Criminal and Quasi-Criminal Customs Enforcement Among the U.S., Canada and Mexico†

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I. INTRODUCTION

Regardless of the ultimate outcome of the North American Free Trade Agreement (NAFTA) negotiations, the three countries of the Americas are thrown together and are bound to experience greatly enhanced levels of movement of people, goods, and capital. The challenge to liberalize the flow and minimize dislocations and adverse consequences of the flow, especially from criminal elements, requires innovative thinking on mechanisms and structure of the criminal relations. Customs is a key substantive legal area because it cuts across the movement of goods and, to a lesser extent, of persons and capital. From a substantive legal perspective, the areas of international criminal law, customs law, administrative law, and international relations, especially international regime theory, will increasingly interact.[1] This article discusses competing national criminal and quasi-criminal laws of the United States, Canada and Mexico with respect to customs enforcement. Enforcement of customs law is of particular interest in the wake of negotiations for a North American Free Trade Agreement (NAFTA) among the three countries because of the amount of trade among the three countries.

Enforcement of customs law from an international criminal law perspective requires a consideration of the classification of customs

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1. For a discussion of the application of international regime theory to international criminal cooperation in the context of European integration, *see* Scott Carlson and Bruce Zagaris, *International Cooperation in Criminal Matters: Western Europe's International Approach to International Crime*, 15 NOVA L. REV. 551-79 (1991).

law between criminal law and administrative law. This paper discusses the status of customs law within international criminal law. In particular, it considers the classification of customs as "administrative penal law," which system is non-penal in a legal sense, but nonetheless retributive.

II. JURISDICTIONAL BASES

A. The United States

The United States asserts extraterritorial jurisdiction in criminal law on five traditional bases of jurisdiction: territorial, protective, nationality, universal and passive personality.[2] A sixth theory of jurisdiction, sometimes called the floating territorial principle, recognizes the "flagship" state as having jurisdiction over any offense committed on one of its crafts or vessels.[3]

The principal basis of jurisdiction over crime in the U.S. is the territorial principle, which permits a state in control of a territory to prescribe, adjudicate and enforce its laws in that territory.[4] A crime is deemed committed wholly within a state's territory when every essential constituent element is consummated within the territory.[5] A crime is committed partly within a state's territory when any essential constituent element is consummated there.[6] The U.S. also recognizes and utilizes subjective territoriality, when a constituent element of the crime occurs within the U.S.[7] Additionally, U.S. jurisprudence sanctions the assertion of jurisdiction over offenses when the conduct giving rise to the offense has occurred extraterritorially, provided the harmful effects or results have occurred within the U.S. territory.[8] The objective territorial principle has received an expansive interpretation in recent years in the U.S. Assertion of jurisdiction will be enforced as proper in either state and extradition will be approved pursuant to either

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2. *Jurisdiction with Respect to Crime*, 29 A.J.I.L. 435, 439-442 (Supp. 1935) [hereinafter HARVARD RESEARCH].

3. *See* Lauritzen v. Larsen, 345 U.S. 571 (1953); Note, *Jurisdiction*, 15 TEX. INT'L L.J. 379, 404, n. 3 (1980); Empson, *The Application of Criminal Law to Acts Committed Outside the Jurisdiction*, 6 AM. CRIM. L. 32 (1967); George, *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609, 613 (1966).

4. Christopher L. Blakesley, *Extraterritorial Jurisdiction* II INTERNATIONAL CRIMINAL LAW PROCEDURE 8 (1986).

5. HARVARD RESEARCH, *supra* note 2, at 495.

6. *Id.*

7. *Id.*

8. Strassheim v. Daily, 221 U.S. 280 (1911).

state's theory of jurisdiction so long as the offense itself, its result or effects, or any of its constituent or material elements actually occur within the sovereign territory of the requesting party.[9] However, difficulties ensue when a claim of jurisdiction is asserted on some theory other than territoriality, or when the claimed "territorial basis" is strained beyond that believed proper by the other state.[10]

The protective theory of jurisdiction provides a basis for jurisdiction over an extraterritorial offense when that offense has an adverse effect on, or is a danger to, a state's security, integrity, sovereignty or governmental function. The focus of the jurisdictional principle is the nature of the interest that may be injured, rather than the place of the harm, the place of the conduct causing the harm, or the nationality of the perpetrator. This conduct has included lying to a consular officer.[11] Even though the conduct happens wholly abroad, it may be considered as constituting a danger to the sovereignty of the U.S. and as having a deleterious impact on valid governmental interests.[12]

Jurisdiction based on the nationality of the perpetrator is a generally accepted principle of international law.[13] Under international law, nationals of a state remain under the state's sovereignty and owe their allegiance to it, even though traveling or residing outside its territory. The state has the right based on this allegiance, to assert criminal jurisdiction over actions of one of its nationals deemed criminal by that state's laws.[14] In the U.S. the application of any law to extraterritorial offenses is an exception to the territorial principle and must be done on a case-by-case basis. U.S. case law has approved jurisdiction over nationals who commit crimes abroad even though the appropriate statute did not expressly provide that it applied extraterritorially.[15]

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9. *Id.* at 285.

10. Christopher L. Blakesley, *United States Jurisdiction Over Extraterritorial Crime*, 73 J. CRIM. L. AND CRIMINOLOGY 1109, 1132-1229 (1982).

11. *Id.* at 1132-1229.

12. *See, e.g.*, United States v. Pizzarusso, 388 F.2d 8 (2d Cir. 1968) (in which an alien was convicted of knowingly making false statements under oath in a visa application to a U.S. consular officer in Canada. The court noted that the violation of Title 18, sec. 1546 of the U.S. Code occurred entirely in Canada. The accused's entry into the U.S. was not an element of the offense). *See* Blakesley, *supra* note 10, at 1136 for additional discussion and authority.

13. HARVARD RESEARCH, *supra* n.2, at 1155-57.

14. *See* Blackmer v. United States, 284 U.S. 421 (1932).

15. *See, e.g.*, Steel v. Bulova Watch Co., 344 U.S. 280 (1952) (application of

The passive personality theory of jurisdiction generally is not favored in U.S. law. The Restatement (Third) of Foreign Relations Law of the U.S. provides that a state does not have jurisdiction to prescribe a rule of law attaching a legal consequence to conduct of an alien outside its territory merely on the basis that the conduct affects one of its nationals. The U.S. has protested the assertion of this jurisdiction by Mexico and other countries and major incidents have occurred as the result of cases in which U.S. nationals have been arrested and prosecuted on the basis of the passive personality theory.[16]

Under universal jurisdiction, international law allows any of the "community" of nationals to prosecute a perpetrator who allegedly commits a heinous offense universally condemned. Universal jurisdiction has been allowed for piracy, slave trade, war crimes, hijacking and sabotage in civil aircraft, and genocide. A trend exists to include terrorism and traffic in narcotic drugs.[17]

B. Canada

In general, Canadian legislation follows the territorial theory of criminal jurisdiction by prescribing rules of law, criminalizing: (a) conduct within the territory of Canada and, (b) conduct outside the territory that causes effect within Canadian territory.[18] Jurisdiction is seldom based on the nationality of the offender (active nationality principle) and never on the nationality of the victim (passive nationality principle). The Canadian Parliament has authority to enact laws that have extraterritorial operation, restricted to matters within its com-

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U.S. antitrust laws extraterritorially to activities of U.S. nationals); Ramirez & Feraud Chile Co. v. Las Palmas Food Co., 146 F.Supp. 594 (S.D. Cal. 1958), *aff'd per curiam*, 245 F.2d 874 (9th Cir. 1957), *cert. denied*, 355 U.S. 927 (1958); *cf.* Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633 (2d Cir. 1956) (holding that the Lanham Act did not apply to a Canadian corporation although harm occurred in the U.S. as a result of offenses committed by that corporation).

16. Cutting Case, 187 For. Re. 751 (1888), *reported in* 2 J.B. Moore, INTERNATIONAL LAW DIGEST 232-40 (1906).

17. For a useful discussion of universal jurisdiction, *see* Christopher L. Blakesley, *Extraterritorial Jurisdiction*, in M.C. Bassiouni (ed.), INTERNATIONAL CRIMINAL LAW PROCEDURE 3, 31-33 (1986); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES, §404 (1986).

18. S. WILLIAMS, INTERNATIONAL CRIMINAL LAW 8 (1978); Statute of Westminster (Imperial) (1931), 22 Geo V., c. 4, s. 3; *see also* § 8, Interpretational Act, R.S.C., 1970, c. I-13; Extraterritorial Act of Canada R.S.C., 1952, c. 107, § 2.

petence. Some Canadian laws provide specifically for extraterritorial application.

C. *Mexico*

In general, the Mexico Criminal Code provides for jurisdiction over international crimes on several bases. Mexican criminal law applies to crimes that are initiated, prepared or committed abroad, produced or having an effect within Mexico.[19] Jurisdiction is provided for crimes committed in Mexican consulates or against consulate officials when they have not been adjudicated in the country in which the crime was committed.[20] Continuing crimes committed abroad that have effect in Mexico, can be prosecuted in accordance with the laws of Mexico or the place of the defendant.[21] Crimes committed abroad by a Mexican against Mexicans or against foreigners, or by a foreigner against a Mexican will be punished in Mexico in accordance with federal laws if the following requirements exist: the accused is in Mexico; the defendant has not been definitively adjudicated in the country in which the crime was committed; and the infraction of which one is accused is considered a crime in the country in which it is committed and in Mexico.[22]

The latter provision known as the passive nationality principle (the nationality of the victim) caused a problem in *Cutting Case* in 1986.[23] Cutting, a U.S. citizen, was arrested and subsequently jailed in El Paso del Norte, Mexico, for an alleged libel against a Mexican citizen with whom he had been in controversy. The libel was published in a newspaper in El Paso, Texas. Mexico claimed it had a right to punish Cutting, because under its Penal Code, offenses committed by foreigners abroad against Mexican citizens were punishable in Mexico.[24] The U.S. requested Cutting's release and revision of the Mexican Penal Code in this respect in order to avoid similar incidents in the future. The U.S. was not able to persuade Mexico to grant either request. However, Cutting was later released when the plaintiff withdrew his action.[25] Another example of the problem involved Ri-

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19. Mexico Federal Penal Code of Jan. 2, 1931, art. 2(I).
20. *Id.* at art. 2(II).
21. *Id.* at art. 3.
22. *Id.* at art. 4.
23. Cutting Case, 187 For. Re. 751 (1888), *reported in* 2 J.B. Moore, INTERNATIONAL LAW DIGEST 232-40 (1906).
24. 6 WHITEMAN'S DIGEST OF INTERNATIONAL LAW 104-5.
25. MOORE, *supra* note 16, at 228.

chard Fielder, a U.S. citizen, who was detained by Mexico City police officials for a crime alleged to have been committed in New Jersey. The case never came to trial however because Mr. Fielder was released and departed from Mexico before the trial date.[26]

The Mexican Code provides that a crime would be considered as committed in the Mexican territory if: the crimes are committed by Mexicans or by foreigners on the high seas on board Mexican boats, or committed on board a Mexican warship in the port or territorial waters of the other country.[27] This extends to merchant boats if the delinquent has not been adjudicated in the country to which the port belongs. Mexico also asserts jurisdiction over acts which disturb the public tranquility. Such acts include those committed on board a foreign boat in a Mexican port or in territorial waters of Mexico, or those committed on board a Mexican or foreign airline, which is in Mexican territory or in its atmosphere, as well as crimes committed in Mexican embassies and legations.[28] In addition, when one commits a crime not provided for in the Code, where a special law or an international treaty of Mexico obligates it, Mexico will assert jurisdiction.[29]

III. THE STATUS OF CUSTOMS LAW WITHIN INTERNATIONAL CRIMINAL LAW

Within the field of international criminal law, customs law in large part is classified as "administrative penal law," a term that indicates a system is non-penal in the legal sense, but whose philosophical foundation is nonetheless retributive. In order to properly deal with customs law in the context of international criminal law, its relationship with other systems of sanctioning must be considered. As a recent Congress of the International Penal Law Association has observed, the connections between administrative penal law and international penal law are a source of practical difficulties.[30]

Among the legal problems are the risk that penal sanctions will be ineffective and that a plurality of proceedings will be conducted

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26. 6 WHITEMAN'S DIGEST OF INTERNATIONAL LAW 104.

27. *Id.*

28. *Id.* at art. 5.

29. *Id.* at art. 6.

