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PANEL 4. ANTI-MONEY-LAUNDERING AND GOVERNANCE IN LATIN AMERICA

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Abstract

This paper is designed to provide a first approach to some questions raised by the Global Administrative Law Project concerning the anti-money laundering system, as a global governance project, and how it works in Latin America. We address some interactions between actors at the global, regional and local level. So we have organized our presentation according to those three spaces: 1) global standards, 2) regional efforts and 3) national experiences, where we present the contrast between Brazil and Argentina.

Key words: Money laundering, financial system, FATF (Financial Action Task Force on Money Laundering), GAFISUD, international bodies.

PANEL 4. ANTI-MONEY-LAUNDERING AND GOVERNANCE IN LATIN AMERICA¹

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This paper is designed to provide a first approach to the questions raised by the Global Administrative Law Project concerning the anti-money laundering system, as a global governance project, and how it works in Latin America. These questions can be organized in three main levels: 1) the global, 2) the regional and 3) the local.

The first section provides a general view of the development and spread of global standards concerning money laundering. It also describes the interaction with private sector initiatives, the creation of a worldwide network of financial intelligence coordination and the administration of sanctions for non-compliance.

Section two examines the regional space of Latin America, including the membership of Argentina, Brazil and Mexico of the FATF and the creation of GAFISUD - a regional FATF-style body -. It also describes some problems this organization has in practice.

In the third section we compare the contrasting trajectories of the local experiences of Brazil and Argentina. While the Brazilian experience shows how FATF

¹ We are very grateful to Professor Kevin Davis and other colleagues for their comments at the GAL conference in Buenos Aires on the paper we presented on the occasion. Comments are welcome at mairamachado@fgvsp.br and gjorge@udesa.edu.ar.

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standards were mainly used to improve local governance, especially to deal with corruption issues, the Argentine experience only shows instances of formal compliance and small improvements taken in response to serious threats of being excluded from global administrative mechanisms.

1. The Global

1.1. The anti-money laundering strategy

Although there is no single definition of money laundering, most descriptions refer to it as the process by which proceeds of illegal activities are concealed, enabling control and access to these assets, and providing a legitimate cover for the origin of the income.

The policy designed to curb this phenomenon caused a quiet revolution in criminal law and law enforcement theory. Instead of simply closing rackets that generate illegal income, the central objective has become to attack criminal profits after they have been earned⁴. The underlying theory is that this will eliminate both the motive and the capital for further crimes.

Originally designed by US policy makers as a pragmatic way to reduce the drug market, the anti-money laundering system was first expanded to control so-called enterprise crimes⁵ and soon after almost all crimes that generate profit.

In very broad terms, the strategy is composed of three main components:

First, prevention and detection: financial institutions and other relevant economic private actors (including some liberal professions) are expected to detect and prevent money launderers from entering their ill-gotten gains into the legal economy. They will do so by “knowing their customers”, performing “ongoing due diligence” over those

⁴ Naylor, T., Naylor, T. “Wash Out: A critique of follow-the-money methods in crime control policy, *Crime, Law & Social Change* 32: 1–57, 1999.

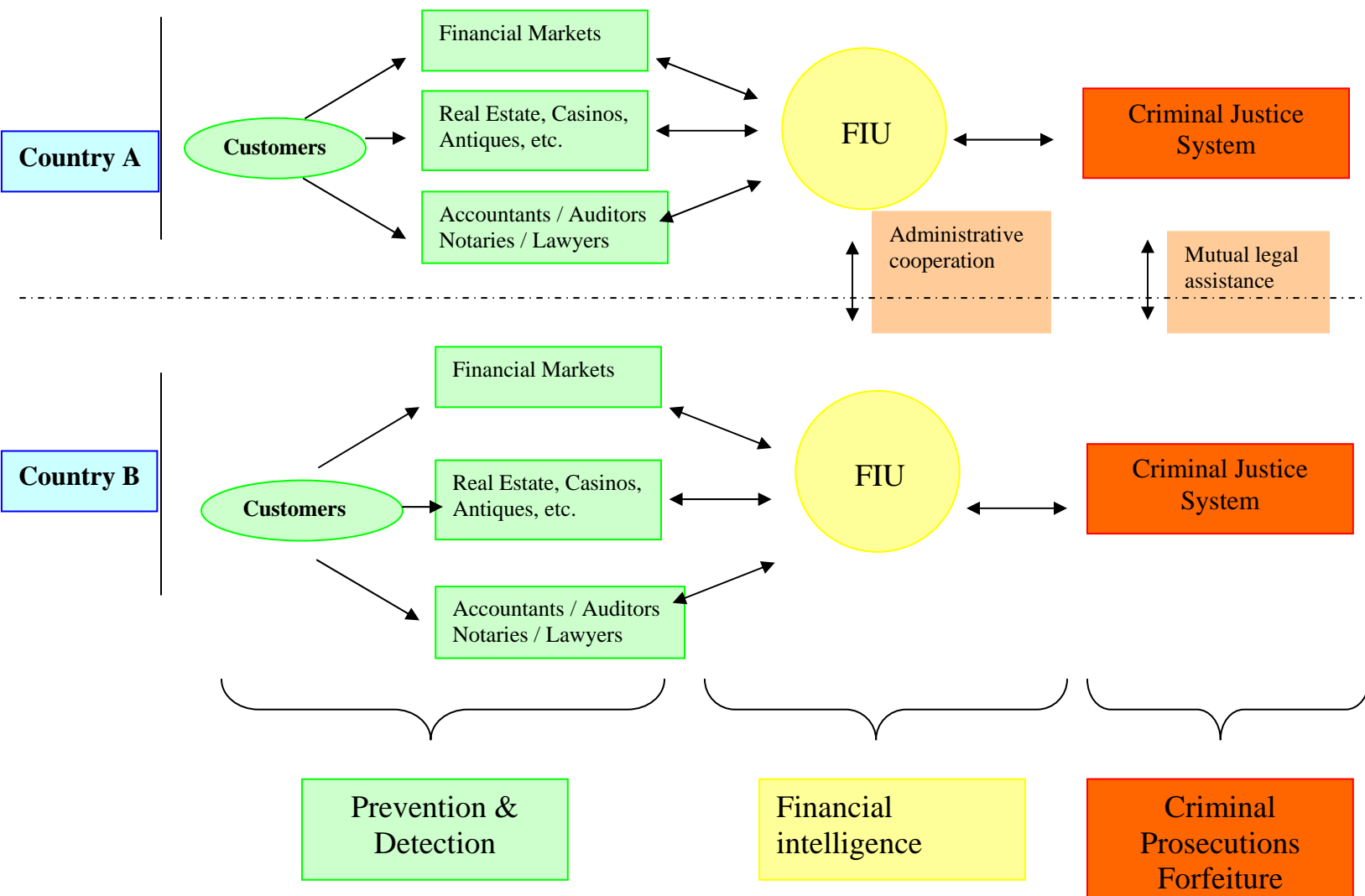
⁵ Enterprise crimes have been characterized as crimes consisting in producing and distributing illegal goods and services, creating illegal markets. Giving the fact that the illegal exchanges are consensual, there are not particular victim to make complains. Cfr. Naylor, T., cit.

