system.

16.* The requirements set out in Recommendations 13 to 15, and 21 apply to all designated non-financial businesses and professions, subject to the following qualifications:

a) Lawyers, notaries, other independent legal professionals and accountants should be required to report suspicious transactions when, on behalf of or for a client, they engage in a financial transaction in relation to the activities described in Recommendation 12(d). Countries are strongly encouraged to extend the reporting requirement to the rest of the professional activities of accountants, including auditing.

b) Dealers in precious metals and dealers in precious stones should be required to report suspicious transactions when they engage in any cash transaction with a customer equal to or above the applicable designated threshold.

c) Trust and company service providers should be required to report suspicious transactions for a client when, on behalf of or for a client, they engage in a transaction in relation to the activities referred to Recommendation 12(e).

Lawyers, notaries, other independent legal professionals, and accountants acting as independent legal professionals, are not required to report their suspicions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.

Other measures to deter money laundering and terrorist financing

17. Countries should ensure that effective, proportionate and dissuasive sanctions, whether criminal, civil or administrative, are available to deal with natural or legal persons covered by these Recommendations that fail to comply with anti-money laundering or terrorist financing requirements.

18. Countries should not approve the establishment or accept the continued operation of shell banks. Financial institutions should refuse to enter into, or continue, a correspondent banking relationship with shell banks. Financial institutions should also guard against establishing relations with respondent foreign financial institutions that permit their accounts to be used by shell banks.

19.* Countries should consider:

a) Implementing feasible measures to detect or monitor the physical cross-border transportation of currency and bearer negotiable instruments, subject to strict safeguards to ensure proper use of information and without impeding in any way the freedom of capital movements.

b) The feasibility and utility of a system where banks and other financial institutions and intermediaries would report all domestic and international currency transactions above a fixed amount, to a national central agency with a computerised data base, available to competent authorities for use in money laundering or terrorist financing cases, subject to strict safeguards to ensure proper use of the information.

20. Countries should consider applying the FATF Recommendations to businesses and professions, other than designated non-financial businesses and professions, that pose a money laundering or terrorist financing risk.

Countries should further encourage the development of modern and secure techniques of money management that are less vulnerable to money laundering.

Measures to be taken with respect to countries that do not or insufficiently comply with the FATF Recommendations

21. Financial institutions should give special attention to business relationships and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply the FATF 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 competent authorities. Where such a country continues not to apply or insufficiently applies the FATF Recommendations, countries should be able to apply appropriate countermeasures.

22. Financial institutions should ensure that the principles applicable to financial institutions, which are mentioned above are also applied to branches and majority owned subsidiaries located abroad, especially in countries which do not or insufficiently apply the FATF Recommendations, to the extent that local applicable laws and regulations permit. When local applicable laws and regulations prohibit this implementation, competent authorities in the country of the parent institution should be informed by the financial institutions that they cannot apply the FATF Recommendations.

Regulation and supervision

23.* Countries should ensure that financial institutions are subject to adequate regulation and supervision and are effectively implementing the FATF Recommendations. Competent authorities should take the necessary legal or regulatory measures to prevent criminals or their associates from holding or being the beneficial owner of a significant or controlling interest or holding a management function in a financial institution.

For financial institutions subject to the Core Principles, the regulatory and supervisory measures that apply for prudential purposes and which are also relevant to money laundering, should apply in a similar manner for anti-money laundering and terrorist financing purposes.

Other financial institutions should be licensed or registered and appropriately regulated, and subject to supervision or oversight for anti-money laundering purposes, having regard to the risk of money laundering or terrorist financing in that sector. At a minimum, businesses providing a service of money or value transfer, or of money or currency changing should be licensed or registered, and subject to effective systems for monitoring and ensuring compliance with national requirements to combat money laundering and terrorist financing.

24. Designated non-financial businesses and professions should be subject to regulatory and supervisory measures as set out below.

a) Casinos should be subject to a comprehensive regulatory and supervisory regime that ensures that they have effectively implemented the necessary anti-money laundering and terrorist-financing measures. At a minimum:

- casinos should be licensed;
- competent authorities should take the necessary legal or regulatory measures to prevent criminals or their associates from holding or being the beneficial owner of a significant or controlling interest, holding a management function in, or being an operator of a casino
- competent authorities should ensure that casinos are effectively supervised for compliance with requirements to combat money laundering and terrorist financing.

b) Countries should ensure that the other categories of designated non-financial businesses and professions are subject to effective systems for monitoring and ensuring their compliance with requirements to combat money laundering and terrorist financing. This should be performed on a risk-sensitive basis. This may be performed by a government authority or by an appropriate self-regulatory organisation, provided that such an organisation can ensure that its members comply with their obligations to combat money laundering and terrorist financing.

25.* The competent authorities should establish guidelines, and provide feedback which will assist financial institutions and designated non-financial businesses and professions in applying national measures to combat money laundering and terrorist financing, and in particular, in detecting and reporting suspicious transactions.

C. INSTITUTIONAL AND OTHER MEASURES NECESSARY IN SYSTEMS FOR COMBATING MONEY LAUNDERING AND TERRORIST FINANCING

Competent authorities, their powers and resources

26.* Countries should establish a FIU that serves as a national centre for the receiving (and, as permitted, requesting), analysis and dissemination of STR and other information regarding potential money laundering or terrorist financing. The FIU should have access, directly or indirectly, on a timely basis to the financial, administrative and law enforcement information that it requires to properly undertake its functions, including the analysis of STR.

27.* Countries should ensure that designated law enforcement authorities have responsibility for money laundering and terrorist financing investigations. Countries are encouraged to support and develop, as far as possible, special investigative techniques suitable for the investigation of money laundering, such as controlled delivery, undercover operations and other relevant techniques. Countries are also encouraged to use other effective mechanisms such as the use of permanent or temporary groups specialised in asset investigation, and co-operative investigations with appropriate competent authorities in other countries.

28. When conducting investigations of money laundering and underlying predicate offences, competent authorities should be able to obtain documents and information for use in those investigations, and in prosecutions and related actions. This should include powers to use compulsory measures for the production of records held by fi-

nancial institutions and other persons, for the search of persons and premises, and for the seizure and obtaining of evidence.

29. Supervisors should have adequate powers to monitor and ensure compliance by financial institutions with requirements to combat money laundering and terrorist financing, including the authority to conduct inspections. They should be authorised to compel production of any information from financial institutions that is relevant to monitoring such compliance, and to impose adequate administrative sanctions for failure to comply with such requirements.

30. Countries should provide their competent authorities involved in combating money laundering and terrorist financing with adequate financial, human and technical resources. Countries should have in place processes to ensure that the staff of those authorities are of high integrity.

31. Countries should ensure that policy makers, the FIU, law enforcement and supervisors have effective mechanisms in place which enable them to co-operate, and where appropriate coordinate domestically with each other concerning the development and implementation of policies and activities to combat money laundering and terrorist financing.

32. Countries should ensure that their competent authorities can review the effectiveness of their systems to combat money laundering and terrorist financing systems by maintaining comprehensive statistics on matters relevant to the effectiveness and efficiency of such systems. This should include statistics on the STR received and disseminated; on money laundering and terrorist financing investigations, prosecutions and convictions; on property frozen, seized and confiscated; and on mutual legal assistance or other international requests for co-operation.

Transparency of legal persons and arrangements

33. Countries should take measures to prevent the unlawful use of legal persons by money launderers. Countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities. In particular, countries that have legal persons that are able to issue bearer shares should take appropriate measures to ensure that they are not misused for money laundering and be able to demonstrate the adequacy of those measures. Countries could consider measures to facilitate access to beneficial ownership and control information to financial institutions undertaking the requirements set out in Recommendation 5.

34. Countries should take measures to prevent the unlawful use of legal arrangements by money launderers. In particular, countries should ensure that there is adequate, accurate and timely information on express trusts, including information on the settlor, trustee and beneficiaries, that can be obtained or accessed in a timely fashion by competent authorities. Countries could consider measures to facilitate access to beneficial ownership and control information to financial institutions undertaking the requirements set out in Recommendation 5.

D. INTERNATIONAL CO-OPERATION

35. Countries should take immediate steps to become party to and implement fully the Vienna Convention, the Palermo Convention, and the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism. Countries

are also encouraged to ratify and implement other relevant international conventions, such as the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the 2002 Inter-American Convention against Terrorism.

Mutual legal assistance and extradition

36. Countries should rapidly, constructively and effectively provide the widest possible range of mutual legal assistance in relation to money laundering and terrorist financing investigations, prosecutions, and related proceedings. In particular, countries should:

a) Not prohibit or place unreasonable or unduly restrictive conditions on the provision of mutual legal assistance.

b) Ensure that they have clear and efficient processes for the execution of mutual legal assistance requests.

c) Not refuse to execute a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

d) Not refuse to execute a request for mutual legal assistance on the grounds that laws require financial institutions to maintain secrecy or confidentiality.

Countries should ensure that the powers of their competent authorities required under Recommendation 28 are also available for use in response to requests for mutual legal assistance, and if consistent with their domestic framework, in response to direct requests from foreign judicial or law enforcement authorities to domestic counterparts.

To avoid conflicts of jurisdiction, consideration should be given to devising and applying mechanisms for determining the best venue for prosecution of defendants in the interests of justice in cases that are subject to prosecution in more than one country.

37. Countries should, to the greatest extent possible, render mutual legal assistance notwithstanding the absence of dual criminality.

Where dual criminality is required for mutual legal assistance or extradition, that requirement should be deemed to be satisfied regardless of whether both countries place the offence within the same category of offence or denominate the offence by the same terminology, provided that both countries criminalise the conduct underlying the offence.