30. For an excellent overview of the novel legal problems and practical difficulties, on which this account relies heavily, *see* Mireille Delmas-Marty, *The Legal and Practical Problems Posed by the Difference Between Criminal Law and Administrative Penal Law*, 59 REV. INT'L DE DROIT PENAL 21 (1988).

and sanctions will be imposed for the same act. The movement towards individualization within penal law has resulted in a diversification of sanctions that makes it more difficult to demarcate each of the systems of sanctions, because the penal sanction can no longer be identified with deprivation of liberty. Similarly, the philosophical foundations of the penal sanction vis-à-vis those of the administrative sanction become equally difficult to identify. Because depenalization has resulted in recourse to penal "administrative law" as a possible alternative to penal law, the question becomes within which limits the general principles of penal law and of penal procedure need to be transplanted into the administrative field.[31]

Practical difficulties arise in part from the profoundly different traditions and on closed and largely uncoordinated institutional structures. Prosecutors fear that the penal system may be dispossessed of its jurisdiction by the administration. Simultaneously, they may fear an overburdening of the criminal justice system in cases in which the penal infraction is merely non-compliance with a ruling or a sanction imposed by the customs agency. The customs agency may fear being dispossessed of the monopoly over regulating customs, which in some cases may have predated the establishment of the criminal justice system. Customs agencies may believe that a court exercising criminal jurisdiction is not able to appreciate the appropriateness of an administrative decision. Sometimes the customs agencies may be criticized for not appreciating the legal subtleties of criminal law and procedure.[32]

In discussing the interaction of the customs laws of the U.S., Mexico, and Canada in the context of reform of international criminal law, especially in the wake of a NFTA, this article will follow the issues utilized by the International Penal Law Association Congress which considered the legal and practical problems posed by the difference between criminal law and administrative penal law.[33]

IV. THE DIFFERENCE BETWEEN CRIMINAL LAW AND ADMINISTRATIVE PENAL LAW IN THE U.S., CANADA AND MEXICO

A. The U.S.[34]

1. Substantive Law Issues

In the U.S., administrative agencies have law-making (quasi-legislative or rulemaking) and judicial (quasi-judicial or order-making)

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31. *Id.*; *cf.* The Oztürk Judgment, Reb. 21 Eur. Ct. H.R. (1984).
32. Delmas-Marty, *supra* note 30, at 22.
33. *Id.* at 23-25.
34. For more detail from which this account relies in part, *see* Emilio Viano,

powers that the legislative branch delegates at both the national and state levels to administrators. Administrative law is unique, in that more than 90% of it is derived from common law.[35] Hence, administrative law is based only marginally on statutory law. Another difference of administrative law in civil law systems is that the philosophical foundation of U.S. administrative law is not retributive; rather its purpose is to deliver government services to its citizens. Furthermore, the constitutional organization of the U.S. government involves the courts in an active role in almost every administrative system. Congress also maintains oversight and adjusts the legislative mandate whenever the circumstances appear to warrant action.

Both the Tariff Act of 1930[36] and criminal law contain numerous penalty and enforcement provisions for violations of the laws governing the importation of merchandise. With respect to infractions under the Tariff Act, the Secretary of the Treasury is empowered by statute to institute various punishments and to deal with their remission or mitigation. Part V of the Tariff Act of 1930, as amended, contains a long list of enforcement provisions, including fines, penalties, and forfeitures for violations of various provisions of the Tariff Act.[37] The Secretary also has the general statutory authority to create a regulatory and administrative framework in which to implement and dispose of its enforcement responsibilities.[38] The Customs guidelines for recordkeeping, inspection, search, and seizure are found in 19 C.F.R., section 162. Section 171 of 19 C.F.R. contains provisions relating to the filing of petitions for relief from fines, penalties, and forfeitures incurred, and petitions for the restoration of proceeds from the sale of seized and forfeited property.

The Legal and Practical Problems Posed by the Difference Between Criminal Law and Administrative Penal Law: Questions Relating to the Legal Structure of the Two Systems, 59 REV. INT'L DE DROIT PENAL 95-108.

35. KEN DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 140 (1969).

36. ACT OF JUNE 17, 1930, *as amended* (codified in 19 U.S.C.).

37. The main areas covered by Part V include the following: the boarding of vessels; search of persons and baggage; certification of manifest; falsity or lack of manifest; departure before report or entry; unlawful unlading or transshipment; examination of hovering vessels; transportation between American ports via foreign ports; penalties for fraud, gross negligence, and negligence; libel on vessels and vehicles; searches and seizures; forfeitures; interest of officers in vessels or cargo; seizures and their disposition; referral of prosecution to a U.S. district court; disposition of proceeds of forfeited property; compromise of government claims; and the remission or mitigation of penalties. 19 U.S.C. 1581 *et seq.* (1991).

38. *Id.* at §§ 66, 1624.

Section 1592 of the Tariff Act of 1930[39] is recognized as the primary statutory provision used for the enforcement of the tariff laws. The Customs Procedural Reform and Simplification Act of 1978[40] substantially changed this section to limit penalties thereunder, to codify the prepenalty procedures, to provide for judicial *de novo* review, and to change the statute of limitations.[41] Part II of the Tariff Act pertains to the reporting, entry, and unlading of vessels and vehicles. Penalties are assessed for the failure to report, make entry, and pay duties on the cost of repairs of vessels and equipment thereon engaged in foreign or coastwise trade.[42] Part III of the Tariff Act provides statutory authority for customs to ascertain, collect, and recover duties. Provisions are included for seizures and forfeiture for merchandise bearing U.S. trademarks[43] and of wild mammals and birds in violation of foreign law.[44]

Under the separate and distinct criminal customs law provisions, punishment by fine and/or imprisonment are provided for specific activities.[45] The government has regularly used other criminal statutes in combination with the enumerated customs criminal statutes.[46]

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39. 19 U.S.C. § 1592.

40. Pub. L. No. 95-419.

41. For an extensive overview of the changes made to Section 1592 by the Customs Procedural Reform and Simplification Act of 1978, *see* John M. Peterson, *Civil Customs Penalties Under Section 1592 of the Tariff Act: Current Practice and the Need for Further Reform*, 18 VAND. J. TRANSNAT'L L. 679 (1985) [hereinafter Peterson]. *See also*, United States v. Ven-Fuel, Inc., 758 F.2d 741 (1st Cir. 1985).

42. 19 U.S.C. § 1466 (1991).

43. *Id.* at § 1526.

44. *Id.* at § 1527.

45. The customs criminal statutes cover the following activities: entry of goods falsely classified, by means of false statements, or for less than legal duty 18 U.S.C. §§541-543 (1991); relading of goods (§544); smuggling goods into the U.S. or into foreign countries (§§545, 546); depositing goods in buildings on boundaries (§547); removing or repacking goods in warehouses (§548); removing goods from customs custody and breaking seals (§549); false claims for refund of duties (§550); concealing or destroying invoices or other papers (§551); officers aiding importation of obscene or treasonous books and articles (§552); and, importation or exportation of stolen motor vehicles, off-highway mobile equipment, vessels, or aircraft (§553).

46. The government often uses 18 U.S.C. § 1001 (1991) which prohibits knowing and willful false statements to a U.S. agency. For a discussion of the appropriate use of § 1001 with the other criminal customs statutes, *see* United States v. Rose, 570 F.2d 1358 (9th Cir. 1978). Other statutes which are often triggered are 18 U.S.C. § 371 (conspiracy) and §§ 1956, 1957 (prohibiting the use of the proceeds of certain criminal activity).

Determination of Responsibility: Culpability and Imputability

The U.S. does not distinguish between penal law and administrative law in the determination of responsibility. Many agencies have the authority to seek criminal sanctions by acting as the prosecuting authority in a traditional criminal trial. Unlike many civil law systems, there is no possibility in the U.S. to merge and try in the same trial criminal, administrative, and civil law issues. Additionally, the U.S. does not have a separate criminal and administrative court.

There are three levels of culpability under the main civil enforcement statute, Section 1592 of the Tariff Act of 1930: negligence, gross negligence, and fraud.[47] Negligence is a violation which results from an offender's failure to exercise reasonable care and competence to ensure that a statement that is made is correct. A negligent violation may result from acts of either commission or omission. Gross negligence is a violation which results from an act or acts (of commission or omission) done with actual knowledge of or wanton disregard for the relevant facts and with indifference or disregard for the offender's obligations under the statute, but without intent to defraud the revenue or violate the laws of the United States.

Fraud is a violation which results from an act or acts (of commission or omission) deliberately done with intent to defraud the revenue or to otherwise violate the laws of the United States, as established by clear and convincing evidence.

Most of the criminal statutes require an intent to either knowingly or willfully perform a particular act.[48] Under Section 1592, liability is imputed to individuals as well as corporate executives and managers. The Court of International Trade has held that the word "person" under Section 1592 is not limited to either natural persons or corporations and no such limitation can be implied.[49]

Grounds for Exoneration

The grounds for exoneration are clearly articulated in the penal law; however, in administrative law the quasi-judicial order-making

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47. These levels of culpability are defined in Appendix B, 19 C.F.R. Part 171, *as amended* by T.D. 89-83, 23 CUST. BULL. (1989).

48. *See, e.g.*, 18 U.S.C. § 545 (1991) ("Whoever knowingly and willfully, with intent to defraud the United States, smuggles . . . ."), § 550, ("Whoever knowingly and willfully files any false or fraudulent entry or claim . . . ."); § 548 ("Whoever fraudulently conceals, removes, or repacks merchandise in any bonded warehouse . . . .").

49. *See* United States v. Appendagez, Inc., 5 Ct. Int'l Trade 74, 80 (1983). The criminal statutes similarly use the term "any person" in their language of who can be held accountable thereunder; and thus corporate executives may be pursued personally under the criminal statutes.

level grounds for exoneration vary widely. For example, clerical errors or mistakes of fact are not violations of Section 1592 unless they are a part of a pattern of negligent conduct.[50]

Section 1618 of the Tariff Act of 1930[51] provides for remission and mitigation proceedings for any person who has had goods seized or fines instituted under the customs laws. The Secretary of the Treasury has delegated to Customs the authority to remit or mitigate duties.[52] For penalties under Section 1592, Customs has provided certain mitigating factors which should be considered when assessing a penalty amount in a case involving gross negligence or negligence. They are contributory customs error, cooperation, immediate remedial action, inexperience in importing, prior good record, and other extraordinary mitigating factors. An alleged violator bears the burden of demonstrating these mitigating factors with sufficient evidence.[53]

Sanctions

The terminology for most administrative sanctions is the same as for legal terminology. Sanctions as punishment are the province of the criminal court with the administrative agency acting as the prosecutor. Administrative agencies have the authority to arrest and imprison persons for relatively long periods of time without having to invoke court proceedings, so long as the incarceration is done with the intent to punish.[54] Congress has authorized administrators to arrest and temporarily imprison persons who have not been accused of or convicted of any criminal offenses to protect the larger interests of society.[55] Such administrative discretion opens the possibility for abuse of innocent persons. Administrative agencies have also arrested and detained persons without complying with the normal constitutional restrictions on making arrests and detentions.[56] With respect to sanctions against property,

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50. 19 U.S.C. § 1592(a)(2) (1991).

51. *Id.* at § 1618.

52. 8 CUST. BULL. 553, T.D. 74-287 (1974).

53. 19 C.F.R. § 171.23 (1991).

54. Wing v. United States, 163 U.S. 228 (1896).

55. *See, e.g.*, *Ex parte* Hardcastle, 208 S.W. 531 (Tex. 1919) (public health administrators, to protect public health, have the authority to apprehend and confine those who pose a dangerous health threat to the community without the benefit of a judicial proceeding).

56. *See, e.g.*, Abel v. United States, 362 U.S. 217 (1960) (an administrative agency working with the FBI circumvented 4th amendment protections); *see also* United States v. Alvarado, 321 F.2d 336 (2nd Cir. 1963) (upheld the constitutionality of an administrative arrest carried out by the U.S. Customs Service without first obtaining an administrative warrant).

forfeiture, revocation of licenses, such administrative sanctions are subject to the review of the courts. The extent of sanctions against property vary according to the agency, empowering statutes, and the area of enforcement. In general, the agencies usually have discretion over the actual amounts of the fine, so long as they stay within the upper and lower limits contemplated in the law.

The enforcement of the sanction normally has been provided to the agencies, so that they can revoke licenses and take other action when businesses refuse to comply with the agency's sanctions. Normally, agencies have broad discretion to use various enforcement measures depending on past performance, compliance record, and seriousness of the violation. Other intervening variables may be the size of the business, the perceived importance or essential nature of the services performed by the business for the nation's economy or security. A person may be deprived of his or her liberty if found in civil contempt by the court for not obeying an agency's order. However, it is used only in egregious situations. Managers or owners may also be charged and convicted of a crime and deprived of liberty after conviction.