clients that pose specific risks, and report “suspicious transactions” to a specialized, newly-created central agency, usually called the Financial Intelligence Unit.

Second, financial analysis carried out through brand-new centralized agencies, Financial Intelligence Units (FIUs) that will go deeper in investigating the reported transaction. To that end, FIUs are expected to have unrestricted access to domestic financial information and straightforward cooperation with their foreign counterparts.

Third, the criminal justice system will prosecute offenders and forfeit ill-gotten assets. To that end, the system has been equipped with new offences (money laundering) and new tools for seizing, freezing and confiscating assets, including new specific instances of international cooperation for following the money.

The strategy is captured by the following graph:



These are, as said, very broad terms. Going to the details, each prong of the strategy has its own theoretical questions and practical nuances.

Since this policy follows the money with the aim of cutting off the supply from illegal markets, it was quickly recognized that the approach would have to be comprehensive and implemented world-wide. The United Nations served as the first forum for a comprehensive binding instrument related to drug trafficking (the UN Vienna Convention of 1988). This treaty introduced the criminal law aspects of money laundering: freezing, seizing and forfeiture of proceeds of the drug-trade, criminalization of money launderers, mutual legal assistance and extradition.

A completely separate but parallel development was the emergence of customer due diligence (CDD). CDD emerged as a matter of prudential law and risk management concepts within financial institutions. The theory is that understanding the customer's business and conducting diligence checks is the most effective way of diminishing financial risks and legal exposure. The Swiss experience in self-regulated codes of conducts for banks (with guidance on customer identification, offshore companies, and beneficial ownership) influenced some international texts such as the Basel Statement of Principles of 1988, where bank supervisors agreed for the first time on the risks associated with the abuse of the financial system where '*money derived from criminal activity*' is involved⁶

In 1989, and after some compromises regarding its scope of work, the USA, UK and France, acting within the G7 context, were instrumental in establishing the **Financial Action Task Force** as the international major agenda-setter in antimoney laundering issues. All OECD members are FATF members, plus some other developing countries.

FATF created 40 Recommendations in 1989, whose scope was substantially enlarged in 1996 and 2003. They constitute the world wide recognized standards against money laundering and they are basically the result of a merging of the developments in criminal law and in financial law summarized above.

1.2. Spreading the global standards: the international bodies.

In order to ensure compliance with FATF standards, several existing as well as newly created institutions have been used at both regional and sectorial levels.

⁶ Pieth, M., "Anti Money Laundering, Leveling the playing field", Basel Institute on Governance, Working Paper, available at www.baselgovernance.org

At the regional level, and despite important developments of the OAS, CoE, EU and APE, FAFT encouraged the creation of FATF/Style groups of two categories FATF-Associate Members and FATF Style Regional Bodies. Though they differ in their “status” –former Style Regional Bodies were “elevated” to the category of associated members), both are expected to spread the gospel in their respective regions.

So far, FATF have three Associate Members (Asia/Pacific Group⁷, Council of Europe –MONYVAL⁸- and South America - GAFISUD⁹) and 5 FATF/-Style Regional Bodies (Caribbean¹⁰, Euroasian¹¹, Eastern and Southern Africa¹², Middle East and North Africa¹³ and GIABA¹⁴), ensuring at least formal compliance with the 40 Recommendations by 152 countries in the world.

As the paradigm was developing, there was a firm effort to control and close as many entry points into the financial system as possible. From the narrow focus on the banking sector the policy soon shifted towards so-called Non Banking Financial Institutions –basically comprising insurance and capital markets- and a couple of years later to Non Financial Institutions -including liberal professions that may act as financial

⁷ Afghanistan, Australia, Bangladesh, Brunei Darussalam, Cambodia, Canada, Chinese Taipei, Cook Islands, Fiji, Hong Kong, China, India, Indonesia, Japan, Macau, Malaysia, Marshall Islands, Mongolia, Myanmar, Nepal, New Zealand, Niue, Pakistan, Republic of Korea, Palau, Philippines, Samoa, Singapore, Sri Lanka, Thailand, Tonga, United States, Vanuatu.