38.* There should be authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate property laundered, proceeds from money laundering or predicate offences, instrumentalities used in or intended for use in the commission of these offences, or property of corresponding value. There should also be arrangements for co-ordinating seizure and confiscation proceedings, which may include the sharing of confiscated assets.

39. Countries should recognise money laundering as an extraditable offence. Each country should either extradite its own nationals, or where a country does not do so solely on the grounds of nationality, that country should, at the request of the country seeking extradition, submit the case without undue delay to its competent authorities for the purpose of prosecution of the offences set forth in the request. Those authorities should take their decision and conduct their proceedings in the same manner as in the case of any other offence of a serious nature under the domestic law of that country. The countries concerned should cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecutions.

Subject to their legal frameworks, countries may consider simplifying extradition by allowing direct transmission of extradition requests between appropriate ministries, extraditing persons based only on warrants of arrests or judgements, and/or introducing a simplified extradition of consenting persons who waive formal extradition proceedings.

Other forms of co-operation

40.* Countries should ensure that their competent authorities provide the widest possible range of international co-operation to their foreign counterparts. There should be clear and effective gateways to facilitate the prompt and constructive exchange directly between counterparts, either spontaneously or upon request, of information relating to both money laundering and the underlying predicate offences. Exchanges should be permitted without unduly restrictive conditions. In particular:

a) Competent authorities should not refuse a request for assistance on the sole ground that the request is also considered to involve fiscal matters.

b) Countries should not invoke laws that require financial institutions to maintain secrecy or confidentiality as a ground for refusing to provide co-operation.

c) Competent authorities should be able to conduct inquiries; and where possible, investigations; on behalf of foreign counterparts.

Where the ability to obtain information sought by a foreign competent authority is not within the mandate of its counterpart, countries are also encouraged to permit a prompt and constructive exchange of information with non-counterparts. Co-operation with foreign authorities other than counterparts could occur directly or indirectly. When uncertain about the appropriate avenue to follow, competent authorities should first contact their foreign counterparts for assistance.

Countries should establish controls and safeguards to ensure that information exchanged by competent authorities is used only in an authorised manner, consistent with their obligations concerning privacy and data protection.

GLOSSARY

In these Recommendations the following abbreviations and references are used:

"**Beneficial owner**" refers to the natural person(s) who ultimately owns or controls a customer and/or the person on whose behalf a transaction is being conducted. It also incorporates those persons who exercise ultimate effective control over a legal person or arrangement.

"**Core Principles**" refers to the Core Principles for Effective Banking Supervision issued by the Basel Committee on Banking Supervision, the Objectives and Principles for Securities Regulation issued by the International Organization of Securities Commissions, and the Insurance Supervisory Principles issued by the International Association of Insurance Supervisors.

"**Designated categories of offences**" means:

- participation in an organised criminal group and racketeering;
- terrorism, including terrorist financing;
- trafficking in human beings and migrant smuggling;
- sexual exploitation, including sexual exploitation of children;
- illicit trafficking in narcotic drugs and psychotropic substances;
- illicit arms trafficking;
- illicit trafficking in stolen and other goods;
- corruption and bribery;
- fraud;
- counterfeiting currency;
- counterfeiting and piracy of products;
- environmental crime;
- murder, grievous bodily injury;
- kidnapping, illegal restraint and hostage-taking;
- robbery or theft;
- smuggling;
- extortion;
- forgery;
- piracy; and
- insider trading and market manipulation.

When deciding on the range of offences to be covered as predicate offences under each of the categories listed above, each country may decide, in accordance with its domestic law, how it will define those offences and the nature of any particular elements of those offences that make them serious offences.

"**Designated non-financial businesses and professions**" means:

a) Casinos (which also includes internet casinos).

b) Real estate agents.

c) Dealers in precious metals.

d) Dealers in precious stones.

e) Lawyers, notaries, other independent legal professionals and accountants – this refers to sole practitioners, partners or employed professionals within professional firms. It is not meant to refer to 'internal' professionals that are employees of other types of businesses, nor to professionals working for government agencies, who may already be subject to measures that would combat money laundering.

f) Trust and Company Service Providers refers to all persons or businesses that are not covered elsewhere under these Recommendations, and which as a business, provide any of the following services to third parties:

- acting as a formation agent of legal persons;
- acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons;
- providing a registered office; business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement;
- acting as (or arranging for another person to act as) a trustee of an express trust;
- acting as (or arranging for another person to act as) a nominee shareholder for another person.

"**Designated threshold**" refers to the amount set out in the Interpretative Notes.

"**Financial institutions**" means any person or entity who conducts as a business one or more of the following activities or operations for or on behalf of a customer:

1. Acceptance of deposits and other repayable funds from the public.[78]

2. Lending.[79]

3. Financial leasing.[80]

4. The transfer of money or value.[81]

5. Issuing and managing means of payment (e.g. credit and debit cards, cheques, traveller's cheques, money orders and bankers' drafts, electronic money).

6. Financial guarantees and commitments.

7. Trading in:

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[78] This also captures private banking.

[79] This includes inter alia: consumer credit; mortgage credit; factoring, with or without recourse; and finance of commercial transactions (including forfaiting).

[80] This does not extend to financial leasing arrangements in relation to consumer products.

[81] This applies to financial activity in both the formal or informal sector e.g. alternative remittance activity. See the Interpretative Note to Special Recommendation VI. It does not apply to any natural or legal person that provides financial institutions solely with message or other support systems for transmitting funds. See the Interpretative Note to Special Recommendation VII.

(a) money market instruments (cheques, bills, CDs, derivatives etc.);

(b) foreign exchange;

(c) exchange, interest rate and index instruments;

(d) transferable securities;

(e) commodity futures trading.

8. Participation in securities issues and the provision of financial services related to such issues.

9. Individual and collective portfolio management.

10. Safekeeping and administration of cash or liquid securities on behalf of other persons.

11. Otherwise investing, administering or managing funds or money on behalf of other persons.

12. Underwriting and placement of life insurance and other investment related insurance.[82]

13. Money and currency changing.

When a financial activity is carried out by a person or entity on an occasional or very limited basis (having regard to quantitative and absolute criteria) such that there is little risk of money laundering activity occurring, a country may decide that the application of anti-money laundering measures is not necessary, either fully or partially.

In strictly limited and justified circumstances, and based on a proven low risk of money laundering, a country may decide not to apply some or all of the Forty Recommendations to some of the financial activities stated above.

"**FIU**" means financial intelligence unit.

"**Legal arrangements**" refers to express trusts or other similar legal arrangements.

"**Legal persons**" refers to bodies corporate, foundations, anstalt, partnerships, or associations, or any similar bodies that can establish a permanent customer relationship with a financial institution or otherwise own property.

"**Payable-through accounts**" refers to correspondent accounts that are used directly by third parties to transact business on their own behalf.

"**Politically Exposed Persons**" (PEPs) are individuals who are or have been entrusted with prominent public functions in a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials. Business relationships with family members or close associates of PEPs involve reputational risks similar to those with PEPs themselves. The definition is not intended to cover middle ranking or more junior individuals in the foregoing categories.

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[82] This applies both to insurance undertakings and to insurance intermediaries (agents and brokers).

"**Shell bank**" means a bank incorporated in a jurisdiction in which it has no physical presence and which is unaffiliated with a regulated financial group.

"**STR**" refers to suspicious transaction reports.

"**Supervisors**" refers to the designated competent authorities responsible for ensuring compliance by financial institutions with requirements to combat money laundering and terrorist financing.

"**the FATF Recommendations**" refers to these Recommendations and to the FATF Special Recommendations on Terrorist Financing.

ANNEX

INTERPRETATIVE NOTES TO THE FORTY RECOMMENDATIONS

INTERPRETATIVE NOTES

General

1. Reference in this document to "countries" should be taken to apply equally to "territories" or "jurisdictions".

2. Recommendations 5-16 and 21-22 state that financial institutions or designated non-financial businesses and professions should take certain actions. These references require countries to take measures that will oblige financial institutions or designated non-financial businesses and professions to comply with each Recommendation. The basic obligations under Recommendations 5, 10 and 13 should be set out in law or regulation, while more detailed elements in those Recommendations, as well as obligations under other Recommendations, could be required either by law or regulation or by other enforceable means issued by a competent authority.

3. Where reference is made to a financial institution being satisfied as to a matter, that institution must be able to justify its assessment to competent authorities.

4. To comply with Recommendations 12 and 16, countries do not need to issue laws or regulations that relate exclusively to lawyers, notaries, accountants and the other designated non-financial businesses and professions so long as these businesses or professions are included in laws or regulations covering the underlying activities.

5. The Interpretative Notes that apply to financial institutions are also relevant to designated nonfinancial businesses and professions, where applicable.

Recommendations 5, 12 and 16

The designated thresholds for transactions (under Recommendations 5 and 12) are as follows:

- Financial institutions (for occasional customers under Recommendation 5) - USD/EUR 15,000.
- Casinos, including internet casinos (under Recommendation 12) - USD/EUR 3000
- For dealers in precious metals and dealers in precious stones when engaged in any cash transaction (under Recommendations 12 and 16) - USD/EUR 15,000.

Financial transactions above a designated threshold include situations where the transaction is carried out in a single operation or in several operations that appear to be linked.

Recommendation 5

Customer due diligence and tipping off

1. If, during the establishment or course of the customer relationship, or when conducting occasional transactions, a financial institution suspects that transactions relate to money laundering or terrorist financing, then the institution should:

a) Normally seek to identify and verify the identity of the customer and the beneficial owner, whether permanent or occasional, and irrespective of any exemption or any designated threshold that might otherwise apply.

b) Make a STR to the FIU in accordance with Recommendation 13.

2. Recommendation 14 prohibits financial institutions, their directors, officers and employees from disclosing the fact that an STR or related information is being reported to the FIU. A risk exists that customers could be unintentionally tipped off when the financial institution is seeking to perform its customer due diligence (CDD) obligations in these circumstances. The customer's awareness of a possible STR or investigation could compromise future efforts to investigate the suspected money laundering or terrorist financing operation.