Under the criminal law, all of the criminal customs statutes are imposed against the person and provide for both imprisonment and fines. Most of the sanctions impose a fine of not more than $5,000 or two years imprisonment, or both;[57] others impose longer imprisonment and/or larger fines.[58] Any officer who knowingly admits to the entry of goods for less than legal duty may be removed from office in addition to being subject to a fine and imprisonment.[59] The nature of the sanctions imposed under U.S. customs statutes are both *in personam* and *in rem* in nature. *In rem* procedures include the forfeiture of the merchandise at issue.[60]

Maximum civil penalties imposed under Section 1592 are delineated by the culpability of the wrongdoer. For a fraudulent violation, Customs

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57. 18 U.S.C. §§ 541-544, 546-551 (1991).

58. *Id.* at §§ 545, 552, 553. The sanctions for violating the money laundering statutes are significantly harsher. For a violation of 18 U.S.C. § 1956, one is subject to a fine of $500,000 or twice the value of the monetary instrument or funds, whichever is greater, or imprisonment for not more than twenty years, or both. For § 1957, which involves monetary transactions for criminally derived property, a violator is subject to a fine of up to twice the amount of the criminally derived property instead of, or in conjunction with, imprisonment of not more than ten years. 18 U.S.C. § 981 is the civil forfeiture provision which serves as a counterpart to §§ 1956 and 1957.

59. *Id.* at § 543.

60. *Id.* at §§ 544, 545, 548, 550.

may assess a civil penalty in an amount not to exceed the domestic value of the merchandise.[61] A grossly negligent violation is punishable by a civil penalty in an amount not to exceed the lesser of the domestic value of the merchandise or four times the lawful duties of which the U.S. is or may be deprived. If the violation did not affect the assessment of duties, the penalty will equal forty-percent of the merchandise's dutiable value.[62]

A negligent violation is punishable by a civil penalty in an amount not to exceed the lesser of the merchandise's domestic value, or two times the lawful duties of which the U.S. is or may be deprived. If the violation did not affect the assessment of duties, the penalty will equal twenty-percent of the merchandise's dutiable value.[63]

Customs may seize merchandise under Section 1592 if the Secretary has reasonable cause to believe that a person has violated the provisions of that section and that person is insolvent or beyond the jurisdiction of the U.S. or where seizure is otherwise essential to protect the revenue of the U.S. or to prevent the introduction of prohibited or restricted merchandise into the customs territory of the U.S.[64] The Customs Procedural Reform and Simplification Act of 1978 transformed Section 1592 from a primarily *in rem* forfeiture law to an *in personam* monetary penalty statute.[65]

Whereas Section 1592 is *in personam* in nature, Customs may still institute an *in rem* action under 19 U.S.C. § 1595(a), which directs that any merchandise that is introduced into the U.S. contrary to law may be seized and forfeited. Seizure and forfeiture is also authorized of all vehicles and other items used to aid such importation or transportation of articles contrary to law. Any person who assists in such activity is liable to a penalty equal to the value of the article or articles introduced or attempted to be introduced. Civil penalties may be assessed from an owner or master who willfully or knowingly neglects or fails to report, make entry, and pay duties on vessels, vehicles, and equipment thereon, which are employed in foreign or coastwise trade. Customs may also seize and forfeit the vessel or impose a penalty up to the value of the vessel.[66]

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61. 19 U.S.C. § 1592(c)(1) (1991).
62. *Id.* at § 1592(c)(2).
63. *Id.* at § 1592(c)(3).
64. *Id.* at § 1592(c)(5).
65. United States v. One Red Lamborghini, 10 Ct Int'l Trade 7 (1986).
66. 19 U.S.C. § 1466 (1991).

Civil penalties may be assessed *in personam* against any person who fails to declare an article at entry, prior to the examination of baggage, in the amount equal to the value of such article. Seizure of such articles is also authorized.[67] Customs is empowered to seize and forfeit any imported merchandise which bears a trademark registered with the Patent and Trademark Office by a U.S. entity and recorded with the U.S. Customs Service. Any person importing such merchandise may be required to export or destroy the merchandise or to remove or obliterate the offending trademark. In addition, the person will be liable for damages and profits for use of the trademark.[68] Similarly, Customs is authorized to seize and forfeit any wild mammal or bird which was imported into the U.S. in violation of the laws of the origin country.[69]

Criminal actions are brought by the U.S. Government in the federal district court system. Under the Customs Courts Act of 1980, proceedings for the recovery of civil penalties under Section 1592 must be brought in the Court of International Trade.[70] Section 1592 sets forth procedures which must be used when such an action is brought by the U.S..

2. *Procedural Questions*

Conditions For Establishing An Infraction

An agency often initiates an infraction, often through its inspections. The agency has the authority to charge and inform. U.S. Customs has broad authority to inspect all merchandise, persons, vehicles, vessels, instruments of international travel, documents and buildings which relate to merchandise brought into the U.S. contrary to law. Customs is also authorized to make searches and seizures of any structure which it believes may contain any merchandise upon which duties have not been paid, or which was brought in the U.S. contrary to law.[71] To obtain a search warrant under Section 1595, Customs must make application to the appropriate municipal, county, state, or federal judge.

Imported merchandise required by law or regulation to be inspected, examined or appraised may not be delivered from Customs, except under bond or other security, until it has been inspected, ex-

67. *Id.* at § 1497.

68. *Id.* at § 1526(c).

69. *Id.* at § 1527(b). Under 18 U.S.C. § 42, there is a general prohibition against the importation of injurious mammals, birds, fish, amphibia, and reptiles.

70. 28 U.S.C. § 1582 (1991).

71. 19 U.S.C. § 1595(a) (1991); 19 C.F.R. § 162, Subpt. B (1991).

amined and is reported by the appropriate Customs officer to have been truly and correctly invoiced and found to comply with the pertinent requirements.[72] Customs has the power to inspect, examine, search vessels arriving at U.S. ports as well as any person or merchandise thereon.[73] Customs may also examine any person's baggage arriving in the U.S., regardless of whether a declaration and entry has been made to determine whether it contains dutiable or prohibited articles.[74]

Customs has implemented regulations covering Customs examination, sampling, and testing of merchandise.[75] The district director has the power to examine such packages or quantities of merchandise as he deems necessary for the determination of duties and for compliance with the Customs laws and other laws enforced by the U.S. Customs Service.[76] U.S. Customs may board any vessel or vehicle within the U.S. or the customs waters to inspect the vessel or vehicle itself or any person, package, cargo, or manifest thereon.[77]

The administrative summons is available to Customs during the course of any inquiry or investigation initiated to determine duty liability, liability for any fines, penalties or forfeitures, or to insure compliance with all Customs laws and regulations. Customs may obtain through the use of the summons any relevant records, statements, declarations, or other documents. Customs may also examine witnesses under oath to obtain pertinent information.[78] Customs may seek judicial enforcement of a summons. Contempt of court sanctions may be imposed on an importer who fails to comply with a court's enforcement order. A party who fails to comply may be stripped of his importing privileges and have the delivery of imported merchandise withheld.[79]

When prosecution is pursued under the Customs criminal statutes, the role of charging and informing the accused is performed in the same manner and by the same party as that in any other criminal case. That is, the prosecutor performs this role, aided by the police and the courts.[80]

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72. 19 U.S.C. § 1499 (1991).
73. *Id.* at § 1467.
74. *Id.* at § 1496.
75. Part 151 of 19 C.F.R.
76. *Id.* at § 151.1.
77. 19 U.S.C. § 1581(a) (1991); *see* 19 C.F.R. §§ 162.3 - 162.7 (1991).
78. *Id.* at § 1509.
79. 19 U.S.C. § 1592(b) (1991).
80. Very often in prosecutions for violations of the customs laws, the government seeks an indictment or information to charge a violation of 18 U.S.C. § 1001 which prohibits the making of false statements or entries to government agencies.

Whenever Customs contemplates the issuance of a claim for monetary penalty under Section 1592, that provision requires that it send a pre-penalty notice to the person concerned. The pre-penalty notice is a written notice of Customs' intention which sets forth all details which give rise to the claim. Once the concerned party has had the opportunity to make representations in response to the pre-penalty notice, Customs may issue a penalty notice if it still determines that a violation occurred.[81]

Agency with the Jurisdiction to Impose a Sanction

Most administrative agencies have the authority to impose sanctions, except in criminal cases. Some agencies must refer criminal cases to the Justice Department although a few agencies can go to court themselves if the Attorney General does not.[82]

Appeal or Other Recourse Available to the Defense

Once administrative review is exhausted, recourse to judicial review by the courts allows the courts to declare legislative and administrative actions unconstitutional. U.S. courts typically give much closer scrutiny to an agency action that is penal in nature, especially if it appears disproportionate to the offense and represents an abuse of discretionary authority.[83]

Any person who has an interest in any vessel, vehicle, or merchandise seized under the Customs laws and who has incurred any monetary penalty thereunder, may file a petition for remission or mitigation of such fine, penalty, or forfeiture prior to the sale of such items.[84] After Customs has considered such a petition and issued its decision, an importer has the option of accepting the penalty assessed

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81. 19 U.S.C. § 1592(b) (1991). Customs Regulations provide that written notice of *any* fine, penalty, or liability for forfeiture must be given to each party that the facts of record indicate has an interest in the claim or seized property. The notice must supply to the party the provision of law alleged to have been violated, a description of the merchandise at issue, as well as all other pertinent information. 19 C.F.R. § 162.31 (1991).

82. *See, e.g.*, 15 U.S.C. § 56 (the Federal Trade Commission can go to court if the Attorney General does not).

83. *See* Beck v. Securities and Exchange Commission, 432 F.2d 832 (5th Cir. 1969) (the court held inadequate an order imposing a sanction under the Securities Exchange Act because justification of such sanction was not disclosed).

84. 19 U.S.C. § 1618; *see* 19 C.F.R. Part 171, Subpart B and Appendix B (1991).

by Customs or allowing suit to be brought against him in the Court of International Trade. In such a suit, the person may contest all issues which gave rise to the penalty and/or seizure, including the amount of the penalty.

Character of the Procedure

The U.S. criminal justice system has an accusatorial (adversarial), oral, and public procedure. Administrative procedures, although not as clearly defined, tend to be accusatorial although they are increasingly inquisitorial (especially in the investigative and discovery stages, the use of warrantless searches, the limited cross-examination, the more limited due process protection, and the erosion of constitutionally protected privacy guarantees), increasingly written, and public in most cases. Agency adjudications are normally closed to outside interested parties who are not specific litigants to the dispute.[85]

The character of the procedures under Section 1592 is accusatorial, also because Customs has the various powers to ascertain the facts of the case through the use of the search warrant or the administrative summons with opportunities for both written and oral representations. Under 19 U.S.C. § 1618, the Secretary of Treasury may issue a commission to any Customs officer to take testimony to ascertain the facts of a case. When Customs has issued a pre-penalty notice, the concerned person may make both written and oral representations as to why a claim for a monetary penalty should not be issued in the amount stated. If Customs finds that the issuance of a penalty notice is warranted, thereafter, the person concerned again has the opportunity to make both oral and written representations seeking remission or mitigation of the monetary penalty, in accordance with 19 U.S.C. § 1618.

The Customs Regulations give an importer the opportunity to submit supplemental petitions for relief.[86] Where a party is not satisfied with a decision rendered by Customs, a supplemental petition may be filed. A party may request review of the supplemental petition by the regional commissioner of Customs "if the amount of the liability is

85. 5 U.S.C. § 554(c) (1991) (only interested parties may participate in an administrative consent adjudication. The term "interested parties" has been limited to those with "a legally recognized private interest" and courts have refused to broaden the category of those entitled to demand a hearing). *See* Local 282, Int'l Brotherhood of Teamsters v. NLRB, 339 F.2d 795 (2d Cir. 1964).

86. Supplemental Petitions for Relief, 19 C.F.R. § 171.33 (1991).

$25,000 or less, or [by] the Commissioner of Customs if the amount of the liability is more than $25,000 but does not exceed $100,000."[87] One further supplemental petition is allowed to appeal a decision made with respect to the first supplemental.[88] In order to have the opportunity of this second supplemental petition process, a party must first pay all penalties withheld and excess duties owed.

Rules of Evidence

The common law rules of evidence do not apply even in formal hearings of administrative law since there is no jury and many of the common law rules of evidence are designed to keep potentially prejudicial evidence from the jury.[89] In addition, constitutional protection, namely the fourth and fifth amendments, can be invoked in administrative discovery.[90] During the administrative process for Customs

87. *Id.* at § 171.33(b).

