

Hauser Globalization Colloquium Fall 2008: Global Governance and Legal Theory

NYU Law School

Professors Benedict Kingsbury and Richard Stewart
Furman Hall 324, 245 Sullivan St. (unless otherwise noted)
Wednesdays 2.15pm-4.05pm

Provisional Semester Program - Attached Paper is shown in Bold

- August 27- Teaching Session: Introductory Class (course instructors)
- September 3- **No class** (legislative Monday)
- September 10- Speaker: David Dyzenhaus, University of Toronto, NYU Global Law Professor
Topic: The Concept of (Global) Administrative Law
- September 17- Panel Discussion on the September 2008 ECJ Decision in Kadi. *Furman Hall 900.*
Professors Stewart, Kingsbury, and members of the international law faculty.
- September 24- Speakers: Eyal Benvenisti (Tel Aviv/NYU) and George Downs (NYU)
Topic: Toward Global Checks and Balances
- October 1- Speakers: Nico Krisch (LSE); and Euan MacDonald and Eran Shamir-Borer (NYU)
Topic: Global Constitutionalism and Global Administrative Law (two papers)
- Friday October 3 - SPECIAL SESSION** *Furman Hall 310, 3pm-5pm*
Speaker: Neil Walker, Edinburgh
Topic: Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders
Background reading: Constitutionalism Beyond the State
- October 8- Speaker: Meg Satterthwaite (NYU)
Topic: Human Rights Indicators in Global Governance
- October 15- Speaker: Janet Levit, Dean, University of Tulsa College of Law
Topic: Bottom-Up Law-Making Through a Pluralist Lens: The ICC Banking Commission and the Transnational Regulation of Letters of Credit
- October 22- Speaker: Jack Goldsmith, Harvard Law School. *Furman Hall 900.*
Topic: Law for States: International Law, Constitutional Law, Public Law (paper co-authored with Daryl Levinson)
Guest Commentator: Prof Georges Abi-Saab, Geneva, former Chair of WTO Appellate Body
- October 29- [The IILJ will convene jointly with JILP a conference on International Tribunals, on Wed Oct 29, 9am-5pm, at the Law School. Global governance issues will feature. Students should attend this conference during the regular Colloquium time slot, and are welcome to attend other parts of the conference also. See the IILJ Website for details.]
- November 5- Speaker: Robert Keohane, Princeton and Kal Raustiala (UCLA). *Furman Hall 900.*
Topic: Toward a Post-Kyoto Climate Change Architecture: A Political Analysis
- November 12- Speaker: Jeremy Waldron (NYU). *Furman Hall 900.*
Topic: International Rule of Law
- November 19- Speaker: Benedict Kingsbury (NYU)
Topic: The Concept of 'Law' in Global Administrative Law
- November 26- [No class, session rescheduled due to Thanksgiving break]
- December 3-** Speaker: Michelle Ratton-Sanchez, FGV Law School in Sao Paulo
Topic: The Global Administrative Law Project: A Review From Brazil
- Background reading:
Michelle Ratton-Sanchez, The WTO And The OECD Rules On Export Credits: A Virtuous Circle?
Maira Rocha Machado, FGV Law School in Sao Paulo, **Financial Regulation And International Criminal Policy: The Anti-Money Laundering System In Brazil And Argentina**

Student paper presentations and wrap up.

Program and papers available at: <http://iilj.org/courses/2008HauserColloquium.asp>

FINANCIAL REGULATION AND INTERNATIONAL CRIMINAL POLICY: THE ANTI-MONEY LAUNDERING SYSTEM IN BRAZIL AND ARGENTINA

Maira Rocha Machado

Getulio Vargas Foundation Law School

Abstract:

The objective of this paper is to present and compare the process and the results of the implementation of the anti-money laundering system in Brazil and Argentina. Considering that the internal transformations cannot be discussed without a clear understanding of the international apparatus, attention will be given to the description of the international policy designed and conducted by FATF. Therefore, its incorporation into two different national realities, the Brazilian and the Argentinean ones, will shed light not only on the transnational transformations both States underwent but also on the anti-money laundering regime itself.

The paper is divided into five parts. The first one presents a brief introduction on the emergence and development of the relationship between financial regulation and criminal-policy. The two following sections are designed to present an overview of the anti-money laundering system in Brazil and Argentina and of the role of FATF in their implementation process. The fourth section presents two Brazilian examples of situations in which full advantage of the FATF regime was taken: the National Strategy to Combat Corruption and Money Laundering and the BacenJud, a communication channel between the financial system and the judicial power. To conclude, final comments will be presented in connection with the central questions of the project this paper is part of .