⁸ Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, France, Georgia, Hungary, Latvia, Liechtenstein, Lithuania, Malta, Moldova, Monaco, The Netherlands, Poland, Romania, Russian Federation, San Marino, Serbia, Slovakia, Slovenia, The former Yugoslav Republic of Macedonia, Ukraine.

⁹ Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay.

¹⁰ Anguilla, Antigua & Barbuda, Aruba, Bahamas, Barbados, Belize, Bermuda, British Virgin Islands, Cayman Islands, Costa Rica, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Montserrat, Netherland Antilles, Nicaragua, Panama, St. Kitts & Nevis, St. Lucia, St. Vincent & the Grenadines, Suriname, Trinidad & Tobago, Turks & Caicos Islands, Venezuela.

¹¹ Belarus, China, Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Uzbekistan

¹² Botswana, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Seychelles, Tanzania, Uganda, Zambia, Zimbabwe

¹³ Algeria, Bahrain, Egypt, Jordan, Kuwait, Lebanon, Morocco, Oman, Qatar, Saudi Arabia, Syria, Tunisia, United Arab Emirates, Yemen

¹⁴ Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea Bissau, Guinea Conakry, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo.

intermediaries or be responsible for auditing, some cash based legal markets (casinos), real estate and articles without a defined market value (arts, antiques).

Accordingly, FATF standards have also been spread out “sectorially” by other global institutions and by the private sector itself. As the 40 Recommendations have been drafted in very broad terms, the sectorial actors, both public and private, establish the “details” affecting their activities.

The Basel Committee on Banking Supervision (BCBS)¹⁵, a forum of Bank Supervisors created in 1974 by the Group of Ten to enhance convergence and improve the quality of banking supervision worldwide, was the chosen forum for ensuring compliance in the banking industry. After the 1988 Working Paper on “Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering”, the BCBS issued a more comprehensive paper on “Customer Due Diligence for Banks” (2001), a guideline on “Sharing of Financial Records between Jurisdictions in connection with the Fight against Terrorist Financing” (2002) and a more recent “General Guide to Account Opening and Customer Identification” (2003).

The International Organization for Securities Commissions (IOSCO) – recognized today as the international standard setter for securities markets– was the forum in charge of detailing the 40 Recommendations as required by operators in the securities market. After its initial Resolution on Money Laundering of 1992, it has regularly issued guidelines which are expected to be followed by its 90 members.

¹⁵ The Committee does not possess any formal supervisory authority, and its conclusions do not have legal force. It formulates broad supervisory standards and guidelines in the expectation that individual authorities will take steps to implement them through detailed arrangements - statutory or otherwise - which are best suited to their own national systems.

The International Association for Insurance Supervisors (IAIS) made the respective adjustments to the insurance industry, by expanding its “Insurance Core Principles and Methodology” to principles of Customer Due Diligence for insurers and insurance intermediaries.

The three organizations – BCBS, IOSCO and IAIS - constituted a “Joint Forum” in 2003 that has already issued two joint technical papers to “address vulnerabilities”.

In spite of the fact that the International Monetary Fund as well as the World Bank have been supporting FATF work since the beginning, the multilateral financial institutions broadened their scope of intervention after September 11, 2001. After a 2002 pilot project, in March 2004 the IMF Executive Board agreed to make antimoney laundering (AML) and counter financial of terrorism (CFT) assessments and technical assistance a regular part of IMF work and to expand this work to cover the full scope of the FATF recommendations. To that end, the IMF and the WB developed a specific methodology to evaluate countries, which was endorsed by FATF. Currently, all evaluations of the strengths and weaknesses of the IMF or the WB in the financial sector, include an assessment of the jurisdiction's AML/CFT regime. Such specific assessments may be conducted by either the IMF, the World Bank, FATF, or the FSRBs.

1.3. Private sector initiatives

Another important global development was the approach taken by the banking industry. In 1999, after a series of reputational disasters for the banking industry, two NGOs (Transparency International and the Basel Institute on Governance) convinced the major players of the banking industry to form a group to develop customer-due-diligence

standards in private banking –the most sensitive segment of the banking industry for money laundering and corruption. The group is formed by twelve key industry players that control roughly 60-70% of the world market in private banking and which has already issued principles for antimoney laundering on private banking, corresponding banking, preventing the financing of terrorism and anti money laundering issues in the context of investment.

As regulation increased considerably in the era of deregulation, it might be argued that the main reason for such an initiative was to preempt a new regulation and maintain the “playing field” leveled among major players. The process undoubtedly harmonized standards amongst key competitors –especially the US, European and Japanese companies whose activities were based on diverging regulatory environments– and it was done far more expediently than through inter-governmental negotiations¹⁶. Additionally, the Wolfsberg principles are expected to have a direct impact on offshore centers, as they also apply to all subsidiaries of members, no matter where they do business.

The Wolfsberg initiative has managed to establish itself as a key policy interlocutor with the regulators and international bodies. It is said to have prepared the ground for a change of paradigm towards a ‘risk-based approach’, engaging the responsibility of the profession in a far more in-depth way than the ‘rule-based approach’ traditionally adopted by regulators. A risk-based approach allows financial institutions to find solutions more closely attuned to their needs. This shift was reflected in the last version of the 40 Recommendations (2003) that now allows members to subject gatekeepers based on the degree of risks their businesses represents.