88. *Id.* at § 171.33(c)(1).

89. An example is the burden of proof in a customs forfeiture action involving a seized automobile instituted under 19 U.S.C. § 1595(a). First, the government must prove that "evidence establishes probable cause," then the owner of the seized vehicle must show by the "preponderance of the evidence that the violation was committed by a person who unlawfully obtained the vehicle." *See*, United States v. One 1975 Ford, 558 F.2d 755 (5th Cir. 1977). In criminal cases the government always has the burden of proving guilt beyond a reasonable doubt. In administrative law cases, the issue of which party bears the burden is not always clear.

Whereas constitutional due process protections apply in criminal cases, they only have limited applicability in disputes involving alleged administrative procedural violations. Although hearsay evidence is only allowed by exception in criminal trials, it can be more readily introduced in agency hearings. In both criminal and administrative cases, a finding cannot stand unless it is supported by evidence. Whereas criminal convictions must be based on evidence beyond a reasonable doubt, hearing decisions need only be supported by substantial evidence, that is, evidence that reasonably substantiates the decision. In both criminal trials and administrative hearings courts and hearing examiners can officially notice facts which are not obvious to the general public yet are readily accepted as common knowledge to the courts or examiners. This happens more readily in administrative proceedings.

A variety of different information gathering techniques is available in the administrative process. Compulsory process by means of subpoenas, prehearing conference as a discovery tool; depositions; interrogatories to parties; and searches. In general the rules of attorney-client privileges in administrative proceedings are no different from the privilege applied outside administrative law.

90. Neither of these constitutional protections has provided those subject to discovery with significant protection. A refusal to answer based on the fourth amendment's ban on unreasonable searches and seizures, without more, will not defeat enforcement. United States v. Carroll, 567 F.2d 955 (10th Cir. 1977). The fifth

violations, the concerned party has the burden of proving that the violation did not occur or that the circumstances otherwise warrant remission or mitigation of the penalty. Under the mitigation guidelines of Section 1592, a petitioner must establish any mitigating factors with "sufficient evidence."[91]

When a violation claimed under Section 1592 is referred to the U.S. Attorney, the following burdens of proof will apply: (1) if the monetary penalty is based on fraud, the U.S. shall have the burden of proof to establish the alleged violation by clear and convincing evidence; (2) if the monetary penalty is based on gross negligence, the U.S. shall have the burden of proof to establish all the elements of the alleged violation; and (3) if the monetary penalty is based on negligence, the U.S. shall have the burden of proof to establish the act or omission constituting the violation, and the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence.[92]

During any Customs administrative investigation regarding a penalty or seizure, Customs must refrain from disclosing any information regarding the investigation until the Customs' action is concluded.[93] A party who is the subject of a Customs investigation has the opportunity to request records under the Freedom of Information Act (FOIA).[94] Customs, however, generally denies requests for disclosure of investigative materials under the exemption in 19 U.S.C. § 552(b)(7). Thus, importers seeking remission or mitigation of a penalty on the administrative level have no right to discover the evidence used against them or to cross examine government witnesses. Such materials would be discoverable by an importer defending an action by the government in the Court of International Trade to collect a Section 1592 penalty.

Customs has the power to issue an administrative summons to acquire evidence related to a Customs violation. If Customs issues a summons to a third party record keeper of documents related to an import transaction, such as an attorney, accountant, or customhouse broker, it must issue notice of the summons to the person who is

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amendment protection against self-incrimination also has only a limited effect on administrative discovery. *See* Fisher v. United States, 425 U.S. 391, 96 S. Ct. 1569, 48 L.Ed. 2d 39 (1976); Couch v. United States, 409 U.S. 322, 328, 93 S. Ct. 611, 615-16, 34 L.Ed. 2d 548 (1973).

91. 19 C.F.R. Part 171, Appendix B (1991).

92. 19 U.S.C. § 1592(e) (1991).

93. 19 C.F.R. § 103.16 (1991).

94. 5 U.S.C. § 552. The regulations covering the Customs guidelines in implementing the FOIA are found in 19 C.F.R. 103 (1991).

identified in the description of the records (i.e., importer of record).

Upon receipt of notice, an importer may request the summoned third party not to comply with the Customs request.[95] Whenever a person does not comply with a Customs summons, Customs may request the U.S. Attorney to seek an order requiring compliance from the U.S. district court for the district in which the person is found, resides, or is doing business. Another evidentiary tool which Customs has is the search warrant under Section 1595 of Title 19 of the United States Code. Customs, however, is restrained from conducting an unreasonable search and seizure under this statute by the Fourth Amendment.[96]

3. *Relationship between the Two Systems*

Possible Transition from One Procedure to Another

A clear distinction and significant differences exist between criminal and administrative procedures. Many agencies have the authority to seek criminal sanctions by becoming the prosecuting authority in a traditional criminal trial. Other agencies must refer the case to the Justice Department for prosecution. In the U.S., whenever Customs determines that the circumstance surrounding a seizure or a violation of the Customs laws "requires" prosecution by the U.S. Attorney, it shall report such case to the U.S. Attorney for prosecution.[97]

Cumulative or alternative operation

In the U.S., plurality of proceedings are possible and a time sequence exists in those proceedings. A number of principles limit recourse to federal courts until a person has utilized the administrative avenues of adjudication (i.e., the exhaustion rule, the concept of primary jurisdiction, the ripeness principle, and the comity and abstention doctrines).

For a party contesting a penalty imposed by Customs to gain jurisdiction in the Court of International Trade, that person must exhaust the remission and mitigation procedures of Section 1618 of Title 19 of the United States Code. The Court of International Trade

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95. 19 U.S.C. § 1509(c) (1991).

96. *See In Re* No. 32 East Sixty-Seventh Street, 96 F.2d 153, 155 (2nd Cir. 1938), *mandate amended* 96 F.2d 795 (1938).

97. 19 U.S.C. § 1603 (1991). Under § 1604, the Attorney General must review the information provided and investigate the facts of the alleged violation and begin the necessary proceeding to collect any fine, penalty, or forfeiture. 19 U.S.C. § 1604 (1991).

has exclusive jurisdiction over civil penalties issued.[98] Because civil and criminal penalties are distinct and independent from each other, plurality of sanctions can be imposed. Civil *in rem* forfeiture is pursued by the U.S. Government before, during, or after conviction. Administrative penalties may be imposed before criminal action is instituted. In practice, with the exception of civil *in rem* forfeiture, plurality of sanctions does not occur often. In the customs area, civil penalties may be imposed even if a criminal action has been pursued for the same violation of the Customs laws.[99] Customs may resort to the Court of International Trade to enforce a civil penalty imposed against a person arising out of a violation of certain provisions of the Customs laws. Again, Customs has the ability to refer a case to the U.S. Attorney to prosecute a wrongdoer regardless of whether a civil suit has been initiated.

Criteria of Demarcation Between the Two Systems

In the U.S., a substantial difference exists between criminal and administrative proceedings. As a result, several constitutional guarantees that protect the citizen in criminal proceedings are considerably diminished in the administrative process.[100] For example, U.S. Customs has sweeping powers of search and seizure at the borders which are not restricted by the constitution of the United States. Unreasonable searches conducted under Section 1595 of Title 19 of the United States Code, however, are prohibited by the Fourth Amendment.

U.S. Customs administrative penal law has been criticized for its failure to provide importers with due process in its administrative proceedings. Although the Customs Procedural Reform and Simplification Act of 1978 instituted the prepenalty notice, the same local Customs officials who previously investigated an importer's action review any prepenalty response as well as determine whether a penalty is issued. Thus, the same officials are involved throughout most of the administrative process as investigator, prosecutor, trial judge, and appellate judge (in the case of a motion for reconsideration) and often have the incentive to reaffirm their prior judgments. Customs Head-

98. 19 U.S.C. §§ 1592, 1641(b)(6), 1641(d)(2)(a), 1671(i)(2), or 1673c(i)(2) (1991).

99. *See* United States v. Murray, 5 CIT 102, Slip Op. 83-18 (1983).

100. *E.g.*, protections against unreasonable searches and seizures under the Fourth Amendment, the right against self-incrimination under the Fifth Amendment, the right to a trial by jury in the Seventh Amendment and procedural due process under the Fifth and Fourteenth Amendments.

quarters often will rely heavily on the local Customs factual determinations and findings in making its decision during the administrative appeal process.[101]

Another disadvantage for the importer during the administrative penal process is the lack of access to evidence during an investigation. Due to exemptions under the FOIA, the importer is unable to discover evidence or cross-examine government witnesses. Customs, on the other hand, has many tools to gather evidence against an importer, including the administrative summons. This lopsided access to evidence under the administrative process is not present under the criminal process since evidence regarding an investigation would be discoverable therein.[102]

B. Canada[103]

1. *Substantive Law Issues*

In Canada, no clear distinction exists between the criminal law system, which is administered by criminal courts, and the administrative penal law system, which is administered by a variety of federal, provincial, municipal and specific organs. Administrative law in Canada is much less developed than criminal law. Appellate review by the courts concerns form rather than substance, and is concerned with legality rather than the merits of the case.

Canada's main statutory customs laws are set forth in the Customs Act and are both civil and criminal in nature. Various provisions of the Customs Act authorize the Governor in Council to make regulations for the implementation of those provisions. Under the Customs Act, the Governor in Council has the general mandate to make regulations to carry out the purposes of the Act.[104]

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101. *See* Peterson, *supra* note 41, at 710.

102. *Id.* at 711.

103. For a useful discussion of legal and practical problems posed by the difference between criminal and administrative law in Canada, *see* Grygier, *XIVth International Congress on Penal Law, Addendum to the Report Presented to Section I*, 59 REV. INT'L DE DROIT PENAL 136-39 (1988).

104. CUSTOMS ACT, § 164(j) (1989). Revenue Canada has issued its own set of administrative rulings, called D Memoranda, which provides the government's position on a wide variety of customs issues. The general areas of customs law in the Customs Act and the Customs Tariff relate to the following: licensing and regulation of customs brokers, all aspects of importing, including classification, valuation, entry requirements, movement and storage of goods, warehouses and duty free shops, origin of goods, which relate to marking and preferential tariff programs, abatements, refunds, draw-

Another source of statutory law is the Customs Tariff Act which sets forth the tariff schedules and certain basic rules for classification thereunder. It is under the Customs Tariff that one determines whether certain articles are prohibited or regulated at importation or exportation which, in turn, may determine whether violations of the Customs Act have occurred.

2. *Determination of Responsibility*

Canadian law on culpability and imputability is inconsistent. In theory there can be no crime without *actus reus* (criminal act) and *mens rea* (guilty mind or criminal intent). However, the 1985 Crime Code of Canada does not define *mens rea*. Rather it uses and implies a variety of definitions of intent, recklessness and negligence and uses presumptions of intent when intent is clearly absent.

Administrative penal law has no strict requirement of *mens rea*, but it does require reasonably conforming behavior. The lack of a strict requirement of *mens rea* make a finding of responsibility against the defendant easier. The distinction with the *mens rea* requirement in a criminal case facilitates prosecution of such cases and conversely exacerbates the defense. The only general rule of culpability is provided in section 153(c) which states that no person shall "wilfully" evade or attempt to evade compliance with any provision of the Customs Act. Managers of major enterprises, particularly corporations, were in the past rarely ever held responsible for what could be defined as corporate offenses. However, in recent years they have been fined.

Where a corporation commits an offense, any officer, director or agent of a corporation who "directed, authorized, assented to, acquiesced in, participated in" the commission of the offense is personally liable on conviction to punishment.[105]

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backs and remission of duties, exportation, enforcement, and, regulations.

The main areas of infractions, or offenses as they are called in the *Customs Act*, cover the following: making false or deceptive statements; evasion of duties; misdescription of goods in accounting records; keeping, acquiring, disposing of goods illegally imported; possession of certain blank customs documents; opening or unpacking unreleased imported goods; breaking or tampering with customs seals; certain illegal actions of corporate officials; smuggling; and a general offense relating to the contravention of certain enumerated provisions of the Customs Act. Finally, the Act contains an all inclusive offense which provides for the contravention of any provision of the Customs Act where punishment is not elsewhere provided.

105. *Id.* at § 158.