3. Therefore, if financial institutions form a suspicion that transactions relate to money laundering or terrorist financing, they should take into account the risk of tipping off when performing the customer due diligence process. If the institution reasonably believes that performing the CDD process will tip-off the customer or potential customer, it may choose not to pursue that process, and should file an STR. Institutions should ensure that their employees are aware of and sensitive to these issues when conducting CDD.

CDD for legal persons and arrangements

4. When performing elements (a) and (b) of the CDD process in relation to legal persons or arrangements, financial institutions should:

a) Verify that any person purporting to act on behalf of the customer is so authorised, and identify that person.

b) Identify the customer and verify its identity - the types of measures that would be normally needed to satisfactorily perform this function would require obtaining proof of incorporation or similar evidence of the legal status of the legal person or arrangement, as well as information concerning the customer's name, the names of trustees, legal form, address, directors, and provisions regulating the power to bind the legal person or arrangement.

c) Identify the beneficial owners, including forming an understanding of the ownership and control structure, and take reasonable measures to verify the identity of such persons. The types of measures that would be normally needed to satisfactorily perform this function would require identifying the natural persons with a controlling interest and identifying the natural persons who comprise the mind and management of the legal person or arrangement. Where the customer or the owner of the controlling interest is a public company that is subject to regulatory disclosure requirements, it is not necessary to seek to identify and verify the identity of any shareholder of that company.

The relevant information or data may be obtained from a public register, from the customer or from other reliable sources.

Reliance on identification and verification already performed

5. The CDD measures set out in Recommendation 5 do not imply that financial institutions have to repeatedly identify and verify the identity of each customer every time that a customer conducts a transaction. An institution is entitled to rely on the identification and verification steps that it has already undertaken unless it has doubts about the veracity of that information. Examples of situations that might lead

an institution to have such doubts could be where there is a suspicion of money laundering in relation to that customer, or where there is a material change in the way that the customer's account is operated which is not consistent with the customer's business profile.

Timing of verification

6. Examples of the types of circumstances where it would be permissible for verification to be completed after the establishment of the business relationship, because it would be essential not to interrupt the normal conduct of business include:

- Non face-to-face business.
- Securities transactions. In the securities industry, companies and intermediaries may be required to perform transactions very rapidly, according to the market conditions at the time the customer is contacting them, and the performance of the transaction may be required before verification of identity is completed.
- Life insurance business. In relation to life insurance business, countries may permit the identification and verification of the beneficiary under the policy to take place after having established the business relationship with the policyholder. However, in all such cases, identification and verification should occur at or before the time of payout or the time where the beneficiary intends to exercise vested rights under the policy.

7. Financial institutions will also need to adopt risk management procedures with respect to the conditions under which a customer may utilise the business relationship prior to verification. These procedures should include a set of measures such as a limitation of the number, types and/or amount of transactions that can be performed and the monitoring of large or complex transactions being carried out outside of expected norms for that type of relationship. Financial institutions should refer to the Basel CDD paper[83] (section 2.2.6.) for specific guidance on examples of risk management measures for non-face to face business.

Requirement to identify existing customers

8. The principles set out in the Basel CDD paper concerning the identification of existing customers should serve as guidance when applying customer due diligence processes to institutions engaged in banking activity, and could apply to other financial institutions where relevant.

Simplified or reduced CDD measures

9. The general rule is that customers must be subject to the full range of CDD measures, including the requirement to identify the beneficial owner. Nevertheless there are circumstances where the risk of money laundering or terrorist financing is lower, where information on the identity of the customer and the beneficial owner of a customer is publicly available, or where adequate checks and controls exist elsewhere in national systems. In such circumstances it could be reasonable for a country to allow

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[83] "Basel CDD paper" refers to the guidance paper on Customer Due Diligence for Banks issued by the Basel Committee on Banking Supervision in October 2001.

its financial institutions to apply simplified or reduced CDD measures when identifying and verifying the identity of the customer and the beneficial owner.

10. Examples of customers where simplified or reduced CDD measures could apply are:

- Financial institutions – where they are subject to requirements to combat money laundering and terrorist financing consistent with the FATF Recommendations and are supervised for compliance with those controls.
- Public companies that are subject to regulatory disclosure requirements.
- Government administrations or enterprises.

11. Simplified or reduced CDD measures could also apply to the beneficial owners of pooled accounts held by designated non financial businesses or professions provided that those businesses or professions are subject to requirements to combat money laundering and terrorist financing consistent with the FATF Recommendations and are subject to effective systems for monitoring and ensuring their compliance with those requirements. Banks should also refer to the Basel CDD paper (section 2.2.4.), which provides specific guidance concerning situations where an account holding institution may rely on a customer that is a professional financial intermediary to perform the customer due diligence on his or its own customers (i.e. the beneficial owners of the bank account). Where relevant, the CDD Paper could also provide guidance in relation to similar accounts held by other types of financial institutions.

12. Simplified CDD or reduced measures could also be acceptable for various types of products or transactions such as (examples only):

13. Countries could also decide whether financial institutions could apply these simplified measures only to customers in its own jurisdiction or allow them to do for customers from any other jurisdiction that the original country is satisfied is in compliance with and has effectively implemented the FATF Recommendations.

- Life insurance policies where the annual premium is no more than USD/EUR 1000 or a single premium of no more than USD/EUR 2500.
- Insurance policies for pension schemes if there is no surrender clause and the policy cannot be used as collateral.
- A pension, superannuation or similar scheme that provides retirement benefits to employees, where contributions are made by way of deduction from wages and the scheme rules do not permit the assignment of a member's interest under the scheme.

Simplified CDD measures are not acceptable whenever there is suspicion of money laundering or terrorist financing or specific higher risk scenarios apply.

Recommendation 6

Countries are encouraged to extend the requirements of Recommendation 6 to individuals who hold prominent public functions in their own country.

Recommendation 9

This Recommendation does not apply to outsourcing or agency relationships.

This Recommendation also does not apply to relationships, accounts or transactions between financial institutions for their clients. Those relationships are addressed by Recommendations 5 and 7.

Recommendations 10 and 11

In relation to insurance business, the word "transactions" should be understood to refer to the insurance product itself, the premium payment and the benefits.

Recommendation 13

1. The reference to criminal activity in Recommendation 13 refers to:

a) all criminal acts that would constitute a predicate offence for money laundering in the jurisdiction; or

b) at a minimum to those offences that would constitute a predicate offence as required by Recommendation 1.

Countries are strongly encouraged to adopt alternative (a). All suspicious transactions, including attempted transactions, should be reported regardless of the amount of the transaction.

2. In implementing Recommendation 13, suspicious transactions should be reported by financial institutions regardless of whether they are also thought to involve tax matters. Countries should take into account that, in order to deter financial institutions from reporting a suspicious transaction, money launderers may seek to state *inter alia* that their transactions relate to tax matters.

Recommendation 14 (tipping off)

Where lawyers, notaries, other independent legal professionals and accountants acting as independent legal professionals seek to dissuade a client from engaging in illegal activity, this does not amount to tipping off.

Recommendation 15

The type and extent of measures to be taken for each of the requirements set out in the Recommendation should be appropriate having regard to the risk of money laundering and terrorist financing and the size of the business.

For financial institutions, compliance management arrangements should include the appointment of a compliance officer at the management level.

Recommendation 16

1. It is for each jurisdiction to determine the matters that would fall under legal professional privilege or professional secrecy. This would normally cover information lawyers, notaries or other independent legal professionals receive from or obtain through one of their clients: (a) in the course of ascertaining the legal position of their client, or (b) in performing their task of defending or representing that client in, or concerning judicial, administrative, arbitration or mediation proceedings. Where accountants are subject to the same obligations of secrecy or privilege, then they are also not required to report suspicious transactions.

2. Countries may allow lawyers, notaries, other independent legal professionals and accountants to send their STR to their appropriate self-regulatory organisations, provided that there are appropriate forms of co-operation between these organisations and the FIU.

Recommendation 19

1. To facilitate detection and monitoring of cash transactions, without impeding in any way the freedom of capital movements, countries could consider the feasibility of subjecting all cross-border transfers, above a given threshold, to verification, administrative monitoring, declaration or record keeping requirements.

2. If a country discovers an unusual international shipment of currency, monetary instruments, precious metals, or gems, etc., it should consider notifying, as appropriate, the Customs Service or other competent authorities of the countries from which the shipment originated and/or to which it is destined, and should co-operate with a view toward establishing the source, destination, and purpose of such shipment and toward the taking of appropriate action.

Recommendation 23

Recommendation 23 should not be read as to require the introduction of a system of regular review of licensing of controlling interests in financial institutions merely for anti-money laundering purposes, but as to stress the desirability of suitability review for controlling shareholders in financial institutions (banks and non-banks in particular) from a FATF point of view. Hence, where shareholder suitability (or "fit and proper") tests exist, the attention of supervisors should be drawn to their relevance for anti-money laundering purposes.

Recommendation 25

When considering the feedback that should be provided, countries should have regard to the FATF Best Practice Guidelines on Providing Feedback to Reporting Financial Institutions and Other Persons.

Recommendation 26

Where a country has created an FIU, it should consider applying for membership in the Egmont Group. Countries should have regard to the Egmont Group Statement of Purpose, and its Principles for Information Exchange Between Financial Intelligence Units for Money Laundering Cases. These documents set out important guidance concerning the role and functions of FIUs, and the mechanisms for exchanging information between FIU.

Recommendation 27

Countries should consider taking measures, including legislative ones, at the national level, to allow their competent authorities investigating money laundering cases to postpone or waive the arrest of suspected persons and/or the seizure of the money for the purpose of identifying persons involved in such activities or for evidence gathering. Without such measures the use of procedures such as controlled deliveries and undercover operations are precluded.