¹⁶ See Pieth, M and Aiolfi, G, quote in note 6.

The primary goal of the Wolfsberg standards is to reduce regulatory costs, which can be achieved by agreeing with competitors and above all with key regulators on ‘best practices’.

This kind of private initiative has obvious impacts on Latin American countries. As subsidiaries and branches of international banks are subject to headquarters’ policies, the domestic banking community is usually alone in lobbying to influence domestic standards. Only when they are higher than internationally agreed internal compliance rules, which is an unusual case, will the international banks join the local bankers. These fissures in the financial community increase the margin of negotiations for state actors, making private capture more difficult.

1.4. Coordinating financial intelligence

Another important ongoing global development is about coordinating and exchanging financial intelligence. In 1995, a group of FIUs, encouraged by FINCEN decided to establish an informal group of FIUs to encourage international co-operation. Now known as the Egmont Group of Financial Intelligence Units, these FIUs meet regularly to find ways to cooperate, especially in the areas of information exchange, training and the sharing of expertise. Countries must go through a formal procedure in order to be recognized as meeting the Group. There are currently 100 countries with recognized operational FIU units, with others in various stages of development.

According to its White Paper, “*one of the main goals of the Egmont Group is to create a global network by promoting international co-operation between FIUs*”. For this purpose, members are required at least to be able to receive, analyze, and disclose

information by financial institutions to competent authorities, of suspicious or unusual financial transactions. Despite recognizing that every FIU operates under different guidelines, members must be able to exchange information with foreign counterpart FIUs, which is one of the main purposes of the network.

Another less explicit purpose of this network of FIUs is related to collecting information in a systematic fashion. FIUs generally receive two different types of information from the private sector: suspicious transactions (“subjective” reporting) and regular transactions above a certain threshold, usually the equivalent of US\$ 10,000 (“objective” reporting). The latter reporting system allows FIUs to create databases with solid financial information for the country. As financial markets were increasingly liberalized, FIUs are now performing this supervisory role.

1.5. Ensuring compliance and administering sanctions for non-compliance

This remarkable success in changing the international legal and regulatory landscape would not have been possible without various forms of monitoring and ways of administering sanctions for non compliance.

FATF was the body that first developed a monitoring mechanism that has been described as a “*major departure from the traditional view that implementation of treaties and conventions was a purely domestic matter*”¹⁷. Relying on on-site visits of experts of other member States, this “*Mutual Evaluation Procedure*” (MEP) has proved to be a very successful mechanism for ensuring compliance, at least among FATF members. The

¹⁷ Levi, Michael and Gilmore, William, “Terrorist Finance, Money Laundering and the Rise and Rise of Mutual Evaluation: A New Paradigm for Crime Control?”, in: Financing Terrorism (Ed. Mark Pieth), Kluwer Academic Publishers, 2002, at. 87.

experts conduct interviews and give their critical judgment to the Group that negotiates an assessment text.

Non-FATF members, however, were treated in a very different fashion. The FATF initiated the process to identify so-called *Non-Cooperative Territories and Countries (NCCTs)*. With the offshore financial centers as its main target, the FATF has re-conceptualized money laundering as a problem of under-regulated offshore financial centers¹⁸.

In 2000, FATF allowed its members to make “complaints” against countries that appear not to respect the 40 Recommendations. After a technical assessment, the FATF first blacklists the country and sets up a deadline for compliance, offering technical and financial help to the “non-cooperative” jurisdiction. If after the deadline the expected measures have not been taken, the FATF recommends that its members adopt countermeasures. Countermeasures basically increase the costs for financial institutions in FAFT members when transacting with “non-cooperative” jurisdictions, resulting in virtual isolation with even worse consequences than a formal financial embargo.

In 5 years, the NCCTs initiative evaluated 47 jurisdictions and blacklisted 23 of them. Six of them were threatened with counter measures and 3 were effectively sanctioned. Today, all of de-listed jurisdictions are members of a FATF-style Regional body and their FIUs are members of the Egmont Group.

¹⁸ Pieth & Aiolfi, quote in note 6.

2. The Regional

In 1999, both Brazil and Argentina were invited to become members of the FATF. It was the first change in membership since 1991, when the group completed 26 members. This invitation was part of the program approved in 1998 “to establish a world-wide anti-money laundering network and to spread the FATF’s message to all continents and regions of the globe”. The network was to be based on (i) an expansion of FATF membership, (ii) the development of FATF-style regional bodies, especially in areas where FATF was not sufficiently represented and (iii) close cooperation with relevant international organizations, in particular United Nations bodies and International Financial Institutions¹⁹.

The expansion of membership was directed to “strategically important countries which already have certain key anti-money laundering measures in place (criminalization of money laundering, mandatory customer identification and suspicious/unusual transactions reporting by financial institutions), and which are politically determined to make a full commitment with the implementation of the forty recommendations, and which could play a major role in their regions in the process of combating money laundering”,²⁰.

In order to become a member, the minimum and *sine qua non* criteria for admission were, among others: first, to be fully committed at the political level: (i) to implement the 1996 Recommendations within a reasonable time frame (three years), and (ii) to undergo annual self-assessment exercises and two rounds of mutual evaluations; and second, to be a full and active member of the relevant FATF-style regional body

¹⁹ FATF Annual Report, 1998, p.8.

²⁰ FATF Annual Report, 1998, p.8.