Grounds for Exoneration

No general rules exist in Canada to mitigate circumstances and grounds for exonerations. Instead, the courts proceed from case-to-case. Similarly, Revenue Canada has wide latitude in determining the amount of a monetary penalty or whether seized goods will be forfeited. For example, when Revenue Canada has determined that a violation under the Customs Act has in fact occurred under section 131, Revenue Canada *may* release seized goods upon the payment of a monetary amount. This payment may be any amount that the Minister determines, as long as it does not exceed a ceiling amount.[106] Publicity of court actions is viewed as a fundamental principle in the Canadian judicial process and is utilized unless special circumstances exist. Unless limited by statute, the use of publicity by an administrative tribunal is discretionary.[107] Revenue Canada makes its determination of the amount assessed on a case by case basis, with the opportunity for judicial review.

Sanctions

The courts and administrative agencies have available a wide range of sanctions, such as the right to seize smuggled goods and contraband, and to impose fines or prohibitions. A number of federal laws provide for the possibility of suspended sentences, intermittent incarceration, placement in a community-based home, restriction of professional activities, probation, parole, restitution, forfeiture of property, and a variety of prohibitions.

Administrative agencies have authority in many cases to impose the above-mentioned and other sanctions (i.e., seizure of contraband, suspension of licenses, and fines). In Canada administrative agencies can only indirectly enforce sanctions. The most immediate way Revenue Canada may impose a sanction where it believes a violation has occurred is to seize the goods which gave rise to the violation. The Customs Act provides for seizure of such goods as well as any conveyance used whether at or after the time of the contravention.[108]

Two major types of criminal punishments are set forth in the Customs Act. Summary conviction is the type of sanction which is used in the vast majority of criminal customs violations in Canada. A

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106. *Id.* at § 133.

107. *See Re* Millwood v. Public Service Commission (1974) 2 F.C. 530, 49 D.L.R. (3) 295.

108. CUSTOMS ACT at § 110.

person who is guilty of an offense punishable on summary conviction is liable to a fine of not more than $2000 and not less than $200 or to imprisonment for a term not exceeding 6 months or to both.[109] Courts in Canada frequently and effectively use publicity as a form of sanction.

Indictment is used in those cases where aggravating circumstances are present, such as where a violation is incurred by a repeat offender or the value of the prohibited goods is very large. A person who is guilty of an indictable offense is liable to a fine of not more than $25,000 and not less than $200 or to imprisonment for a term not exceeding five years or to both.[110]

Jurisdiction to Impose Sanctions

The enforcement of sanctions is divided among federal and provincial authorities and administrative agencies. The National Revenue for Customs and Excise enforces the provisions of the Customs Act and has been given broad authority to determine if violations have occurred thereunder. A Customs officer may search any person who has arrived in Canada, who is about to leave Canada, or who has had access to an area designated for use by such persons if he has reasonable grounds to suspect that the Act was contravened.[111] Similarly, a Customs officer may examine goods which have been imported into Canada or are about to be exported from Canada in order to enforce the Act and the regulations or any other act of parliament. He also may, upon reasonable grounds, open and examine any piece of mail that weighs over thirty grams.[112] Revenue Canada may place an officer on any conveyance arriving in Canada from outside Canada in order to do anything to facilitate the administration or enforcement of the Customs Act or any other act of parliament.[113]

Revenue Canada also may authorize any person to make an inquiry into a matter for any purpose related to the enforcement and administration of the Customs Act.[114] The use of search warrants is available which gives Revenue Canada the power to search any building, receptacle, or place connected with the violation of the Customs Act upon

109. *Id.* at § 160.
110. *Id.* at § 161.
111. *Id.* at § 98.
112. *Id.* at § 99.
113. *Id.* at § 100.
114. *Id.* at § 109.

reasonable grounds.[115] With the search warrant, Revenue Canada may seize any goods or conveyances involved in a contravention of the Customs Act, as well as anything which will afford evidence in an action under the Customs Act.[116]

Whenever Revenue Canada believes that a person has violated the Customs Act in respect to any goods or conveyance, it may demand payment of an amount of money if the goods are not found or seizure would be impractical. This amount may be equal to the aggregate of the value for duty of the goods and the amount of any duties due thereon, or any lesser amount as the Minister may direct.[117]

When a sanction such as seizure or demand for payment has been issued under section 124, the concerned person may request a decision of the Minister under section 129 by giving written notice to the officer who made the seizure or issued the notice for payment. Upon receipt of such notice, the Minister must provide the person requesting such decision a written notice describing the reasons for seizure or the request for payment. Thereafter, the person may furnish evidence on his behalf within 30 days.[118] Under section 131, the Minister must then consider and weigh the circumstances of the case and decide whether there was a contravention of the Act which warranted the seizure or the notice for payment.

The decision of the Minister under section 131 is not subject to review except by the federal courts, as provided in section 135. Within ninety days of being notified of the Minister's decision, the person may appeal the decision by way of action to the Federal Court-Trial Division in which that person is the plaintiff and the Minister is the defendant.

Where Revenue Canada determines that a contravention of the Customs Act has not occurred, it must release from custody any seized goods and refund any moneys paid, with interest.[119] In cases where a contravention has occurred, Revenue Canada may either: return the goods or conveyances seized upon the receipt of an amount of money;[120]

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115. *Id.* at § 111.

116. *Id.* Sections 117-121 of the Customs Act set forth a framework for the return of goods, conveyances, animals, and perishable goods seized. Customs may release goods seized upon receipt of an amount of money equal to the aggregate of the value for duty of the goods and the amount of any duties due thereon. *Id.*

117. *Id.* at § 124.

118. *Id.* at § 130.

119. *Id.* at § 132.

120. *Id.* at § 133(2). Goods may be returned upon the payment of an amount of money of a value equal to the aggregate of the value for duty of the goods and

remit any portion of any money or security charged; and where necessary, demand additional money as the circumstances warrant.[121]

A third party who claims an interest in seized goods as owner, mortgagee, lien-holder, or holder of like interest, may apply to a court for an order declaring that his interest is not affected by such seizure and declaring the nature and extent of his interest at the time of the contravention or use. The court which issues this order is not a federal court, but rather one of the provincial courts set forth in section 138(5).[122]

When a person owes the government an amount rising from a violation under the Customs Act and fails to satisfy that debt, several means are available for enforcing such an infraction. First, after the government has notified a person of any amount owed (except under sections 124 or 131(1)(c)) and that person has appealed the notice of arrears in accordance with section 144, a judgment may be obtained in federal court.[123] Liens also may be placed on goods for unpaid duties[124] and the government may garnish amounts owed by the government to a person who is indebted under the Customs Act.[125] Many courts have held that administrative discretions given statutorily are partly or wholly unreviewable.[126]

Rules of evidence

In Canada, the rules of evidence in criminal proceedings are based on the adversary system. The rules of evidence in administrative penal law proceedings, on the other hand, are flexible and variable, but influenced by the adversary system. In contrast to the civil law system,

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any amount of duties assessed thereon, or any lesser amount. For conveyances, the payment may equal the value of the item at the time of seizure, or any lesser amount. § 133(3).

121. *Id.* at § 133(4). This amount may not exceed an amount equal to the sum of the value for duty of the goods and the amount of duties assessed thereon. With respect to conveyances, the amount may not exceed an amount equal to value of the conveyance at the time of seizure or the service of notice under section 124. § 133(5).

122. *Id.* at §§ 138-141.

123. *Id.* at §§ 143-145.

124. *Id.* at § 146.

125. *Id.* at § 147.

126. *See* Robert F. Reid & Hillel David, ADMINISTRATIVE LAW & PRACTICE 312-313 (1978) (citing cases holding that actions by various administrative officials were shielded from judicial review). In the customs area, a court has refused to review the Minister of National Revenue's determination on the value of goods for customs duties. *See* R. v. Weddel Ltd., Ex. C.R. 97 (1945) 4 D.L.R. 385.

the judge takes no initiative in the conduct of the trial or other proceedings, and takes limited initiative during the trial. The counsel argue about procedure, take procedural steps, and seek and present evidence. The judge rules about the points of procedure and the admissibility of evidence. When the trial is conducted before the jury, the judge summarizes the evidence and explains and applies the law but the jury decides on the facts of the case.

The adversary system does not fit the administrative penal law. However, its influence strengthens the proclivity to hear as fully as possible the accused's point of view and evidence in its support. Very few administrative decisions are reviewed by the federal court in Canada. The burden of proof in a prosecution under the Customs Act with respect to the identity of origin of any goods, the circumstances surrounding the importation or exportation of any goods, the payment of duties, or the compliance with the Customs Act with respect to any goods lies on the accused, if the government establishes that the facts of the case are within the knowledge of the accused or are or were within the accused's means to know.[127]

Revenue Canada may release all types of evidence obtained for purposes of enforcing the Customs Act on the order or subpoena of a court of record. Also, Revenue Canada may provide documentary evidence obtained under the Customs Act to the person by or on behalf of whom the item was provided, or to that person's authorized agent.[128] As well, Revenue Canada may use the search warrant to gather evidence when it believes that there has been a contravention under the Customs Act.[129]

3. *Relationship Between the Two Systems*

Even after the establishment of the federal court, federal and provincial courts hearing appeals from penal administrative decisions often encroach on each other's jurisdiction. However, there has been more consistency in their procedure and decisions. Appeals of seizures and notices of payments under section 124 are pursued in the federal courts.[130] Appeals from other fees and amounts owed are also within the jurisdiction of the federal courts.[131] Third-party claims under section

127. *Id.* at § 152(4).
128. *Id.* at § 108.
129. *Id.* at § 115.
130. *Id.* at § 135.
131. *Id.* at § 144.

138 are appealed within the provincial court system. The criminal punishments of summary judgment and indictment are instituted, heard, tried, or determined in the place in which the offence was committed or in which the accused is apprehended or is located.[132]

Cumulative or Alternative Operations

When an administrative decision is deemed by an aggrieved person as unfair, illegal, or arbitrary, the person can appeal to the court. Noncompliance with an administrative sanction does not constitute a criminal offense in Canada, but the same act may be subject to administrative and/or criminal sanctions.

Under the Canadian Customs Act there can be a plurality of sanctions concerning the same act. The result of an act of smuggling, for example, can result in seizure of the goods in an *in rem* procedure, while a separate *in personam* action can be instituted to imprison the wrongdoer. Thus, the civil sanctions can be pursued simultaneously with the criminal sanctions. If a penalty or fine is not paid, the government can institute forfeiture proceedings and dispose of the seized merchandise to satisfy the outstanding debt. Liens and garnishments of payments due a citizen are both mechanisms that the government can utilize to enforce a civil penalty.

No criteria explicitly demarcates the two systems of application of penal sanctions. There is no consistency in the nature of the values protected, or harm or danger established. The gravity of the infraction is probably the best, albeit still uncertain, criteria. Different agencies have different sanctions at their disposal, some severe (detention, confiscation, extradition), some minor. The two systems appropriately coexist in Canada. Administrative sanctions are applied swiftly and effectively in some major and most minor cases by officials well acquainted with the operation of the agency they serve. The courts have more power to apply the law.

Under the Customs Act, no criteria explicitly demarcates the penal administrative law from the criminal law. Revenue Canada will move from the former to the latter on a case by case basis. Both qualitative and quantitative criteria are considered when determining whether to impose criminal sanctions in a particular case. For example, the undeclared entry of three bottles of spirits for personal use may result in seizure of the alcohol and the issuance of a small administrative fine to the wrongdoer. A person importing a larger amount of spirits with

132. *Id.* at § 162.

the intention of selling it could result in an indictable offense, especially if the wrongdoer has a prior bad record for the same violation.

C. *Mexico*

Customs law in Mexico fits into the administrative penal law classification. There is a depenalization of some of the offenses, a heavy reliance on monetary fines, and confiscation; and sanctions are provided as retributive reactions to violations of the primary regulations. In addition, Mexico has followed the international trend toward removing some customs violations of minor social importance from the traditional criminal law.

Enforcement of customs law relies largely on imposition of penal responsibility on the basis of personal fault (intent or negligence). The severity of customs sanctions emphasizes proportionality to the gravity of the infraction. The defenses of justification and excuse are available in the Mexican adjudication of alleged criminal violations of customs laws.

1. *Substantive Law Issues*

Customs law consists of customs laws supplemented by the Fiscal Code of the Mexican Federation. The substantive law of customs crimes is contained in Title VII of the law.[133] In contraband cases, the Fiscal Code is considered to be a special law which is applicable to federal cases (pursuant to art. 6 of the Penal Code of the Federal District) and thus regulates this type of illegal conduct. In criminal cases involving contraband or theft of merchandise in tax or criminal courts, the Secretary of the Treasury must declare that the federal treasury has suffered or could suffer the loss of goods, or in the cases of contraband, that taxes were not paid, or that trafficking of illegal substances was involved.