Recommendation 38

Countries should consider:

a) Establishing an asset forfeiture fund in its respective country into which all or a portion of confiscated property will be deposited for law enforcement, health, education, or other appropriate purposes.

b) Taking such measures as may be necessary to enable it to share among or between other countries confiscated property, in particular, when confiscation is directly or indirectly a result of co-ordinated law enforcement actions.

Recommendation 40

1. For the purposes of this Recommendation:

- "Counterparts" refers to authorities that exercise similar responsibilities and functions.
- "Competent authority" refers to all administrative and law enforcement authorities concerned with combating money laundering and terrorist financing, including the FIU and supervisors.

2. Depending on the type of competent authority involved and the nature and purpose of the cooperation, different channels can be appropriate for the exchange of information. Examples of mechanisms or channels that are used to exchange information include: bilateral or multilateral agreements or arrangements, memoranda of understanding, exchanges on the basis of reciprocity, or through appropriate international or regional organisations. However, this Recommendation is not intended to cover co-operation in relation to mutual legal assistance or extradition.

3. The reference to indirect exchange of information with foreign authorities other than counterparts covers the situation where the requested information passes from the foreign authority through one or more domestic or foreign authorities before being received by the requesting authority. The competent authority that requests the information should always make it clear for what purpose and on whose behalf the request is made.

4. FIUs should be able to make inquiries on behalf of foreign counterparts where this could be relevant to an analysis of financial transactions. At a minimum, inquiries should include:

- Searching its own databases, which would include information related to suspicious transaction reports.
- Searching other databases to which it may have direct or indirect access, including law enforcement databases, public databases, administrative databases and commercially available databases.

Where permitted to do so, FIUs should also contact other competent authorities and financial institutions in order to obtain relevant information.

Appendix 4: Kimberley process Certification Scheme

Preamble

PARTICIPANTS,

RECOGNISING that the trade in conflict diamonds is a matter of serious international concern, which can be directly linked to the fuelling of armed conflict, the activities of rebel movements aimed at undermining or overthrowing legitimate governments, and the illicit traffic in, and proliferation of, armaments, especially small arms and light weapons;

FURTHER RECOGNISING the devastating impact of conflicts fuelled by the trade in conflict diamonds on the peace, safety and security of people in affected countries and the systematic and gross human rights violations that have been perpetrated in such conflicts;

NOTING the negative impact of such conflicts on regional stability and the obligations placed upon states by the United Nations Charter regarding the maintenance of international peace and security;

BEARING IN MIND that urgent international action is imperative to prevent the problem of conflict diamonds from negatively affecting the trade in legitimate diamonds, which makes a critical contribution to the economies of many of the producing, processing, exporting and importing states, especially developing states;

RECALLING all of the relevant resolutions of the United Nations Security Council under Chapter VII of the United Nations Charter, including the relevant provisions of Resolutions 1173 (1998), 1295 (2000), 1306 (2000), and 1343 (2001), and determined to contribute to and support the implementation of the measures provided for in these resolutions;

HIGHLIGHTING the United Nations General Assembly Resolution 55/56 (2000) on the role of the trade in conflict diamonds in fuelling armed conflict, which called on the international community to give urgent and careful consideration to devising effective and pragmatic measures to address this problem;

FURTHER HIGHLIGHTING the recommendation in United Nations General Assembly Resolution 55/56 that the international community develop detailed proposals for a simple and workable international certification scheme for rough diamonds based primarily on national certification schemes and on internationally agreed minimum standards;

RECALLING that the Kimberley Process, which was established to find a solution to the international problem of conflict diamonds, was inclusive of concerned stake holders, namely producing, exporting and importing states, the diamond industry and civil society;

CONVINCED that the opportunity for conflict diamonds to play a role in fuelling armed conflict can be seriously reduced by introducing a certification scheme for rough diamonds designed to exclude conflict diamonds from the legitimate trade;

RECALLING that the Kimberley Process considered that an international certification scheme for rough diamonds, based on national laws and practices and meeting internationally agreed minimum standards, will be the most effective system by which the problem of conflict diamonds could be addressed;

ACKNOWLEDGING the important initiatives already taken to address this problem, in particular by the governments of Angola, the Democratic Republic of Congo, Guinea and Sierra Leone and by other key producing, exporting and importing countries, as well as by the diamond industry, in particular by the World Diamond Council, and by civil society;

WELCOMING voluntary self-regulation initiatives announced by the diamond industry and recognising that a system of such voluntary self-regulation contributes to ensuring an effective internal control system of rough diamonds based upon the international certification scheme for rough diamonds;

RECOGNISING that an international certification scheme for rough diamonds will only be credible if all Participants have established internal systems of control designed to eliminate the presence of conflict diamonds in the chain of producing, exporting and importing rough diamonds within their own territories, while taking into account that differences in production methods and trading practices as well as differences in institutional controls thereof may require different approaches to meet minimum standards;

FURTHER RECOGNISING that the international certification scheme for rough diamonds must be consistent with international law governing international trade;

ACKNOWLEDGING that state sovereignty should be fully respected and the principles of equality, mutual benefits and consensus should be adhered to;

RECOMMEND THE FOLLOWING PROVISIONS:

SECTION I

Definitions

For the purposes of the international certification scheme for rough diamonds (hereinafter referred to as "the Certification Scheme") the following definitions apply:

CONFLICT DIAMONDS means rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described in relevant United Nations Security Council (UNSC) resolutions insofar as they remain in effect, or in other similar UNSC resolutions which may be adopted in the future, and as understood and recognised in United Nations General Assembly (UNGA) Resolution 55/56, or in other similar UNGA resolutions which may be adopted in future;

COUNTRY OF ORIGIN means the country where a shipment of rough diamonds has been mined or extracted;

COUNTRY OF PROVENANCE means the last Participant from where a shipment of rough diamonds was exported, as recorded on import documentation;

DIAMOND means a natural mineral consisting essentially of pure crystallised carbon in the isometric system, with a hardness on the Mohs (scratch) scale of 10, a specific gravity of approximately 3.52 and a refractive index of 2.42;

EXPORT means the physical leaving/taking out of any part of the geographical territory of a Participant;

EXPORTING AUTHORITY means the authority(ies) or body(ies) designated by a Participant from whose territory a shipment of rough diamonds is leaving, and which are authorised to validate the Kimberley Process Certificate;

FREE TRADE ZONE means a part of the territory of a Participant where any goods introduced are generally regarded, insofar as import duties and taxes are concerned, as being outside the customs territory;

IMPORT means the physical entering/bringing into any part of the geographical territory of a Participant;

IMPORTING AUTHORITY means the authority(ies) or body(ies) designated by a Participant into whose territory a shipment of rough diamonds is imported to conduct all import formalities and particularly the verification of accompanying Kimberley Process Certificates;

KIMBERLEY PROCESS CERTIFICATE means a forgery resistant document with a particular format which identifies a shipment of rough diamonds as being in compliance with the requirements of the Certification Scheme;

OBSERVER means a representative of civil society, the diamond industry, international organisations and non-participating governments invited to take part in Plenary meetings; (Further consultations to be undertaken by the Chair.)

PARCEL means one or more diamonds that are packed together and that are not individualised;

PARCEL OF MIXED ORIGIN means a parcel that contains rough diamonds from two or more countries of origin, mixed together;

PARTICIPANT means a state or a regional economic integration organisation for which the Certification Scheme is effective; (Further consultations to be undertaken by the Chair.)

REGIONAL ECONOMIC INTEGRATION ORGANISATION means an organisation comprised of sovereign states that have transferred competence to that organisation in respect of matters governed by the Certification Scheme;

ROUGH DIAMONDS means diamonds that are unworked or simply sawn, cleaved or bruted and fall under the Relevant Harmonised Commodity Description and Coding System 7102.10, 7102.21 and 7102.31;

SHIPMENT means one or more parcels that are physically imported or exported;

TRANSIT means the physical passage across the territory of a Participant or a non-Participant, with or without transhipment, warehousing or change in mode of transport, when such passage is only a portion of a complete journey beginning and terminating beyond the frontier of the Participant or non-Participant across whose territory a shipment passes;

SECTION II

The Kimberley Process Certificate

Each Participant should ensure that:

(a) a Kimberley Process Certificate (hereafter referred to as the Certificate) accompanies each shipment of rough diamonds on export;

(b) its processes for issuing Certificates meet the minimum standards of the Kimberley Process as set out in Section IV;

(c) Certificates meet the minimum requirements set out in Annex I. As long as these requirements are met, Participants may at their discretion establish additional characteristics for their own Certificates, for example their form, additional data or security elements;

(d) it notifies all other Participants through the Chair of the features of its Certificate as specified in Annex I, for purposes of validation.

SECTION III

Undertakings in respect of the international trade in rough diamonds

Each Participant should:

(a) with regard to shipments of rough diamonds exported to a Participant, require that each such shipment is accompanied by a duly validated Certificate;

(b) with regard to shipments of rough diamonds imported from a Participant:

- require a duly validated Certificate;
- ensure that confirmation of receipt is sent expeditiously to the relevant Exporting Authority. The confirmation should as a minimum refer to the Certificate number, the number of parcels, the carat weight and the details of the importer and exporter;
- require that the original of the Certificate be readily accessible for a period of no less than three years;

(c) ensure that no shipment of rough diamonds is imported from or exported to a non-Participant;

(d) recognise that Participants through whose territory shipments transit are not required to meet the requirement of paragraphs (a) and (b) above, and of Section II (a) provided that the designated authorities of the Participant through whose territory a shipment passes, ensure that the shipment leaves its territory in an identical state as it entered its territory (i.e. unopened and not tampered with).