(where one exists), or be prepared to work with the FATF or even to take the lead in establishing such a body (where none exists). The first mutual evaluation took place at the beginning of 2000²¹.

The FATF report that formally recognizes Brazil, Argentina and Mexico as members mentions the economic importance of each and their susceptibility and fragility due to proximity to the countries that produce drugs²². They were expected to be the leaders of creating a South American FATF-Style Body.

GAFISUD, as it was named, was formally created in December 2000, in Colombia, where representatives of Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru and Uruguay, signed a memorandum of understanding. GAFISUD was created on the model of the Financial Action Task Force (FATF) and adopted the Forty Recommendations issued by FATF and the Special Recommendations against terrorism financing.

At the same time, one of the goals of GAFISUD is to develop its own Recommendations for the improvement of national policies against both offences. The idea of a regional-style body is precisely that it will be capable of developing standards aimed at curbing specific regional issues. Though it was formally incorporated as one of its main objectives, it still remains a challenge for GAFISUD.

²¹ FATF Annual Report, 2000, p.7.

²² The summary of the mutual evaluation report for Argentina starts by saying “given its now-stable and large economy, and its proximity to countries which are exposed to drugs, Argentina can be seen as having a risk of money laundering. The Argentine Republic is considered a transit country for narcotic drugs, due to its location close to the major production centers.” The Brazilian summary states that “with its large and modern financial services sector and its location near some of the major narcotics producing areas of South America, Brazil is an obvious target for money laundering” (FATF Annual Report, 2000, p. 8 and 10).

South America faces serious problems related to the accumulation of illegal gains. Some examples are the complex market of cocaine production²³, the more conspicuous markets of capital flight, piracy and forgery, or high level public corruption. Each illegal market has its own regional distinctive features in relation to laundering procedures: transactions in kind, the black market peso exchange, back to back loans and so on²⁴. So far, however, GAFISUD appeared to be more concerned with muffling FATF and IFI pressures than in being a forum for the creation of regional policies.

Though GAFISUD emulated the FATF monitoring peer review process, a study of the first round of evaluations of GAFISUD shows very different results. The reports are very poor in substance and, as mentioned by some key actors in the process, the bi-annual plenary of the group was never intended to “shame” members, as happened in Paris. Moreover, the legislative changes in the region do not seem to be related with what was recommended in the reports.

This poor performance may explain the robust insistence with which the IMF and the WB, as observer members, negotiated in 2004 that the evaluations were not only to be made according to their new methodology (that split the 40 Recommendations into more than 200 standards) but also conducted by a joint team of experts formed by members and international financial institutions. As the results are now easily translated to the financial assessment programs of the IMF and to the conditionality programs of the World Bank, it is expected that the process will galvanize some GAFISUD members into action.

²³ See Thoumi, F. “Political Economy and Illegal Drugs in Colombia”, Boulder, 1995

²⁴ An economic analysis of these markets can be found at Naylor, T. “*Wages of Crime. Black Markets, Illegal Finance, and the Underworld Economy*”, Ithaca: Cornell University Press, 2002.

This reflects our general perception that GAFISUD has been, so far, more a way to muffle FATF pressures on South American countries (even FATF members, as we will show when revisiting the Argentine experience) than a forum for peer pressures²⁵.

The group did not have fissures until very recently, when, in an unprecedented move driven by a serious environmental conflict with Uruguay, Argentina filed a formal complaint against this country before the plenary of FATF. The complaint is based on allegation that the Uruguayan financial system functions as an offshore center and on the existence of some corporate vehicles that allegedly impede the fight against money laundering. As Uruguay has a plan to eradicate such instruments, there will probably not be any consequences at the international level. However, this might be a precedent for changing the internal dynamics at GAFISUD towards closer peer controls.

²⁵ An illustrative anecdote occurred at the final stage of the selection process for appointing Executive Secretary of GAFISUD in 2004. In the final interviews, all candidates were asked to detail how they would react if, at a FATF plenary in Paris, they were told that a GAFISUD member was about to be blacklisted as NCCT.

3. The local: two contrasting experiences

3.1. Transformation in Brazil and Argentina

Box 1, below, summarizes the main transformations the anti-money laundering system caused in Brazil and Argentina.

Box 1

Global	Regional (LAC)	Brazil	Argentina
1988: UN Convention Against Illicit Traffic In Narcotic Drugs And Psychotropic Substances 1990: FATF : 40 Recommendations.			
1995: Egmont Group	1996: CICAD/OEA creates a money laundering regulation	1996: The Minister of Justice prepares the anti-money laundering legislation according to FATF recommendations and sends to the Parliament.	1995: Laundering of proceeds of drug trafficking criminalized
		1998: Law 9613/98 criminalizes laundering of proceeds of a list of serious crimes and creates the Financial Intelligence Unit - COAF – (Treasury Ministry).	
	1999: CICAD/OEA creates a Money Laundering Unit		
2000: FATF invites the first Latin Americans (Brazil, Argentina and Mexico) to become members.		2000: First FATF evaluation in Brazil. FATF considered Brazil fully compliant with the recommendations then in effect, with one exception: the regulation regarding financial secrecy	2000: Anti Money laundering Statute 25246. All crimes approach to previous offences. Formal creation of FIU.
2001: FATF starts NCCT policy 2001: FATF Eight Special Recommendations concerning terrorism financing		2001: New bank secrecy law (LC 105/2001) eliminates the deficiencies identified by FATF.	2001: FAFT threat for non compliance
2002: UN Convention for the suppression of the financing of terrorism entry in international force.	2002: GAFISUD		2002: FIU started operations