Under the Fiscal Code, the crime of contraband is committed when one introduces to the country or exports from it merchandise, while omitting the total or partial payment of the duties, charges, and taxes

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133. Customs Law of December 28, 1991, as amended by law of January 10, 1983, Law of January 10, 1984, Law of January 10, 1985, Law of January 10, 1986, Law of January 10, 1987, Law of January 10, 1988, Law of January 10, 1989, Law of January 10, 1990, and of January 10, 1991. For a discussion of customs law and customs crime, *see* MAXIMO CARVAJAL CONTRERAS, DERECHO ADUANERO (1986), on which this account relies heavily. *See also* MANUEL RIVERA SILVA, DERECHO PENAL FISCAL (1984).

that are due.[134] The crime of contraband is also committed when one imports or exports merchandise without the permission of the competent authorities when required.[135] It is also considered a crime when one imports or exports illegal substances, or if foreign merchandise is transported from the free zones to the rest of the country.[136] A person who has in his or her possession illicit substances, or substances whose trafficking is banned, is also guilty of the crime of contraband.

Similarly, the law regulates conduct which does not contain all the elements of the crime of contraband, but where the same legal property rights have been violated. A violation of customs law occurs when one acquires and/or has in her possession foreign merchandise that is not for personal use, or if one sells the merchandise without proper documentation to prove its legal status. It is illegal for merchandise to be misrepresented by documentation, or for it to be represented by authentic documentation but different from what is required by law.

Title VII criminalizes the failure to present required documents to the customs authorities, the failure to present the documents or information required by the customs authority within the specified time period, and the presentation of documents with inexact or false dates.[137] A person who, in his capacity as a functionary or public employee of the Federation of the States, of Federal District or Municipalities, authorizes the import of some vehicle, furnishes documents or plaques for its circulation, grants matriculation or abandonment, or intervenes for its inscription into the Federal Vehicle registration, or when the import of such vehicle has occurred without prior permission of competent federal authorities, has committed the crime of contraband.

It is also a crime to have in one's possession a vehicle from abroad imported without permission into Mexico, or in the case of autos or trucks, models from the last five years. It is illegal for a person who has acquired a vehicle imported for transit in the free zones or border areas, or that has been granted permission to circulate in a cited border area, to use that vehicle if the person does not use them or reside in the specified zones or areas.

The concealment of contraband suggests the idea of realization of criminal activity while benefiting the offender or a third person. The Fiscal Code states that the concealment of contraband provides that such actions constitute participation in the crime. A person is responsible

134. Fiscal Code of the Federation of Mexico, article 127, (I) (1983).
135. *Id.* at art. 27 (II).
136. *Id.* at art. 127.
137. *Id.* at art. 136.

for concealment even if there was no prior agreement or participation in the crime, as long as the actual crime took place. If one transfers or hides an object of crime with the idea of personal gain, or who understands the illegality of the proceeds, or helps another hide or transfer it for personal gain, then he/she is guilty of contraband. Anyone who assists an accused person in eluding an investigation from authorities, or hides the actions of the accused, or destroys, alters or conceals evidence of the crime, including any profits from the crime, is guilty of contraband. Such concealment will be punished by imprisonment of three months to six years.

The Mexican customs law criminalizes violations of the requirements to maintain control, security, and safekeeping of the merchandise of foreign commerce.[138] Violations may include failure to use proper labels, locks, stamps, and other means of security required by law or regulation.[139] A person commits a customs crime if the person does not properly place warnings on the package that merchandise is contained that is explosive, flammable, contaminating, radioactive or corrosive.[140] The captains or pilots of vessels and airplanes with international services and business to which they belong violate the law on customs control and security when they unjustifiably arrive or land in an unauthorized place.[141]

The Fiscal Code establishes a continuing crime when there is a plurality of conduct and acts, with a unity of criminal intent and identity of legal disposition. One who commits continuing customs crime, even of a small nature can receive a sentence that is increased by as much as one-half the normally applicable sentence. Persons will be held responsible for any intention of attempting to commit a crime, including execution of actions directed towards realizing the crime, even if execution was stopped by outside forces acting upon the agent. If

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138. *Id.* at art. 138.

139. *Id.* at art. 138, I.

140. *Id.* at art. 138, III.

141. *Id.* at art. 138, VII. Persons are held responsible for the crime of contraband who have helped or assisted generally or who have specifically orchestrated the execution of the act. The law defines such actions as constituting the crime of contraband in the following circumstances: when there is understanding of the illegality of the act; when there is comprehension of the action as it is described by the law; when one commits the crime with another; when one acts as an instrument for the completion of the crime; when one induces another under false pretenses to commit the crime; or if according to a prior agreement, a person helps someone after the execution of the crime has taken place. *Id.*

the actor stops the execution of a crime, or attempts to hinder its completion, sanctions are not imposed.

Sanctions

In contraband crimes, the Secretary of the Treasury formulates the damages and then confiscates property in the amount equivalent to the damages caused. This result applies only in criminal procedures which have not rebounded into administrative procedures. In these crimes the court does not impose pecuniary sanctions. By virtue of the administrative authority, the Treasury will order effective the omitted contributions, the charges and administrative corresponding sanctions. To determine the value of merchandise and the amount of duties omitted, authorities will take into account the amount of the items if they are produced before smuggling. The penalty for contraband is from three months to six years, if the amount of customs duty omitted does not exceed approximately $10,000. If the amount of customs duty which was not paid exceeds the before mentioned amount, the penalty increases from three to nine years. Imprisonment of three to nine years is proscribed for illegal trafficking of merchandise which has been prohibited by the Federal Executive under the second paragraph of Article 131 of the Constitution of Mexico and its regulatory law. In all other cases of illegal trafficking of merchandise, the sanctions range from three to nine years imprisonment. The penalty is slightly less for crimes where it is not possible to determine the amount of duties omitted when smuggling merchandise without permission from the competent authorities, generally 3 to 6 years. An attempted crime is punished with a sentence of two-thirds the duration of the punishment which would have been levied against the agent if the crime had been committed.

Grounds for Exoneration

Prosecution of customs crimes can be halted if the Secretary of the Treasury requests that they be stopped, and if the defendants pay the duties lost as a result of their actions. This petition must be realized before the Federal Public Ministry recommends prosecution.

In the case of an infraction pursuant to the Article 127.1 of the Fiscal Code involving nonpayment of duties, when the lack of payment was due solely to arithmetic errors, the customs authority will take corrective action.[142] An offender can receive exoneration when the

142. *Id.* at art. 103.

inexact classification of duties is due only to the genuine differences of a technical nature in the interpretation of the tariffs contained in the laws of the general import or export duties, provided that the nature and other characteristics of the merchandise have been correctly manifested to the authority.[143]

Exoneration will apply when an offender has not received permission from the competent customs authority, while the merchandise remains on deposit before the customs. In this case, the customs authority will withhold the merchandise until permission is received or the requirement withdrawn.[144]

The legal status in the country of foreign merchandise is proved by: customs documentation required by law; the bill of sale required by the Federal Fiscal Authority; the bill required by a person inscribed in the Federal Register to Contributors; and the document of carriage which contains the dates of the remittance, and, if applicable, the destination and the effects that are covered.[145]

V. PROBLEMS AND SOLUTIONS

A. No States Prosecute

One of the problems that results from the parallel existence of different jurisprudence and criminal laws in different countries and

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143. *Id.* at art. 133, II.

144. *Id.* at art. 133, III, IV. No sanctions will be imposed on merchandise cataloged as personal use. The following merchandise is considered to be for personal use: food and drink for consumption, clothes and other personal objects, except jewelry; cosmetics, sanitary and cleaning products, lotions, perfumes, medicine and medical apparatus that the owner personally utilizes; domestic articles for residences provided always that they are limited to no more than two of the same articles. *Id.*

145. *Id.* at art. 136, I and art. 128. A person is presumed to commit the infraction of contraband when: a person unloads surreptitiously foreign merchandise from the means of transport; a person deals with foreign merchandise without documents, or when a person unloads merchandise and puts it on boats which operate exclusively cabotage, except if the person can demonstrates that they were lost in an accident or disembarked in a place other than the national territory; an airplane with foreign merchandise lands in a place not authorized for international traffic, except by cause of a major force such as a storm; the foreign merchandise in domestic or international transit is not unloaded in the authorized place, so that it may clear customs; a person introduces or brings from the country hidden merchandise or with artificial attributes, so that its natural state can pass customs unknown, if its importation or exportation is prohibited or restricted or by itself should require payment of foreign commerce taxes, and a person introduces into the country merchandise or brings it by itself to an unauthorized place. These presumptions under Mexican law save the prosecution from its burden of proving the *mens rea*, thereby facilitating the work of the prosecution in contraband cases.

from the use of different bases of criminal jurisdiction is that there may be crimes that no state criminalizes. Consequently, the offender escapes or both the state where the crime was committed and the state where the suspect is a resident may claim jurisdiction when an offender crosses a border, so that a customs crime perpetrated by one or a group of persons may escalate into a conflict of international law.

It appears that, due to the gradual extension of extraterritorial jurisdiction in criminal cases, even by the common law countries of the U.S. and Canada, and because of the doctrines of objective and subjective territoriality, as well as the floating territorial principle of asserting jurisdiction over crimes committed on a national vessel, customs and quasi-customs offenses will go uncovered only infrequently by laws of one of the three countries concerned.

Nevertheless, to assure such potential lacunae are identified and remedied and due to the increased traffic of goods and persons, the enforcement offices of the customs authorities in the three countries should as a matter of course examine the enforcement of their respective customs law and discuss potential problems and prospective means of remedying them. This should occur regardless of the outcome of the discussions of a North American Free Trade Agreement. Indeed, pursuant to the bilateral mutual assistance in customs matters agreements between Mexico and the U.S., and between each of the three governments, a working group could be established. This has occurred, for instance, under the Mutual Legal Assistance in Criminal Matters Agreement (MLAT) between the U.S. and Italy. The working group has focused on specific problems, such as narcotics, organized crime, and terrorism.[146] A working group of customs officials could focus on cooperation in enforcement matters such as contraband, documents fraud, narcotics, currency violations, identification and recovery of stolen cultural property, trafficking in endangered species, trade in counterfeit goods and violation of intellectual property laws, and so forth. The groups may also want to discuss potential harmonization of documents. Any customs working group would have a brief that would not supercede, but rather complement other bilateral enforcement groups.

Alternatively or in addition, the three governments could establish a common working group(s) to which the customs authorities of each

146. For a discussion of the establishment and operation of the working group between the U.S. and Italy and less formal working groups on anti-terrorism between the U.S. and France, *see* Bruce Zagaris and David Simonetti, *Judicial Assistance Under U.S. Bilateral Treaties*, LEGAL RESPONSES TO INTERNATIONAL TERRORISM U.S. PROCEDURAL ASPECTS 219, 227-28 (M. Bassiouni ed. 1988).

of the three governments would belong. Such a working group could focus on simultaneous investigations, especially where third countries might be involved or where specialized industries are involved, and the governments may want to exchange information and utilize specialists. Such working groups are used to conduct simultaneous examinations in the international tax area.[147]

B. International Legal Assistance

To strengthen cooperation in customs matters, the three countries should review the operation of customs cooperation. In connection with the review, the legal mechanisms should be carefully considered. The operation of the Mutual Assistance in Criminal Matters Agreement (MLAT) between the U.S. and Canada would be considered. The governments might want to consider the operation of the mutual assistance in customs cooperation agreements. Article XVIII of the U.S.-Canada MLAT provides that the two government will consult "as appropriate to develop other specific agreements or arrangements, formal or informal, on mutual legal assistance."[148] The two governments can agree on such practical measures as may be necessary to facilitate the MLAT's implementation. The annex specifically applies to enforcement of environmental and wildlife crimes. The manner in which the annex is likely to be implemented is that periodically the law enforcement officials responsible for both international cooperation and environmental cooperation will meet to discuss specific legal areas in which environmental problems have been raised and design solutions. This has begun already between the U.S. and Mexico outside of the context of the MLAT as a result of the pressure by environmentalists for improved procedures to stop cross-border environmental problems. Among the areas of the environment that are likely to be discussed within the annex of the U.S.-Canada MLAT are: enforcement of the Convention on the International Trade in Endangered Species,[149] the

147. For a discussion of simultaneous tax examinations in the context of tax information exchange agreements, *see* Bruce Zagaris, *New Exchange of Information Agreements*, FOREIGN INVESTMENT IN THE UNITED STATES: A PRACTICAL APPROACH FOR THE 1990s 247, 261 (PLI 1990).