SECTION IV

Internal Controls

Undertakings by Participants

Each Participant should:

(a) establish a system of internal controls designed to eliminate the presence of conflict diamonds from shipments of rough diamonds imported into and exported from its territory;

(b) designate an Importing and an Exporting Authority(ies);

(c) ensure that rough diamonds are imported and exported in tamper resistant containers;

(d) as required, amend or enact appropriate laws or regulations to implement and enforce the Certification Scheme and to maintain dissuasive and proportional penalties for transgressions;

(e) collect and maintain relevant official production, import and export data, and collate and exchange such data in accordance with the provisions of Section V.

(f) when establishing a system of internal controls, take into account, where appropriate, the further options and recommendations for internal controls as elaborated in Annex II.

Principles of Industry Self-Regulation

Participants understand that a voluntary system of industry self-regulation, as referred to in the Preamble of this Document, will provide for a system of warranties underpinned through verification by independent auditors of individual companies and supported by internal penalties set by industry, which will help to facilitate the full traceability of rough diamond transactions by government authorities.

Section V

Co-operation and Transparency

Participants should:

(a) provide to each other through the Chair information identifying their designated authorities or bodies responsible for implementing the provisions of this Certification Scheme. Each Participant should provide to other Participants through the Chair information, preferably in electronic format, on its relevant laws, regulations, rules, procedures and practices, and update that information as required. This should include a synopsis in English of the essential content of this information;

(b) compile and make available to all other Participants through the Chair statistical data in line with the principles set out in Annex III;

(c) exchange on a regular basis experiences and other relevant information, including on self-assessment, in order to arrive at the best practice in given circumstances;

(d) consider favourably requests from other Participants for assistance to improve the functioning of the Certification Scheme within their territories;

(e) inform another Participant through the Chair if it considers that the laws, regulations, rules, procedures or practices of that other Participant do not ensure the absence of conflict diamonds in the exports of that other Participant;

(f) cooperate with other Participants to attempt to resolve problems which may arise from unintentional circumstances and which could lead to non-fulfilment of the minimum requirements for the issuance or acceptance of the Certificates, and inform all other Participants of the essence of the problems encountered and of solutions found;

(g) encourage, through their relevant authorities, closer co-operation between law enforcement agencies and between customs agencies of Participants.

Section VI

Administrative Matters

Meetings

1. Participants and Observers are to meet in Plenary annually, and on other occasions as Participants may deem necessary, in order to discuss the effectiveness of the Certification Scheme.

2. Participants should adopt Rules of Procedure for such meetings at the first Plenary meeting.

3. Meetings are to be held in the country where the Chair is located, unless a Participant or an international organisation offers to host a meeting and this offer has been accepted. The host country should facilitate entry formalities for those attending such meetings.

4. At the end of each Plenary meeting, a Chair would be elected to preside over all Plenary meetings, ad hoc working groups and other subsidiary bodies, which might be formed until the conclusion of the next annual Plenary meeting.

5. Participants are to reach decisions by consensus. In the event that consensus proves to be impossible, the Chair is to conduct consultations.

Administrative support

6. For the effective administration of the Certification Scheme, administrative support will be necessary. The modalities and functions of that support should be discussed at the first Plenary meeting, following endorsement by the UN General Assembly.

7. Administrative support could include the following functions:

(a) to serve as a channel of communication, information sharing and consultation between the Participants with regard to matters provided for in this Document;

(b) to maintain and make available for the use of all Participants a collection of those laws, regulations, rules, procedures, practices and statistics notified pursuant to Section V;

(c) to prepare documents and provide administrative support for Plenary and working group meetings;

(d) to undertake such additional responsibilities as the Plenary meetings, or any working group delegated by Plenary meetings, may instruct.

Participation

8. Participation in the Certification Scheme is open on a global, non-discriminatory basis to all Applicants willing and able to fulfill the requirements of that Scheme.

9. Any applicant wishing to participate in the Certification Scheme should signify its interest by notifying the Chair through diplomatic channels. This notification should include the information set forth in paragraph (a) of Section V and be circulated to all Participants within one month.

10. Participants intend to invite representatives of civil society, the diamond industry, non-participating governments and international organizations to participate in Plenary meetings as Observers.

Participant measures

11. Participants are to prepare, and make available to other Participants, in advance of annual Plenary meetings of the Kimberley Process, information as stipulated in paragraph (a) of Section V outlining how the requirements of the Certification Scheme are being implemented within their respective jurisdictions.

12. The agenda of annual Plenary meetings is to include an item where information as stipulated in paragraph (a) of Section V is reviewed and Participants can provide further details of their respective systems at the request of the Plenary.

13. Where further clarification is needed, Participants at Plenary meetings, upon recommendation by the Chair, can identify and decide on additional verification measures to be undertaken. Such measures are to be implemented in accordance with applicable national and international law. These could include, but need not be limited to measures such as;

(a.) requesting additional information and clarification from Participants;

(b.) review missions by other Participants or their representatives where there are credible indications of significant non-compliance with the Certification Scheme.

14. Review missions are to be conducted in an analytical, expert and impartial manner with the consent of the Participant concerned. The size, composition, terms of reference and time-frame of these missions should be based on the circumstances and be established by the Chair with the consent of the Participant concerned and in consultation with all Participants.

15. A report on the results of compliance verification measures is to be forwarded to the Chair and to the Participant concerned within three weeks of completion of the mission. Any comments from that Participant as well as the report, are to be posted on the restricted access section of an official Certification Scheme website no later than three weeks after the submission of the report to the Participant concerned. Participants and Observers should make every effort to observe strict confidentiality regarding the issue and the discussions relating to any compliance matter.

Compliance and dispute prevention

16. In the event that an issue regarding compliance by a Participant or any other issue regarding the implementation of the Certification Scheme arises, any concerned Participant may so inform the Chair, who is to inform all Participants without delay about the said concern and enter into dialogue on how to address it. Participants and Observers should make every effort to observe strict confidentiality regarding the issue and the discussions relating to any compliance matter.

Modification

17. This document may be modified by consensus of the Participants.

18. Modifications may be proposed by any Participant. Such proposals should be sent in writing to the Chair, at least ninety days before the next Plenary meeting, unless otherwise agreed.

19. The Chair is to circulate any proposed modification expeditiously to all Participants and Observers and place it on the agenda of the next annual Plenary meeting.

Review mechanism

20. Participants intend that the Certification Scheme should be subject to periodic review, to allow Participants to conduct a thorough analysis of all elements contained in the scheme. The review should also include consideration of the continuing requirement for such a scheme, in view of the perception of the Participants, and of international organisations, in particular the United Nations, of the continued threat posed at that time by conflict diamonds. The first such review should take place no later than three years after the effective starting date of the Certification Scheme. The review meeting should normally coincide with the annual Plenary meeting, unless otherwise agreed.

The start of the implementation of the Scheme

21. The Certification Scheme should be established at the Ministerial Meeting on the Kimberley Process Certification Scheme for Rough Diamonds in Interlaken on 5 November 2002.

ANNEX I

Certificates

A. Minimum requirements for Certificates

A Certificate is to meet the following minimum requirements:

- Each Certificate should bear the title "Kimberley Process Certificate" and the following statement: "The rough diamonds in this shipment have been handled in accordance with the provisions of the Kimberley Process Certification Scheme for rough diamonds"
- Country of origin for shipment of parcels of unmixed (i.e. from the same) origin
- Certificates may be issued in any language, provided that an English translation is incorporated
- Unique numbering with the Alpha 2 country code, according to ISO 3166-1
- Tamper and forgery resistant
- Date of issuance
- Date of expiry
- Issuing authority
- Identification of exporter and importer
- Carat weight/mass
- Value in US$
- Number of parcels in shipment
- Relevant Harmonised Commodity Description and Coding System
- Validation of Certificate by the Exporting Authority

B. Optional Certificate Elements

A Certificate may include the following optional features:

- Characteristics of a Certificate (for example as to form, additional data or security elements)
- Quality characteristics of the rough diamonds in the shipment
- A recommended import confirmation part should have the following elements:

  Country of destination

  Identification of importer

  Carat/weight and value in US$

  Relevant Harmonised Commodity Description and Coding System

  Date of receipt by Importing Authority

  Authentication by Importing Authority

C. Optional Procedures

Rough diamonds may be shipped in transparent security bags. The unique Certificate number may be replicated on the container.

Annex II

Recommendations as provided for in Section IV, paragraph (f)

General Recommendations

1. Participants may appoint an official coordinator(s) to deal with the implementation of the Certification Scheme.

2. Participants may consider the utility of complementing and/or enhancing the collection and publication of the statistics identified in Annex III based on the contents of Kimberley Process Certificates.

3. Participants are encouraged to maintain the information and data required by Section V on a computerised database.

4. Participants are encouraged to transmit and receive electronic messages in order to support the Certification Scheme.

5. Participants that produce diamonds and that have rebel groups suspected of mining diamonds within their territories are encouraged to identify the areas of rebel diamond mining activity and provide this information to all other Participants. This information should be updated on a regular basis.

6. Participants are encouraged to make known the names of individuals or companies convicted of activities relevant to the purposes of the Certification Scheme to all other Participants through the Chair.

7. Participants are encouraged to ensure that all cash purchases of rough diamonds are routed through official banking channels, supported by verifiable documentation.

8. Participants that produce diamonds should analyse their diamond production under the following headings:

- Characteristics of diamonds produced
- Actual production

Recommendations for Control over Diamond Mines

9. Participants are encouraged to ensure that all diamond mines are licensed and to allow only those mines so licensed to mine diamonds.

10. Participants are encouraged to ensure that prospecting and mining companies maintain effective security standards to ensure that conflict diamonds do not contaminate legitimate production.