2003: UN Convention against the transnational organized crime		2003: Creation of GGI-LD - ENCLA 2003: Terrorism financing is considered a previous offence of money laundering (Law 10.701/03).	2003: First FATF Evaluation 2003: Criminalization and forfeiture rules amended, partially complying with Recommendations
		2004: UN Convention on transnational crime entry in force 2004: FATF and GAFISUD second evaluation 2004: Creation of DRCI (Minister of Justice)	
		2005: UN Convention for the suppression of terrorism financing entry in force.	2005: FATF in site visit
			2006: FIU unrestricted access to bank and securities records. 2006: FATF on site visit 2006: Board of FIU changed
			2007: Financing Terrorist draft sent to Congress

3.2. The Brazilian experience: advancing good governance

Like any other public policy, the implementation of the anti-money laundering system requires the co-ordination of the three powers of the State. At least in the case of Brazil, this is hard to implement for two main reasons. In the first place, it is worth mentioning the traditional division of powers within the State, and the autonomy each of them seeks to maintain in relation to the others. Secondly, this system requires an adjustment between criminal policy and regulation of the financial sector, i.e., between very different State organs, languages and even rationale.

The traditional division among the powers cannot describe how the anti-money laundering system actually operates. This phenomenon is obviously felt in many other

areas and is starting to be studied in theoretical terms²⁶. According to this literature, it is possible to distinguish between different functions and tasks that can be provided by one or more of the powers. In this sense, the judiciary and the administration create norms; the legislative power may be dedicated to the implementation of policies and even to investigation, and so on.

The anti-money laundering system is a good example of this new scenario.

Its implementation in Brazil has determined two sets of transformations within all the bodies concerned: (i) the creation of new organs and rules and also (ii) the definition of new tasks in the old organs. The creation of the financial intelligence unit (Minister of Finance) and of a central authority (Minister of Justice); the shift of international cooperation from the judiciary to the administration; the creation of specialized groups on financial crime in the federal justice and in the central bank, just to mention a few, exemplify the first set of transformations. Concerning the second, it is important to mention the close attention of many organs to the production and organization of their databases and to the production of statistics about their activities. There is no doubt that the FATF evaluation policy strongly fosters both sets of transformations.

At this point of the research, we can easily assume that the FATF evaluation policy strongly encourages both sets of transformations. As indicated above, there are few but important document sources that mention FATF. In any case, the interviews conducted until now clearly indicate FATF's role in this transformation process.

A few years after the beginning of the implementation of the system in Brazil, the lack of co-ordination among the various organs – public prosecutor, judiciary, financial

²⁶ For an overview of the theoretical problem and the Brazilian case, see Rodriguez, José Rodrigo. *O direito liberal para além de si mesmo: Franz Neumann, o Direito e a Teoria Crítica*. Phd thesis (2006).

intelligence unit, central authority (in charge of international cooperation and asset recovery), the investigative unit of the central bank, etc – was identified as the most important obstacle to the functioning of the anti-money laundering system²⁷. Consequently, there were no training programs for public agents, sharing of database policy and technological standards.

The initiative to change this scenario came from the Minister of Justice at the end of 2003, the first year of the Lula administration. The effort consisted of the creation of a National Strategy to Combat Money Laundering (ENCLA) by organs of the judiciary and the administration and also the legislative body, at the last meeting in 2006. At this meeting, 52 organs were present: 29 from different sectors of the administration²⁸, 5 from the judiciary, 6 from the public prosecution, 4 from the legislative body and 3 related to the financial sector (one public, one private and Febraban - Brazilian Banking Federation)²⁹. Generally, at a three-day meeting, the head officers collectively identify problems and deficiencies and create a plan of action open to public opinion and civil society³⁰. A cabinet of management (GGI-LD) was also created to serve as the secretariat of ENCLA.

For the last four years the Brazilian anti-money laundering system has been under scrutiny by this initiative. During this period 137 goals were formulated and most of them

²⁷ See, for example, Encla Report, 2004, p. 03 (available in Portuguese at www.mj.gov.br)

²⁸ Mainly justice, foreign affairs, economy, tax issues, transparency issues and police.

²⁹ There were also associations of judges and prosecutors, the “Institute for the Quality of the Judiciary”, from the third sector and the Minister of Justice of Argentina.

³⁰ Besides the representatives of the organs, associations of judges and lawyers, banks and law schools are also invited to participate in the meetings. A report describing the whole plan of action is permanently available at the Minister of Justice homepage.

were accomplished³¹. An attempt to organize the nature of the goals formulated in these years indicates that the aim of almost half of the goals (45%) was to modify, rebuild, define or even plan the activity of the organs that participate in the ENCLA. The objective of another 33% of the goals was the development of studies or projects to increase the knowledge of the organs about themselves, to train agents and to understand new problems. The last 21% aimed at the modification or creation of laws and decrees, or the ratification of international conventions. In these cases, the organs that participate in the ENCLA can merely exert pressure as the legislative power is the only one able to accomplish the goal.

According to an internal document prepared by GGI-LD, the level of accomplishment of goals is high. They have classified the goals of the last three years into five categories: goal not accomplished (11%); goal not accomplished and reformulated (8%); goal not started or delayed (0); ongoing goal (16%); goal partially accomplished (15%) and goal accomplished (48%). It is worth noting that at the end of 2006 when they prepared this document, there was sufficient information about all the goals. This reveals the commitment of each organ to report to the cabinet even if the goal within its responsibility was not accomplished.