148. Treaty With Canada on Mutual Legal Assistance in Criminal Matters, Mar. 18, 1985, U.S.-Canada, art. XVIII(i), S. TREATY DOC. No. 14, 100th Cong., 2d Sess. (1988) [hereinafter U.S.-Canada MLAT].

149. For background on the need for better coordination between the U.S. and Canada in enforcing CITES, *see* Ronald I. Orenstein, *The Federal Government's Role in the Protection of Endangered Species*, SUSTAINABLE DEVELOPMENT IN CANADA: OPTIONS FOR LAW REFORM 235-37 (The Canadian Bar Assoc. Committee Report 1990).

World Heritage Convention,[150] and the Convention on Wetlands on International Importance Especially as Waterfowl Habitat;[151] enforcement of cross-border air and water pollution; waste-dumping;[152] management of transboundary fishery resources;[153] and perhaps joint training of officials, especially officials whose job is to enforce environmental crimes, but whose expertise is not environmental law (i.e., customs and border officials).

Another important issue will be to properly structure cooperation under the annex. In conjunction with the conclusion of other MLATs, such as the Italian-U.S. MLAT in 1983, the contracting states have provided for periodical meetings to cooperate on certain crime problems (i.e., drugs and organized crime in the case of the U.S. and Italy). The Italian-U.S. working group has broadened its agenda to include cooperating in combatting terrorism.[154]

The U.S. and Mexico may want to review measures to deal with the implementation of an MLAT since the lengthy impasse that precluded the Mexican government from exchanging its instrument of ratification has finally been resolved.[155] Customs authorities might find it useful to review the many agreements that exist and provide for assistance in criminal and enforcement matters that the customs authorities either implement or may find relevant and useful in the performance of their duties and interaction with other officials.

The recent bilateral agreement between Canada and Mexico regarding mutual assistance and cooperation between their customs

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150. 11 I.L.M. 1358; T.I.A.S. no. 8226 (1972).

151. 11 I.L.M. 963 (1971).

152. *See, e.g., U.S. Indictment of Defendants in Crossborder Waste Dumping Signals New Enforcement Cooperation with Mexico*, 5 INT'L ENFORCEMENT LAW REP. 211 (May 1990) (for a discussion of how the U.S. and Mexico have cooperated on crossborder waste cases).

153. For a discussion of the need for improved international and bilateral regulation and management of fisheries resources, *see* Richard Paisley, *International Regulation of Fisheries*, SUSTAINABLE DEVELOPMENT IN CANADA: OPTIONS FOR LAW REFORM 221, 228-29 (1990).

154. For a discussion of the formation of the working group, *see Meese Addresses Italy-USA-Switzerland Conference*, 1.2 INT'L ENFORCEMENT LAW RPTR. 29 (Oct. 1985); Bruce Zagaris and David Simonetti, *Judicial Assistance Under U.S. Bilateral Treaties*, M. Cherif Bassiouni, LEGAL RESPONSES TO INTERNATIONAL TERRORISM U.S. PROCEDURAL ASPECTS 219, 226-27 (1988).

155. For background on the impasse and controversy that caused the Mexican government not to exchange its instrument of ratification for more than one year, *see* Zagaris (ed.), DEVELOPMENTS IN MEXICAN-U.S. LAW ENFORCEMENT COOPERATION: WHAT THE PRACTITIONER NEEDS TO KNOW 22-24 (1990).

administrations[156] includes provisions not found in earlier customs agreements which will encourage a higher level of customs cooperation. For example, the Canadian and Mexican customs administrations are directed to communicate immediately on their own initiative, any information relating to the following: observations and findings resulting from the successful application of new enforcement aids and techniques; techniques and improved methods for processing travellers and cargo; and, new means or methods used to take action against customs offenses.[157] Although the 1984 U.S.-Canadian agreement[158] has two of these three provisions,[159] the 1976 U.S.-Mexican agreement[160] has not been revised to encompass this type of information sharing for enforcement purposes.

The requirement to exchange observations and findings of new enforcement aids and techniques, techniques and improved methods for processing travellers and cargo, and new means and methods to take action against customs offenses provide a framework in which customs officials disclose to each other new technology, laws, and processes. The exchange of information also occurs in the context of joint training and informal discussions and in the context of similar laws and shared traditions. Although the requirement in the agreements do not by themselves stimulate the information exchange, it facilitates such exchanges.

Similarly, the U.S.- Mexican agreement does not include a specific provision which directs the two customs services to cooperate in the research, development and testing of new systems and procedures, in the exchanging of customs personnel, and in coordinating the border facilities of the two countries.[161] Accordingly, the U.S. and Mexico may benefit by updating their mutual customs cooperation agreement to

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156. Agreement Between the Government of Canada and the Government of the United Mexican States Regarding Mutual Assistance and Co-operation Between Their Customs Administrations, signed at Mexico City, March 16, 1990, entered into force September 21, 1990.

157. *Id.* at art. VI(a)(iv)(vi).

158. Agreement Between the United States of America and Canada Regarding Mutual Assistance and Co-operation Between Their Customs Administrations, signed at Quebec, June 20, 1984, entered into force January 8, 1985.

159. *Id.* at art. XI.

160. Agreement Between the United States of America and the United Mexican States Regarding Mutual Assistance Between Their Customs Services, signed at Mexico City, September 30, 1976, entered into force January 26, 1979, T.I.A.S. 8642.

161. *See* Canadian-Mexican Agreement, *infra* note 156 art. II(1)(c); U.S.-Canadian Agreement, *supra* note 158, art. II(1)(c).

reflect the increased level of information sharing which has been negotiated in both of the Canadian agreements. In light of the increased trade among the three countries, the sharing and coordination of technology, manpower, and other resources will be vital for the enforcement efforts of each country's customs administrations.

Other bilateral enforcement cooperation agreements that impact on customs officials and which the customs authorities may find useful to review include: the agreement for return of stolen art;[162] the agreement for recovery of stolen vehicles and aircraft;[163] the bilateral narcotics treaty;[164] extradition treaty;[165] the tax information exchange agreement;[166] and mutual assistance in criminal matters agreement.[167] Since some of these agreements and enforcement efforts (e.g., simultaneous tax audits and exchange of routine bank records)

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162. Treaty of Cooperation Between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, entered into in Mexico City, July 17, 1970, entered into force March 24, 1971. For the texts and legislative history, *see* Franklin Feldman & Stephen Weil, ART WORKS: LAW, POLICY, PRACTICE 555-72 (1974). The U.S. Customs Services has issued regulations and import restrictions governing pre-Columbian art (part 12 of the Customs regulations to implement title II of Public Law 92-587).

163. Convention Between the United States of America and the United Mexican States for the Recovery and Return of Stolen or Embezzled Vehicles and Aircraft, signed on January 15, 1981, entered into force on June 28, 1983. For the text, a discussion of its operation by the U.S. Department of Justice and background to its operation, *see* Bruce Zagaris (ed.), DEVELOPMENTS IN MEXICAN-US LAW ENFORCEMENT COOPERATION, *supra* note 155, at 96-169.

164. Agreement on Cooperation in Combating Narcotics Trafficking and Drug Dependency, signed at Mexico Feb. 23, 1989, entered into force July 30, 1990, 29 I.L.M. 58 (1990).

165. Extradition Treaty Between the United States of America and the United Mexican States, signed at Mexico City May 44, 1978, 31 U.S.T. 5059.

166. Agreement Between the United States of America and the United Mexican States for the Exchange of Information with Respect to Taxes, signed in Washington on November 9, 1989, entered into force on January 18, 1990. For the text, *see* 5 Rufus van Rhoades and Marshall J. Langer, INCOME TAXATION OF FOREIGN RELATED TRANSACTIONS § 81.11; for a discussion of the agreement, *see* Michael J.A. Karlin & Paula E. Breger, *Exchange of Tax Information Between the United States and Mexico*, 6 INT'L ENFORCEMENT LAW REP. 69 (1990); Bruce Zagaris, *U.S. and Mexico Conclude Tax Information Exchange Agreement*, 5 INT'L ENFORCEMENT LAW REP. 413 (1990).

167. The Treaty on Cooperation Between the United States of America and the United Mexican States for Mutual Legal Assistance, signed at Mexico City on December 9, 1987. For the text see Senate Treaty Doc. 100-13 (100th Congr. 2d Sess., 1988); The Treaty Between the Government of the United States of America and the Government of Canada on Mutual Legal Assistance in Criminal Matters. For the text, *see* Senate Treaty Doc. 100-14 (100th Congr. 2d Sess., 1988).

only pertain to two of the three countries may want to discuss the feasibility and desirability of accession by the third government and/or negotiation of a similar agreement vis-à-vis the third government. In view of increased trade, commerce, and travel, the three countries may want in some cases to revise the relevant treaties, and perhaps apply all or part of them to the third government in appropriate cases.

An area that requires immediate improvement between customs authorities among the three governments is in the enforcement of the Convention on the International Trade in Endangered Species (CITES).[168] CITES operates by a system of permits, and proper enforcement requires that permits be examined and collected at border points by qualified personnel. This should be at designated ports of entry. Permits are examined by customs officers. In Canada, experts have criticized monitoring as woefully inadequate and as not correlated with the identical reports given by U.S. customs authorities.[169] In the enforcement of CITES and in the enforcement of other wildlife trade issues, experts have advocated that Canada strengthen its implementation of treaties, providing proper enforcement powers, coordination, and support.[170] In addition to CITES, the governments should consider their adherence to and enforcement of other conventions providing for environmental enforcement involving customs officials.[171] Enforcement of environmental and wildlife laws is also a matter of increased enforcement activity by the Mexican government[172] and of cooperation between the U.S. and Mexico.[173] The three governments should examine and try to harmonize legal sanctions against violators of international

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168. 12 I.L.M. 1085, T.I.A.S. no. 8249 (1973).

169. Ronald I. Orenstein, *The Federal Government's Role in the Protection of Endangered Species*, Sustainable Development in Canada, OPTIONS FOR LAW REFORM 231, 237 (1990).

170. *Id.*

171. The Conventions may include the World Heritage Convention, 11 I.L.M. 1358, T.I.A.S. no. 8226 (1972), and the Convention on the Conservation of Migratory Species of Wild Animals (the "Bonn Convention"), 11 I.L.M. 963 (1971).

172. *See* remarks by Mr. Sergio Reyes-Lujan, Undersecretary for Ecology Secretariat of Urban Development and Ecology (SEDUE), Government of Mexico, to a Congressional briefing on the North America Free Trade Agreement, March 21, at 6. He testified that Mexico has intensified its program of inspection and vigilance to control illegal traffic of all species. In 1990, it confiscated 700,000 specimens of wild flora and fauna.

173. For a discussion of the integrated environmental enforcement program, *see id.* and Bruce Zagaris, *Mexico-U.S. Initiate Border Environmental Cooperation*, 7 INT'L ENFORCEMENT LAW REP. 55 (1991).

treaties relating to wildlife. The lack of harmonization and unequal standards has led to disputes and cases in national and international fora concerning the catching and trade of shrimp and yellow fin tuna.[174] The formation of working groups within customs on environmental and wildlife issues would also meet the legitimate concerns of environmentalists who are demanding that environmental protection not be diminished for the sake of enhanced trade and have called for establishing working groups on the environment in the context of the FTA.[175] These working groups should be in part open for participation by citizens and nongovernmental organizations.[176]

An issue that overlaps international criminal and enforcement (e.g., quasi-criminal) cooperation and supranational criminal justice is the appropriate mechanisms and structure for the subsectoral cooperation. Environment is an example. The Canada-US MLAT has some provisions in the annex for such subsectoral cooperation while the Mexican-U.S. MLAT has no such provisions. However, in the context of the negotiation of (NAFTA), the U.S. Environmental Protection Agency (EPA) and the Secretaria de Desarrollo Urbano y Ecologia (SEDUE) released a working draft of the Integrated Environmental Plan. One chapter discussed the existing environmental institutional framework for the border area and the status of some of the environmental enforcement in place, and contemplated. Although there are a series of important bilateral and multilateral agreements, they do not provide clear and directly applicable enforcement mechanisms.[177]

The planning and coordination starts with regularly-scheduled meetings between the presidents of the two countries on a range of matters that include environment. Most importantly from a working

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174. For a discussion of the tuna controversy, *see* Sarah Barber, *U.S.-Mexico Tuna Fight Moves to GATT While U.S. Appellate Court Gives U.S. Environmentalists a Victory*, 7 INT'L ENFORCEMENT LAW REP. 58 (1991); and for the controversy on shrimp, *see* Lea F. Santamaria, *Shrimp Fishermen Fined in First Enforcement Proceeding While Turtles Complain About the Narrow Territorial Scope of the Endangered Species Act*, 7 INT'L ENFORCEMENT LAW REP. 268 (1990).