Recommendations for Participants with Small-scale Diamond Mining

11. All artisinal and informal diamond miners should be licensed and only those persons so licensed should be allowed to mine diamonds.

12. Licensing records should contain the following minimum information: name, address, nationality and/or residence status and the area of authorised diamond mining activity.

Recommendations for Rough Diamond Buyers, Sellers and Exporters

13. All diamond buyers, sellers, exporters, agents and courier companies involved in carrying rough diamonds should be registered and licensed by each Participant's relevant authorities.

14. Licensing records should contain the following minimum information: name, address and nationality and/or residence status.

15. All rough diamond buyers, sellers and exporters should be required by law to keep for a period of five years daily buying, selling or exporting records listing the names of buying or selling clients, their license number and the amount and value of diamonds sold, exported or purchased.

16. The information in paragraph 14 above should be entered into a computerised database, to facilitate the presentation of detailed information relating to the activities of individual rough diamond buyers and sellers.

Recommendations for Export Processes

17. A exporter should submit a rough diamond shipment to the relevant Exporting Authority.

18. The Exporting Authority is encouraged, prior to validating a Certificate, to require an exporter to provide a declaration that the rough diamonds being exported are not conflict diamonds.

19. Rough diamonds should be sealed in a tamper proof container together with the Certificate or a duly authenticated copy. The Exporting Authority should then transmit a detailed e-mail message to the relevant Importing Authority containing information on the carat weight, value, country of origin or provenance, importer and the serial number of the Certificate.

20. The Exporting Authority should record all details of rough diamond shipments on a computerised database.

Recommendations for Import Processes

21. The Importing Authority should receive an e-mail message either before or upon arrival of a rough diamond shipment. The message should contain details such as the carat weight, value, country of origin or provenance, exporter and the serial number of the Certificate.

22. The Importing Authority should inspect the shipment of rough diamonds to verify that the seals and the container have not been tampered with and that the export was performed in accordance with the Certification Scheme.

23. The Importing Authority should open and inspect the contents of the shipment to verify the details declared on the Certificate.

24. Where applicable and when requested, the Importing Authority should send the return slip or import confirmation coupon to the relevant Exporting Authority.

25. The Importing Authority should record all details of rough diamond shipments on a computerised database.

Recommendations on Shipments to and from Free Trade Zones

26. Shipments of rough diamonds to and from free trade zones should be processed by the designated authorities.

Annex III

Statistics

Recognising that reliable and comparable data on the production and the international trade in rough diamonds are an essential tool for the effective implementation of the Certification Scheme, and particularly for identifying any irregularities or anomalies which could indicate that conflict diamonds are entering the legitimate trade, Participants strongly support the following principles, taking into account the need to protect commercially sensitive information:

(a) to keep and publish within two months of the reference period and in a standardised format, quarterly aggregate statistics on rough diamond exports and imports, as well as the numbers of certificates validated for export, and of imported shipments accompanied by Certificates;

(b) to keep and publish statistics on exports and imports, by origin and provenance wherever possible; by carat weight and value; and under the relevant Harmonised Commodity Description and Coding System (HS) classifications 7102.10; 7102.21; 7102.31;

(c) to keep and publish on a semi-annual basis and within two months of the reference period statistics on rough diamond production by carat weight and by value. In the event that a Participant is unable to publish these statistics it should notify the Chair immediately;

(d) to collect and publish these statistics by relying in the first instance on existing national processes and methodologies;

(e) to make these statistics available to an intergovernmental body or to another appropriate mechanism identified by the Participants for (1) compilation and publication on a quarterly basis in respect of exports and imports, and (2) on a semi-annual basis in respect of production. These statistics are to be made available for analysis by interested parties and by the Participants, individually or collectively, according to such terms of reference as may be established by the Participants;

(f) to consider statistical information pertaining to the international trade in and production of rough diamonds at annual Plenary meetings, with a view to addressing related issues, and to supporting effective implementation of the Certification Scheme.

Appendix 5: Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects

I. Preamble

1. We, the States participating in the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, having met in New York from 9 to 20 July 2001,

2. *Gravely concerned* about the illicit manufacture, transfer and circulation of small arms and light weapons and their excessive accumulation and uncontrolled spread in many regions of the world, which have a wide range of humanitarian and socio-economic consequences and pose a serious threat to peace, reconciliation, safety, security, stability and sustainable development at the individual, local, national, regional and international levels,

3. *Concerned also* by the implications that poverty and underdevelopment may have for the illicit trade in small arms and light weapons in all its aspects,

4. *Determined* to reduce the human suffering caused by the illicit trade in small arms and light weapons in all its aspects and to enhance the respect for life and the dignity of the human person through the promotion of a culture of peace,

5. *Recognizing* that the illicit trade in small arms and light weapons in all its aspects sustains conflicts, exacerbates violence, contributes to the displacement of civilians, undermines respect for international humanitarian law, impedes the provision of humanitarian assistance to victims of armed conflict and fuels crime and terrorism,

6. *Gravely concerned* about its devastating consequences on children, many of whom are victims of armed conflict or are forced to become child soldiers, as well as the negative impact on women and the elderly, and in this context, taking into account the special session of the United Nations General Assembly on children,

7. *Concerned also* about the close link between terrorism, organized crime, trafficking in drugs and precious minerals and the illicit trade in small arms and light weapons, and stressing the urgency of international efforts and cooperation aimed at combating this trade simultaneously from both a supply and demand perspective,

8. *Reaffirming* our respect for and commitment to international law and the purposes and principles enshrined in the Charter of the United Nations, including the sovereign equality of States, territorial integrity, the peaceful resolution of international disputes, non-intervention and non-interference in the internal affairs of States,

9. *Reaffirming* the inherent right to individual or collective self-defence in accordance with
Article 51 of the Charter of the United Nations,

10. *Reaffirming also* the right of each State to manufacture, import and retain small arms and light weapons for its self-defence and security needs, as well as for its capacity to participate in peacekeeping operations in accordance with the Charter of the United Nations,

11. *Reaffirming* the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or for-

eign occupation, and recognizing the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of self-determination. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples,

12. *Recalling* the obligations of States to fully comply with arms embargoes decided by the United Nations Security Council in accordance with the Charter of the United Nations,

13. *Believing* that Governments bear the primary responsibility for preventing, combating and eradicating the illicit trade in small arms and light weapons in all its aspects and, accordingly, should intensify their efforts to define the problems associated with such trade and find ways of resolving them,

14. *Stressing* the urgent necessity for international cooperation and assistance, including financial and technical assistance, as appropriate, to support and facilitate efforts at the local, national, regional and global levels to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects,

15. *Recognizing* that the international community has a duty to deal with this issue, and acknowledging that the challenge posed by the illicit trade in small arms and light weapons in all its aspects is multi-faceted and involves, inter alia, security, conflict prevention and resolution, crime prevention, humanitarian, health and development dimensions,

16. *Recognizing also* the important contribution of civil society, including non-governmental organizations and industry in, inter alia, assisting Governments to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects,

17. *Recognizing further* that these efforts are without prejudice to the priorities accorded to nuclear disarmament, weapons of mass destruction and conventional disarmament,

18. *Welcoming* the efforts being undertaken at the global, regional, subregional, national and local levels to address the illicit trade in small arms and light weapons in all its aspects, and desiring to build upon them, taking into account the characteristics, scope and magnitude of the problem in each State or region,

19. *Recalling* the Millennium Declaration and also welcoming ongoing initiatives in the context of the United Nations to address the problem of the illicit trade in small arms and light weapons in all its aspects,

20. *Recognizing* that the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, establishes standards and procedures that complement and reinforce efforts to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects,

21. *Convinced* of the need for a global commitment to a comprehensive approach to promote, at the global, regional, subregional, national and local levels, the prevention, reduction and eradication of the illicit trade in small arms and light weapons in all its aspects as a contribution to international peace and security,

22. *Resolve* therefore to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects by:

(a) Strengthening or developing agreed norms and measures at the global, regional and national levels that would reinforce and further coordinate efforts to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects;

(b) Developing and implementing agreed international measures to prevent, combat and eradicate illicit manufacturing of and trafficking in small arms and light weapons;

(c) Placing particular emphasis on the regions of the world where conflicts come to an end and where serious problems with the excessive and destabilizing accumulation of small arms and light weapons have to be dealt with urgently;

(d) Mobilizing the political will throughout the international community to prevent and combat illicit transfers and manufacturing of small arms and light weapons in all their aspects, to cooperate towards these ends and to raise awareness of the character and seriousness of the interrelated problems associated with the illicit manufacturing of and trafficking in these weapons;

(e) Promoting responsible action by States with a view to preventing the illicit export, import, transit and retransfer of small arms and light weapons.

II. Preventing, combating and eradicating the illicit trade in small arms and light weapons in all its aspects

1. We, the States participating in this Conference, bearing in mind the different situations, capacities and priorities of States and regions, undertake the following measures to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects:

At the national level

2. To put in place, where they do not exist, adequate laws, regulations and administrative procedures to exercise effective control over the production of small arms and light weapons within their areas of jurisdiction and over the export, import, transit or retransfer of such weapons, in order to prevent illegal manufacture of and illicit trafficking in small arms and light weapons, or their diversion to unauthorized recipients.

3. To adopt and implement, in the States that have not already done so, the necessary legislative or other measures to establish as criminal offences under their domestic law the illegal manufacture, possession, stockpiling and trade of small arms and light weapons within their areas of jurisdiction, in order to ensure that those engaged in such activities can be prosecuted under appropriate national penal codes.

4. To establish, or designate as appropriate, national coordination agencies or bodies and institutional infrastructure responsible for policy guidance, research and monitoring of efforts to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects. This should include aspects of the illicit manufacture, control, trafficking, circulation, brokering and trade, as well as tracing, finance, collection and destruction of small arms and light weapons.