To conclude these brief remarks on the Brazilian experience, we would like to address one specific problem raised by the Global Administrative Project: the fairness of the treatment Brazil and Argentina receive from FATF.

This issue can be seen from two radically different perspectives. If we regard the FATF anti-money laundering system as a criminal policy to deal with certain problems

³¹ The distribution during these four years is as follows: 32 in 2004, 43 in 2005, 29 in 2005 and 33 in 2006. There is very little repetition of goals from one year to another. When there is, they are usually redesigned to incorporate the reason why they were not accomplished in the previous year.

considered very serious by the international community, we tend to place this strategy among others formulated in the international arena in the last few decades – terrorism, drug trafficking, racial discrimination, torture, etc. Consequently, the international convention arises as *the* instrument able to represent the negotiation, agreement and, most importantly, the obligations the countries have decided to undertake. The main point here is that in this case, international conventions create norms only for the countries that have participated in the formulation of the document, signed and ratified according to national rules.

As we have seen above, the document that defines the anti-money laundering system - The 40 Recommendations – was discussed and created 10 years before the invitation to Brazil and Argentina. Moreover, our invitation to become members depended on our commitment to adjusting our national systems to their model and not on discussions about how Latin American interests could be part of the strategy. This was never even an issue of concern – at least the Brazilian administration never publicly presented any divergence with the FATF. On the contrary, all official documents justify the importance of the implementation mentioning international standards in general and FATF in particular³². Nowadays, as members, Brazil and Argentina formally have the same status as the founding fathers³³.

However, if we consider the anti-money laundering system and the FATF activity to be primarily administrative, the question of who creates the norms we have to apply

³² The first Brazilian document is the “introductory note” of the anti-money laundering legislation prepared by the administration and sent to Parliament in December 1996. It quotes the 40 Recommendations four times, always to demonstrate that these new rules were already part of the international legislation and experience (Exposição de Motivos 692/MJ, 18.12.1996). ADD: FATF in COAF reports.

³³ According to the latest report “all decisions of the FATF are taken by its 33 Members, in plenary meetings, by consensus” (FATF, Annual Report, 2005-2006, p. 3). We are conducting interviews with the officers that represent Brazil at these meetings to gather more information about this issue.

does not seem to appear. If viewed only from this perspective, the FATF could be seen as an example of procedural transparency and participation³⁴.

The FATF itself seems to take advantage of both the criminal and administrative perspectives. Its reports insist on the “combat of”, on the “fight against” money laundering, which does not imply the penal system. But at the same time, the criminal discourse helps to formulate a very powerful and convincing image of “threat”. But this is not a privilege of Brazil and Argentina: it is present in all western countries.

And at least according to the Brazilian experience, it is exactly the administrative side of the anti-money laundering system that is resulting in better national governance. Due to the 40 Recommendations, Brazil is becoming able to follow private and public money under investigation and to allow judiciary access to banking information within a reasonable time. Due to the FATF evaluation system, most of the organs of the administration and the judiciary are, for the first time, making serious efforts to gather information about their activities to prepare reports and statistics. And finally, due to national peculiarities, Brazil is experiencing an innovative way to build and support public policies based on the full co-ordination of the administration, the judiciary, the legislative powers and, still timidly, civil society.

3.3. The Argentine experience: pressure driven policy change.

In contrast with the Brazilian experience, where the global rules of anti-money laundering brought new domestic policies for advancing financial transparency and

³⁴ In Kingsbury, Krisch & Stewart. (2005) “The emergence of global administrative law”, FATF appears as an illustration of this in an even more delicate scenario: the NCCT, presented above. The authors call attention to the “invitation of outside input” and the “allowing of comments by governments under consideration for inclusion in the list of non-cooperating countries” (p. 35. Also p. 38 and p. 47).

detecting corruption, the Argentine experience has been blocked by conflicting interests so far and policy changes have been improvised reactions to FATF pressures

After being invited to be a FATF member, Argentina passed a general antimoney laundering statute, criminalizing some conducts, formally creating an FIU and naming the gatekeepers subjected to customer due diligence and reporting obligations.

The three aspects of the strategy were far below FATF's expectations. Traditional criminal lawyers largely opposed incorporating a criminal offence as "pragmatic" as money laundering. According to this view, money laundering is a specific way of concealment, thus – following a long-standing German tradition in criminal law – dependent on the previous offence. Criminalization was drafted accordingly: self-laundering is not punishable, laundering the proceeds of crimes of family members is excused, if the sanction of the previous offence is lower than the sanction for laundering the money, money launderers obtain the sanction of the previous offence. For these reasons, it seems that sanctions for money laundering will not be applied, as statistics have shown so far³⁵.

The Financial Intelligence Unit only started operations at the end of 2002, after several FATF warnings that the deadline for compliance had expired. In its first 4 years of operation, the work of FIU was greatly obstructed by the amount of resources assigned to the Unit and by the refusal to share information and data bases from other public agencies. Even for concrete investigation, the FIU needed a judicial order to obtain banking and securities records. Following an on-site mission of FATF at the end of 2005,

³⁵ To our knowledge, there was not a single conviction based on the criminal offences incorporated by the Money laundering statute of 2000. The existing 2 or 3 reported convictions are based on a drug statute of 1995.

an amendment of April 2006 allowed the FIU to obtain records directly from the financial system and from the liberal professions subjected to gatekeeper obligations.