175. *See, e.g.*, Before the Subcommittee on International Economic Policy and Trade and the Subcommittee on Western Hemisphere Affairs of the House Committee on Foreign Affairs, 102nd Congress (1991) (testimony of Stewart J. Hudson on behalf of National Wildlife Federation.)

176. *See, e.g.*, The National Wildlife Federation's Position on Environmental Issues Related to the North American Free Trade Agreement (March 21, 1991).

177. For a discussion of the enforcement aspects of the plan, *see* Bruce Zagaris, *Mexico-U.S. Integrated Environmental Plan for Mexico-U.S. Border Area*, 7 INT'L ENFORCEMENT LAW REP. 318 (Aug. 1991).

level, the Mexican-U.S. planning activities occur within the framework of the Mexican-U.S. cabinet to cabinet Binational Commission, which brings together the highest levels of authority within the environmental agencies of both countries. At least annually, the Secretary of SEDUE and the Administrator of the EPA meet as part of the cabinet-level Binational Commission to further discussions involving cooperative environmental agreements between the two nations.

Another framework for cooperation is the 1983 Border Environmental Agreement which provides an annual meeting between the National Coordinators of the Agreement. The Mexican coordinator is the Under Secretary for Ecology of SEDUE and the U.S. Coordinator is the Assistant Administrator for International Activities of EPA. The foreign affairs ministries, the IBWC, and a host of representatives of other agencies of the two countries also participate.

Without question, effective transnational enforcement of environmental cooperation will be required just to keep pace with the new levels of trade and investment that will accompany the implementation of NAFTA. Institutionally, none of the many bilateral agreements provide substantial enforcement cooperation. For the most part, cooperation is limited to exchanging information and occasionally personnel. Because of the number of environmental issues and agreements that require serious enforcement cooperation (i.e., hazardous wastes, air, water, protection of flora and fauna, and endangered species), an urgent need for an enforcement cooperation or at least a Memorandum of Understanding (MOUs) on enforcement cooperation exists. Models exist in the areas of international securities and commodities futures trading enforcement, in which the U.S. has both agreements and MOUs.[178] An enforcement cooperation agreement is especially important since the Mutual Assistance in Criminal Matters Treaty between the two governments, which was signed on December 9, 1987, and was ratified by the Mexican government on January 8, 1988 has come into force in 1991 and has not been used much. The lack of enforcement mechanisms is exacerbated by the lack of understanding of each other's

178. For a background on these agreements, *see* Lisa L. Davis & Bruce Zagaris, *International Cooperation in a World Marketplace: Preventing & Prosecuting Commodity Futures Fraud and Abuses*, 15 NOVA L.R. 507-10 (1991); Michael Mann & Joseph Mari, *Current Issues in International Securities Law Enforcement*, WHITE COLLAR CRIME 1989 229 (ABA Nat'l Instit., March 1989); Bruce Zagaris, *U.S. Concludes First Agreements for Securities Enforcement Cooperation*, 5 INT'L ENFORCEMENT LAW REP. 466-67 (1989); Pamela Jimenez, *International Securities Enforcement Cooperation Act and Memorandum of Understanding*, 31 HARV. INT'L L.J. 295-311 (1990).

laws, the lack of experience in cooperation enforcement, and the air of uncertainty and some lack of trust that is inevitable in the context of the relations of the two countries. To overcome these difficulties requires at least an MOU on enforcement cooperation. Subsequently, a full-blown treaty would be required. Alternatively, enforcement cooperation provisions should be added to the bilateral agreements on the environment. However, this would be more time-consuming.

Another area in which cooperation enforcement should make provision is participation by non-governmental organizations. Such provisions would be unique since, normally, enforcement cooperation agreements are only between governments, and non-governmental parties are only objects and not subjects of such agreements. However, there is precedent in that the NAFTA environmental action plan provides for broadening public participation in the formulation and implementation of trade policy to ensure that efforts to liberalize trade are consistent with sound environmental practices.[179]

The three governments may want to consider the feasibility and desirability of more uniform approaches to policy and legislation. While the governments meet regularly in the form of a working group, they should also encourage the academic and business communities to continue to explore these areas. The facilitation of more uniform approaches to the enforcement of customs law and policy could also provide solutions for dealing with the comparative law problems when the customs laws of the three countries interact, particularly due to the nature of customs law as administrative penal law within the context of international criminal law.[180]

One of the goals of the establishment of working groups and supranational institutions as suggested above would be to identify and provide for rules to resolve conflicts between procedural and substantive laws and regulations. This should include discussion, mediation, and binding arbitration. Some thought should be given to allowing individuals to initiating the process for resolving investigations and cases in which such persons are caught.

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179. For background on the broadening of public participation in the formulation and implementation of trade policy to ensure that efforts to liberalize trade are consistent with sound environmental practices, *see* Bruce Zagaris, *NAFTA Environmental Action Plan Fortifies Fast-Track Success and Transborder Enforcement Efforts*, 7 INT'L ENFORCEMENT LAW REP. 203, 204 (May 1991).

180. *See, e.g.*, the draft resolutions in *The Legal and Practical Problems Posed by the Difference Between Criminal and Administrative Penal Law*, 59 REV. INT'L DE DROIT PENAL 523-25 (1988).

C. *Supranational Criminal Justice*

To close gaps in the operation of international legal assistance, some countries have moved to the third level where it is no longer a question of agreements between states, but of a shift in criminal law jurisdiction to institutions superior to individual states, so that rather than speaking of *international*, experts refer to *supranational* law and institutions. In the universal context, the international criminal law field has discussed the creation of an international criminal code and the establishment of an international criminal court. The parameters of cooperation in a supranational context, especially of the U.S., Canada, and Mexico, is limitless because of the magnitude and intensity of the issues that provide the need for cooperation. In the context of supranational criminal justice, customs can be part of the overall umbrella and/or it can be somewhat autonomous in terms of its own mechanisms and structures.

Regionally, in the context of integration, supranational institutions include the Council of Europe and the institutions of the European Community, which have been adopting directives and other instruments concerning matters as criminalizing money laundering, customs, and immigration violations.[181]

While the sensitivity to sovereignty, at least on the part of Mexico, and the absence of agreement on a free trade agreement may make closer cooperation in the form of supranational law and institutions premature, such supranational cooperation appears imminent. Already, Mexico and the U.S. cooperate in the form of common working groups in narcotics, border issues and environmental issues. Each of these groups has detailed programs and activities on enforcement, training, and joint operations. Similarly, the cooperation between Canada and the U.S. is extremely close on many issues.

One area in which exchange of personnel, information, and education would be useful is how the law enforcement officials of each country interact with their own counterparts. For instance, the existence of the Treasury Enforcement Compliance System (TECS), the "look out" maintained by customs and immigration at the border, the operation of the Financial Law Enforcement Intelligence Network (FINCEN) within Treasury, interagency task forces dealing with organized crime and narcotics, would be extremely useful for key officials of each

181. For a discussion of international criminal cooperation in Western Europe, *see* Scott Carlson and Bruce Zagaris, *International Cooperation in Criminal Matters: Western Europe's International Approach to International Crime*, 15 NOVA L.R. 551-79 (1991).

of the customs officials. Understanding the interaction of policies, objectives, and laws of related agencies would also be helpful. For instance, the detection, confiscation (or allowed entry in the case of setting up an organized crime operation) of pre-cursor chemicals, pilots, planes and vessels and the importance for major narcotics traffickers may be very important. Understanding the limits of the law, constitutional rights of individuals, politics surrounding the operation of customs laws and officials in the other countries would also serve the key officials from each of the three countries. The legal basis for such cooperation is provided between the U.S. and Canada already. The U.S.-Canadian MLAT states that the requested state may provide copies of any document, record, or information in the possession of a government department or agency, but not publicly available, to the same extent and under the same conditions as would be available to its own law enforcement and judicial authorities.[182]

In some cases such education already occurs in a multilateral sense. For instance, the Organization of American States (OAS) in cooperation with Canada, is providing training on customs relating to narcotics. A trilateral program on a range of customs cooperation matters would supplement this and other awareness-raising and training activities.[183]

One subject for discussion in a supranational institution is the policy of the three countries vis-à-vis all other countries. There are many common problems with which the three countries need to deal. For instance, many customs problems facing the U.S. and Canada, such as contraband (e.g., narcotics trafficking), false documents, and so forth, and which enter through its border with Mexico, actually may be stopped or reduced by a common policy of Mexico with Central America.[184] By actively identifying and suggesting solutions to some of these problems, the Executives and Legislatures, and eventually supranational authorities, may be able to deal and ameliorate the problems external to the territories of the three countries.

If the North American Free Trade Agreement becomes a reality, the three governments may want to consider establishing cooperation

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182. U.S.-Canada MLAT, art. XIII(2).

183. *See, e.g., Canadian Government and CICAD Host Workshop/Seminar for High-Level Drug Officials in Americas*, 6 INT'L ENFORCEMENT LAW REP. 221-22 (1990).

184. An example is in the area of narcotics policy. An effect of Mexican policy of interdiction and eradication is the use of Central American countries for the growing and transiting of drugs. Mexico has begun to play a leading role in shaping policies in Central America. *See* Bruce Zagaris, *Mexican Government Outlines New Drug Policy Initiatives*, 7 INT'L ENFORCEMENT LAW REP. 2-5 (1991).

emulating selected provisions of the Schengen Accord[185] and Convention,[186] whereby the European Convention on Mutual Assistance in Criminal Matters is supplemented, especially with respect to immigration and customs matters.[187] In this connection, an elaborate intelligence network is established[188] and mutual assistance is provided concerning infringements of their rules concerning excise duty, value added tax and customs duties.[189] Special measures and working groups are established concerning drugs,[190] firearms, and ammunition.[191] In particular, the infrastructure established to implement the Schengen Convention should be monitored closely by the three governments for possible emulation.

In the medium- and long-term, the three governments would be best to construct a framework in which to deal comprehensively with a wide range of criminal matters. The most efficient structure would probably be a regional organization, such as an Americas Committee on Crime Problems with the Assistant Ministers of Justice, with their assistants meeting on a regular basis to discuss and take action and cooperate against drugs, money laundering, customs, and a panoply of criminal justice problems.[192] Such an organization would be best established within an existing organization such as the OAS or perhaps the U.N. Committee for the Prevention of Crime and Treatment of Offenders in Latin America. The OAS is the organization that appears, for political, historical and infrastructure reasons, best suited.[193]

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185. Belgium-France-Federal Republic of Germany-Luxembourg-Netherlands: Schengen Agreement on the Gradual Abolition of Checks at Their Common Borders and the Convention Apply the Agreement, done at Schengen, June 14, 1985, 30 I.L.M. 68 (1991).

186. Convention Applying the Schengen Agreement of June 14, 1985, Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at Their Common Borders, signed at Schengen, June 19, 1990, 30 I.L.M. 84.

187. For a discussion of the Convention and its potential application to other integration efforts, *see* Zagaris, *Schengen Convention Points Way to Enhanced EC Criminal Cooperation*, 7 INT'L ENFORCEMENT LAW REP. 26-33 (1991).

188. Convention, Title IV, arts. 92-133.

189. Convention, art. 50.

190. *See, e.g.*, Convention, arts. 70-71.

191. *See, e.g.*, Convention, arts. 77-78.

192. *See* Bruce Zagaris and Constantine Papavizas, *Using the Organization of American States to Control International Narcotics Trafficking and Money Laundering*, 57 REV. INT'L DE DROIT PENAL 118 (1986).

193. *Id.*

Another series of potential mechanisms to consider in the medium- and long-term to strengthen cooperation in customs enforcement among the three countries would be to adopt some of the provisions of criminal cooperation adopted on December 18 at Maastricht, Netherlands, in the Treaty on European Union. In particular, in Title VI are Provisions on Co-operation in the Spheres of Justice and Home Affairs. The provisions deepen the process already under way in areas such as narcotics and terrorism, which the Trevi Group covered, fraud which was already under EC control, and immigration and customs, which the Schengen Convention already covered. It is worthwhile looking at these provisions in some detail for purposes of seeing some possibilities for cooperation between Mexico, the U.S. and Canada in customs and other related enforcement areas.

The three governments, universities with Mexican-U.S. studies, U.S.-Canadian, and Mexican-Canadian studies, and with international criminal law programs, should stimulate research and discussion on those issues. Politicians should begin the consultative process as well, so that political proposals receive considerations of citizens in the three countries. Shaping the course of relations among the three countries will test the ability of law to contribute positively to the dynamic change that is inevitable in this hemisphere.