5. To establish or designate, as appropriate, a national point of contact to act as liaison between States on matters relating to the implementation of the Programme of Action.

6. To identify, where applicable, groups and individuals engaged in the illegal manufacture, trade, stockpiling, transfer, possession, as well as financing for acquisition, of illicit small arms and light weapons, and take action under appropriate national law against such groups and individuals.

7. To ensure that henceforth licensed manufacturers apply an appropriate and reliable marking on each small arm and light weapon as an integral part of the production process. This marking should be unique and should identify the country of manufacture and also provide information that enables the national authorities of that country to identify

the manufacturer and serial number so that the authorities concerned can identify and trace each weapon.

8. To adopt where they do not exist and enforce, all the necessary measures to prevent the manufacture, stockpiling, transfer and possession of any unmarked or inadequately marked small arms and light weapons.

9. To ensure that comprehensive and accurate records are kept for as long as possible on the manufacture, holding and transfer of small arms and light weapons under their jurisdiction. These records should be organized and maintained in such a way as to ensure that accurate information can be promptly retrieved and collated by competent national authorities.

10. To ensure responsibility for all small arms and light weapons held and issued by the State and effective measures for tracing such weapons.

11. To assess applications for export authorizations according to strict national regulations and procedures that cover all small arms and light weapons and are consistent with the existing responsibilities of States under relevant international law, taking into account in particular the risk of diversion of these weapons into the illegal trade. Likewise, to establish or maintain an effective national system of export and import licensing or authorization, as well as measures on international transit, for the transfer of all small arms and light weapons, with a view to combating the illicit trade in small arms and light weapons.

12 To put in place and implement adequate laws, regulations and administrative procedures to ensure the effective control over the export and transit of small arms and light weapons, including the use of authenticated end-user certificates and effective legal and enforcement measures.

13. To make every effort, in accordance with national laws and practices, without prejudice to the right of States to re-export small arms and light weapons that they have previously imported, to notify the original exporting State in accordance with their bilateral agreements before the retransfer of those weapons.

14. To develop adequate national legislation or administrative procedures regulating the activities of those who engage in small arms and light weapons brokering. This legislation or procedures should include measures such as registration of brokers, licensing or authorization of brokering transactions as well as the appropriate penalties for all illicit brokering activities performed within the State's jurisdiction and control.

15. To take appropriate measures, including all legal or administrative means, against any activity that violates a United Nations Security Council arms embargo in accordance with the Charter of the United Nations.

16. To ensure that all confiscated, seized or collected small arms and light weapons are destroyed, subject to any legal constraints associated with the preparation of criminal prosecutions, unless another form of disposition or use has been officially authorized and provided that such weapons have been duly marked and registered.

17. To ensure, subject to the respective constitutional and legal systems of States, that the armed forces, police or any other body authorized to hold small arms and light weapons establish adequate and detailed standards and procedures relating to the management and security of their stocks of these weapons. These standards and procedures should, inter alia, relate to: appropriate locations for stockpiles; physical security measures; control of access to stocks; inventory management and accounting control; staff training; security, accounting and control of small arms and light weapons held or transported by operational units or authorized personnel; and procedures and sanctions in the event of thefts or loss.

18. To regularly review, as appropriate, subject to the respective constitutional and legal systems of States, the stocks of small arms and light weapons held by armed forces, po-

lice and other authorized bodies and to ensure that such stocks declared by competent national authorities to be surplus to requirements are clearly identified, that programmes for the responsible disposal, preferably through destruction, of such stocks are established and implemented and that such stocks are adequately safeguarded until disposal.

19. To destroy surplus small arms and light weapons designated for destruction, taking into account, inter alia, the report of the Secretary-General of the United Nations on methods of destruction of small arms, light weapons, ammunition and explosives (S/2000/1092) of 15 November 2000.

20. To develop and implement, including in conflict and post-conflict situations, public awareness and confidence-building programmes on the problems and consequences of the illicit trade in small arms and light weapons in all its aspects, including, where appropriate, the public destruction of surplus weapons and the voluntary surrender of small arms and light weapons, if possible, in cooperation with civil society and non-governmental organizations, with a view to eradicating the illicit trade in small arms and light weapons.

21. To develop and implement, where possible, effective disarmament, demobilization and reintegration programmes, including the effective collection, control, storage and destruction of small arms and light weapons, particularly in post-conflict situations, unless another form of disposition or use has been duly authorized and such weapons have been marked and the alternate form of disposition or use has been recorded, and to include, where applicable, specific provisions for these programmes in peace agreements.

22. To address the special needs of children affected by armed conflict, in particular the reunification with their family, their reintegration into civil society, and their appropriate rehabilitation.

23. To make public national laws, regulations and procedures that impact on the prevention, combating and eradicating of the illicit trade in small arms and light weapons in all its aspects and to submit, on a voluntary basis, to relevant regional and international organizations and in accordance with their national practices, information on, inter alia, (a) small arms and light weapons confiscated or destroyed within their jurisdiction; and (b) other relevant information such as illicit trade routes and techniques of acquisition that can contribute to the eradication of the illicit trade in small arms and light weapons in all its aspects.

At the regional level

24. To establish or designate, as appropriate, a point of contact within subregional and regional organizations to act as liaison on matters relating to the implementation of the Programme of Action.

25. To encourage negotiations, where appropriate, with the aim of concluding relevant legally binding instruments aimed at preventing, combating and eradicating the illicit trade in small arms and light weapons in all its aspects, and where they do exist to ratify and fully implement them.

26. To encourage the strengthening and establishing, where appropriate and as agreed by the States concerned, of moratoria or similar initiatives in affected regions or subregions on the transfer and manufacture of small arms and light weapons, and/or regional action programmes to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects, and to respect such moratoria, similar initiatives, and/or action programmes and cooperate with the States concerned in the implementation thereof, including through technical assistance and other measures.

27. To establish, where appropriate, subregional or regional mechanisms, in particular trans-border customs cooperation and networks for information-sharing among law enforcement, border and customs control agencies, with a view to preventing, combating and eradicating the illicit trade in small arms and light weapons across borders.

28. To encourage, where needed, regional and subregional action on illicit trade in small arms and light weapons in all its aspects in order to, as appropriate, introduce, adhere, implement or strengthen relevant laws, regulations and administrative procedures.

29. To encourage States to promote safe, effective stockpile management and security, in particular physical security measures, for small arms and light weapons, and to implement, where appropriate, regional and subregional mechanisms in this regard.

30. To support, where appropriate, national disarmament, demobilization and reintegration programmes, particularly in post-conflict situations, with special reference to the measures agreed upon in paragraphs 28 to 31 of this section.

31. To encourage regions to develop, where appropriate and on a voluntary basis, measures to enhance transparency with a view to combating the illicit trade in small arms and light weapons in all its aspects.

At the global level

32. To cooperate with the United Nations system to ensure the effective implementation of arms embargoes decided by the United Nations Security Council in accordance with the Charter of the United Nations.

33. To request the Secretary-General of the United Nations, within existing resources, through the Department for Disarmament Affairs, to collate and circulate data and information provided by States on a voluntary basis and including national reports, on implementation by those States of the Programme of Action.

34. To encourage, particularly in post-conflict situations, the disarmament and demobilization of ex-combatants and their subsequent reintegration into civilian life, including providing support for the effective disposition, as stipulated in paragraph 17 of this section, of collected small arms and light weapons.

35. To encourage the United Nations Security Council to consider, on a case-by-case basis, the inclusion, where applicable, of relevant provisions for disarmament, demobilization and reintegration in the mandates and budgets of peacekeeping operations.

36. To strengthen the ability of States to cooperate in identifying and tracing in a timely and reliable manner illicit small arms and light weapons.

37. To encourage States and the World Customs Organization, as well as other relevant organizations, to enhance cooperation with the International Criminal Police Organization (Interpol) to identify those groups and individuals engaged in the illicit trade in small arms and light weapons in all its aspects in order to allow national authorities to proceed against them in accordance with their national laws.

38. To encourage States to consider ratifying or acceding to international legal instruments against terrorism and transnational organized crime.

39. To develop common understandings of the basic issues and the scope of the problems related to illicit brokering in small arms and light weapons with a view to preventing, combating and eradicating the activities of those engaged in such brokering.

40. To encourage the relevant international and regional organizations and States to facilitate the appropriate cooperation of civil society, including non-governmental organizations, in activities related to the prevention, combat and eradication of the illicit trade

in small arms and light weapons in all its aspects, in view of the important role that civil society plays in this area.

41. To promote dialogue and a culture of peace by encouraging, as appropriate, education and public awareness programmes on the problems of the illicit trade in small arms and light weapons in all its aspects, involving all sectors of society.

III. Implementation, international cooperation and assistance

1. We, the States participating in the Conference, recognize that the primary responsibility for solving the problems associated with the illicit trade in small arms and light weapons in all its aspects falls on all States. We also recognize that States need close international cooperation to prevent, combat and eradicate this illicit trade.

2. States undertake to cooperate and to ensure coordination, complementarity and synergy in efforts to deal with the illicit trade in small arms and light weapons in all its aspects at the global, regional, subregional and national levels and to encourage the establishment and strengthening of cooperation and partnerships at all levels among international and intergovernmental organizations and civil society, including non-governmental organizations and international financial institutions.

3. States and appropriate international and regional organizations in a position to do so should, upon request of the relevant authorities, seriously consider rendering assistance, including technical and financial assistance where needed, such as small arms funds, to support the implementation of the measures to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects as contained in the Programme of Action.

4. States and international and regional organizations should, upon request by the affected States, consider assisting and promoting conflict prevention. Where requested by the parties concerned, in accordance with the principles of the Charter of the United Nations, States and international and regional organizations should consider promotion and assistance of the pursuit of negotiated solutions to conflicts, including by addressing their root causes.