Perceiving the lack of state structure and support, designated gatekeepers reacted accordingly. Some banks unsuccessfully challenged the reporting system on privacy grounds. Other gatekeepers -accountants and public notaries - challenged the advisories issued by the FIU on the grounds of incoherence according to the statute. That was an interesting situation: while at the global level the industry was influencing FATF to shift from a rule-based approach towards a risk-based approach – increasing responsibility from the private sector with emphasis on subjective reporting- the complaint of Argentine accountants was that the statute was based on objective reporting and they did not want to undertake subjective responsibilities against their clients. Lobbying in the press against the reputation of some members of the FIU was frequent.

Though reporting activities have been increasing year after year, as in most countries in the world, the figures convey little about the quality of reports and commitment of the private sector to its new responsibility of reducing illegal markets and increasing transparency in the financial system. As the number of cases sent to the criminal justice system remained almost the same, it can be supposed that the quality of the reports from the private sector to the FIU has decreased. In addition, as more than 90% of the reporting activities come from the financial sector, one can assume that international banks are the major reporters –in compliance with their world-wide internal rules.

In contrast with such a conflicting internal scenario, the Argentine FIU was able to sign 17³⁶ Memorandums of Understanding (MOU) with foreign peers. The FIU reported that there was no opposition to signing any MOU and the FATF evaluation states that the Argentine FIU does not seem to have problems in cooperating with its peers. The fact that all MOUs allow the FIU to transmit financial information to its foreign peers shows that internal disputes were not actually based on preserving privacy but presumably on obtaining control over financial records.

In July 2006, a new amendment changed the Board of the FIU. In what has been seen by some sectors as a move to control an institution whose integrity is crucial, the administration changed a five-member Board for a President advised by a non-binding Council. Agencies that before had been excluded from the Board, were now incorporated into the Advisory Council. The scenario might be changing right now with the new President who seems to have cleared up internal obstacles and has strengthened ties with other relevant agencies. FIU has now 17³⁷ **attaches (connections?)** in key agencies for internal cooperation, in what seems to be a first move toward a policy of inter-institutional coordination.

At the end of 2006, FATF visited Argentina again and put pressure for a new law criminalizing the financing of terrorism, a demand that FATF had been making since 2002. According to the press and some FATF sources, Argentina risked being first blacklisted and then excluded from the club if the law was not passed within 6 months.

³⁶ Australia, Belgium, Bolivia, Brazil, Canada, Chile, Colombia, El Salvador, Spain, Guatemala, Honduras, Panama, Paraguay, Peru, Portugal, Romania, Venezuela. In addition, negotiations with Israel, The Dominican Republic, Albania, Thailand, France and Monaco have been started.

³⁷ Ministries of Foreign Affairs, Economy, Central Bank, Tax Agency, Securities Commission, Insurance regulator, Civil Registry, Registry of Companies, Real Estate registry, Regulator of Pension Funds, Immigration, Agency of Criminal Records, federal Police, Border police, Navy, Air Force.

Though some human rights groups reasonably argued that allowing the FIU to seek to detect “terrorist financing” might lead to discrimination against communities with ethnic and family ties to Islamism, the draft was sent to Congress **last month** and, remarkably, the president highlighted the importance of having it passed soon, at the opening of Congress sessions **(last week?)**.

4. Conclusion

The anti-money laundering system is undoubtedly changing the Latin American legal landscape. Though most new regional and domestic institutions are only about 5 years old, some provisional concluding remarks can be made:

First, the anti-money laundering global standards pre-suppose a close and collaborative relationship between the private sector, the FIU and the criminal justice system. This collaboration obviously assumes that "suspicious transfers" are marginal and that the private sector will cooperate, based on the legal and reputational risks involved. This might work well in contexts where legitimate businesses are the rule and illegal trade the exception. In contexts where such transactions are not marginal but rather structural, like the markets of corruption, tax evasion, smuggling or piracy in Latin America, this strategy may fail if it is not consensually adopted in conjunction with the private sector and in accordance with local needs.

In other words, in contexts of 35% to 45% of tax evasion, it does not seem very rational to ask a banker to report transactions which might involve tax evasion, as the bank will risk losing a high proportion of its business. This has been central to the obstruction of efforts in Argentina and Brazil and reflects one of the consequences of blindly adopting FATF standards.

Second, as noted before, FATF/Style Regional bodies were created to cover this situation. Though GAFISUD constitutive documents highlighted the necessity of developing such regional standards, GAFISUD has only taken some steps to identify ways for regional cooperation in money laundering investigations. As noted, GAFISUD's major efforts were concentrated more on avoiding pressures from FATF.

Third, anti-money laundering global standards constitute a radical change in criminal law, from a “suspect-oriented” prosecutorial system towards an “assets-oriented” prosecutorial system. Despite many theoretical questions that have not been addressed in this paper, this shift was and still is strongly resisted by prosecutors, the judiciary and criminal lawyers that were accustomed to a different context.

Finally, it is worth noting that the main distinction between the implementation of the anti-money laundering system in Brazil and Argentina lies in the way both governments see the problem FATF seeks to address. We could say that there is not a single problem but a large group of issues and aspects, not all of them relevant to all countries. At the same time, the FATF policy provides more instruments and mechanisms – that in many cases could not be achieved without the intervention of a global body - than goals and action plans. In this sense, Latin American governments could develop a “strategic use” of FATF policy and take full advantage of the possibilities FATF creates to accomplish national and regional goals related to issues of its specific concern, such as corruption and tax evasion.