5. States and international and regional organizations should, where appropriate, cooperate, develop and strengthen partnerships to share resources and information on the illicit trade in small arms and light weapons in all its aspects.

6. With a view to facilitating implementation of the Programme of Action, States and international and regional organizations should seriously consider assisting interested States, upon request, in building capacities in areas including the development of appropriate legislation and regulations, law enforcement, tracing and marking, stockpile management and security, destruction of small arms and light weapons and the collection and exchange of information.

7. States should, as appropriate, enhance cooperation, the exchange of experience and training among competent officials, including customs, police, intelligence and arms control officials, at the national, regional and global levels in order to combat the illicit trade in small arms and light weapons in all its aspects.

8. Regional and international programmes for specialist training on small arms stockpile management and security should be developed. Upon request, States and appropriate international or regional organizations in a position to do so should support these programmes. The United Nations, within existing resources, and other appropriate international or regional organizations should consider developing capacity for training in this area.

9. States are encouraged to use and support, as appropriate, including by providing relevant information on the illicit trade in small arms and light weapons, Interpol's Interna-

tional Weapons and Explosives Tracking System database or any other relevant database that may be developed for this purpose.

10. States are encouraged to consider international cooperation and assistance to examine technologies that would improve the tracing and detection of illicit trade in small arms and light weapons, as well as measures to facilitate the transfer of such technologies.

11. States undertake to cooperate with each other, including on the basis of the relevant existing global and regional legally binding instruments as well as other agreements and arrangements, and, where appropriate, with relevant international, regional and intergovernmental organizations, in tracing illicit small arms and light weapons, in particular by strengthening mechanisms based on the exchange of relevant information.

12. States are encouraged to exchange information on a voluntary basis on their national marking systems on small arms and light weapons.

13. States are encouraged, subject to their national practices, to enhance, according to their respective constitutional and legal systems, mutual legal assistance and other forms of cooperation in order to assist investigations and prosecutions in relation to the illicit trade in small arms and light weapons in all its aspects.

14. Upon request, States and appropriate international or regional organizations in a position to do so should provide assistance in the destruction or other responsible disposal of surplus stocks or unmarked or inadequately marked small arms and light weapons.

15. Upon request, States and appropriate international or regional organizations in a position to do so should provide assistance to combat the illicit trade in small arms and light weapons linked to drug trafficking, transnational organized crime and terrorism.

16. Particularly in post-conflict situations, and where appropriate, the relevant regional and international organizations should support, within existing resources, appropriate programmes related to the disarmament, demobilization and reintegration of ex-combatants.

17. With regard to those situations, States should make, as appropriate, greater efforts to address problems related to human and sustainable development, taking into account existing and future social and developmental activities, and should fully respect the rights of the States concerned to establish priorities in their development programmes.

18. States, regional and subregional and international organizations, research centres, health and medical institutions, the United Nations system, international financial institutions and civil society are urged, as appropriate, to develop and support action-oriented research aimed at facilitating greater awareness and better understanding of the nature and scope of the problems associated with the illicit trade in small arms and light weapons in all its aspects.

IV. Follow-up to the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects

1. We, the States participating in the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, recommend to the General Assembly the following agreed steps to be undertaken for the effective follow-up of the Conference:

(a) To convene a conference no later than 2006 to review progress made in the implementation of the Programme of Action, the date and venue to be decided at the fifty-eighth session of the General Assembly;

(b) To convene a meeting of States on a biennial basis to consider the national, regional and global implementation of the Programme of Action;

(c) To undertake a United Nations study, within existing resources, for examining the feasibility of developing an international instrument to enable States to identify and trace in a timely and reliable manner illicit small arms and light weapons;

(d) To consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons.

2. Finally, we, the States participating in the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects:

(a) Encourage the United Nations and other appropriate international and regional organizations to undertake initiatives to promote the implementation of the Programme of Action;

(b) Also encourage all initiatives to mobilize resources and expertise to promote the implementation of the Programme of Action and to provide assistance to States in their implementation of the Programme of Action;

(c) Further encourage non-governmental organizations and civil society to engage, as appropriate, in all aspects of international, regional, subregional and national efforts to implement the present Programme of Action.

Acronyms

AJIL	American Journal of International Law
AML/CTF	Anti-money laundering / Counterterrorist finance
APEC	Asia-Pacific Economic Cooperation
APG	Asia/Pacific Group Against Money Laundering
ARS	Alternative remittance systems
Art.	Article
ASEAN	Association of Southeast Asian Nations
ATS	Amphetamine-type stimulants
AUC	Autodefensas Unidas de Colombia
BCCI	Bank of Commerce and Credit International
BICC	Bonn Center for Conversion
CDI	Center for Defense Information
CETS	Council of Europe Treaty Series
CFATF	Caribbean Financial Action Task Force
CHIPS	Clearing House for International Payments System
CIA	US Central Intelligence Agency
CIS	Commonwealth of Independent States
CITES	Convention on International Trade in Endangered Species
CMO	Comprehensive Multidisciplinary Outline of Future Activities in Drug Abused Control
CND	UN Commission on Narcotic Drugs
CoE	Council of Europe
COMTRADE	UN Commodity Trade Statistics Database
CSIS	Center for Strategic and International Studies
CTR	Cash Transaction Reports
DALY	Disability-adjusted life years
DDA	United Nations Department for Disarmament Affairs
DDR	Disarmament, demobilisation and Reintegration
DEA	US Drug Enforcement Administration
DRC	Democratic Republic of Congo
EAG	Eurasia Group on combating money laundering and financing of terrorism

ECOSOC	UN Economic and Social Council
ECOWAS	Economic Community of Western African States
ECPAT	End Child Prostitution in Asian Tourism
EEC	European Economic Community
e.g.	*exempli gratia* [for example]
Endiama	Empresa Nacional de Diamantes de Angola
ESAAMLG	Eastern and Southern African Anti-Money Laundering Group
ETS	European Treaty Series
FARC	Fuerzas Armadas Revolucionarias de Colombia
FATF	Financial Action Task Force
f.e.	for example
FIU	Financial Intelligence Unit
FinCEN	US Department of the Treasury's Financial Crimes Enforcement Network
FMNLF	Farabundo Marti National Liberation Front
FSRB	FATF-Style Regional Bodies
GAFISUD	Grupo de Acción Financiera Internacional sobre lavado de dinero de América del Sur (FSRB covering South America)
GAO	Government Accountability Office
GATT	General Agreement on Tariffs and Trade
GBP	British Pound Sterling
GDP	Gross Domestic Product
GIABA	Groupe Inter-gouvernemental d'Action contre le Blanchiment en Afrique (FSRB covering Africa)
GRIP	Groupe de recherche et d'information sur la paix et la sécurité
GSN	Global Survival Network
ha	Hectare
HIV	Human immunodeficiency virus
HM	Her Majesty's
HRD	Hoge Raad voor Diamant [Antwerp High Diamond Council]
HSBC	Hongkong and Shanghai Banking Corporation Limited
IANSA	International Action Network on Small Arms
ICBL	International Campaign to Ban Landmines
ICJ	International Court of Justice
IDMA	International Diamond Manufacturers Association

i.e.	*id est* [that is]
IFAC	International Federation of Accountants
IL	International Law
IMF	International Monetary Fund
IMoLin	UN International Money Laundering Information Network
INCB	International Narcotics Control Board
Interpol	International Criminal Police Organization
IPE	International Political Economy
IR	International Relations
ISS	South African Institute for Security Studies
Kg	Kilogramme
KP	Kimberley Process
KPCS	Kimberley Process Certification Scheme
Lit	Litera
LoN	League of Nations
LSD	Lysergic acid diethylamide
LLTE	Liberation Tigers of Tamil Eelam
MANPAD	Man-portable air defence systems
MDMA	Methylenedioxymethamphetamine
MENAFATF	Financial Action Task Force for the Middle East and North Africa
Moneyval	CoE Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures
MPLA	Movimento Popular para a Libertação de Angola
NAFTA	North American Free Trade Association
NCCT	Non-cooperative countries and territories
NGO	Non-governmental organization
NISAT	Norwegian Initiative on Small Arms
No	Number
NRA	National Rifle Association
NZZ	Neue Zürcher Zeitung
OAS	Organisation of American States
OECD	Organisation for Economic Cooperation in Europe
OGBS	Offshore Group of Banking Supervisors
OSCE	Organisation for Security and Cooperation in Europe

OPEC	Organisation of Petroleum Exporting Countries
PAC	Partnership Africa Canada
Para	Paragraph
PCOB	Permanent Central Opium Board
PDD	Presidential Decision Directive
PoA	Program of Action
RoC	Republic of Congo (Congo-Brazzaville)
RUF	Revolutionary United Front
SADC	Southern African Development Community
SALW	Small Arms and Light Weapons
SAS	Small Arms Survey
SSRC	Social Science Research Council
STR	Suspicious transaction reports
Swift	Society for Worldwide Interbank Financial Telecommunication
TCE	Transaction cost economics theory
THC	Δ9-tetra hydro-cannabinol
TI	Transparency International
UK	United Kingdom
UN	United Nations
UNAMSIL	United Nations Mission in Sierra Leone
UNDCP	UN International Drug Control Programme
UN ESCOR	Unite Nations Economic and Social Council Resolution
UNGA	United Nations General Assembly
UNHRC	United Nations High Commissioner for Refugees
UNITA	União Nacional para a Independência Total de Angola
UNIDIR	United Nations Institute for Disarmament Research
UNODC	United Nations Office on Drugs and Crime
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
US	United States, interchangeably used for United States of America
USA	United States of America
US$	US Dollars
VCLT	Vienna Convention of the Law of Treaties
WFDB	World Federation of Diamond Bourses

WHO	World Health Organisation
WTO	World Trade Organisation

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