Key words: international crime, money laundering, financial system, FATF (Financial Action Task Force on Money Laundering), UN Conventions, Central Bank, suspicious transaction report, Financial Intelligence Unit.

Summary:

1. Financial regulation as instrument of criminal policy.
 - 1.1. Basel Principles
 - 1.2. FATF Recommendations
 - 1.3. UN Conventions
2. The anti-money laundering system in Brazil and Argentina
 - 2.1. The money laundering offence
 - 2.2. The Financial Intelligence Unit
 - 2.3. The obligations to the economic and financial sectors
3. The role of FATF at the implementation process in Brazil and Argentina
4. A national agenda for national needs
 - 4.1. ENCCLA: decentralizing the reformulation of public policy to deal with money laundering and corruption.
 - 4.2. BacenJud: encouraging mediation between the financial industry and judicial intervention
5. Final remarks

**Financial regulation and international criminal policy:
The anti-money laundering system in Brazil and Argentina**

Maira Rocha Machado¹

May, 2008

Since the early 1990's the regulation of financial activities has become an integral part of internationally formulated criminal policy to deal with the so-called transnational crimes – trafficking in drugs, armaments and human beings, terrorism, corruption, money laundering and combining them into one, the work of “criminal organizations”. The purpose of this strategy is to arrive at the wealth generated by these activities and translates itself in the creation of mechanisms directed to *locating and recovering* illegally diverted funds – for example, illegally diverted public money – or to *deprive* certain persons of funds obtained through these activities, as for instance, in the case of trafficking in drugs. In order to meet this objective, together with rules concerning imputation of personal liability, applicable criminal sanctions, extradition of persons, etc. this strategy requires States to adopt a series of other measures that are not directly connected with the criminal system. Together, these measures are aimed at allowing public power access to these funds by way

¹ Phd in Law (University of Sao Paulo - USP), Researcher at the Law and Democracy Group of CEBRAP (Brazilian Center for Analysis and Planning) and Professor at Getulio Vargas Foundation Law School (DireitoGV). A first version of this paper was presented at the 2006 Law and Society Meeting in Baltimore (USA) and published in Portuguese at *Arquivos do Ministério da Justiça* (2006). I would like to thank Ministro Nelson Jobim for the precious information and Bernardo Mota for the interesting and very useful comments this paper received. Thanks to my Argentinean colleague Guillermo Jorge, who was fundamental in the development of the comparative research. Special thanks to Alvaro Pires and his research group for the challenging comments these ideas received at Ottawa University (Oct, 2006). And also to Mireille Delmas Marty for the opportunity to join a research group on the internationalization of law and to discuss money laundering issues from this perspective at College de France (Dec, 2006). I would like to express my gratitude to Martin Bohmer (San Andres University) and, among others, Kevin Davis (NYU) who, in the context of the Global Administrative Law Project, invited me to a conference in Buenos Aires, allowing me to develop the research on Argentina. Finally, I am also extremely grateful to Gregory Shaffer, Damian Chalmers and the “Transnational transformations of the State” research group for the comments and suggestions an earlier version of this paper received and to the U.S. National Science Foundation and the Law and Society Association that supported my participation at the Berlin Conference (Jul, 2007). Comments are welcome at maira.machado@fgv.br

of instruments such as freezing bank accounts, decreeing temporary freezing of funds, anticipated alienation of property, confiscation, etc.

The emergence of this strategy has provided jurists and sympathizers with new issues relating to criminal liability, the binding character of instruments other than treaties and conventions, mechanisms for international cooperation and information exchange and the right to privacy, among others. In the context of transnational transformations of the State, the study of this strategy is rich and important for at least three reasons.

The first one refers to the nature of the environment of the problem this strategy seeks to confront. By focusing on assets obtained through certain practices, this criminal policy proposes to intervene in the dynamics of the international financial system which in recent decades has been characterized by intense liberalization and capital mobility. The possibility of the immediate remittance of funds to different financial centers around the world requires that any strategy aimed at tracking down a specific fund depends upon the availability of similar norms in all countries through which it could go by. Thus the harmonization of national laws becomes a fundamental prerequisite for the entire process, from the identification and tracking of funds to the exchange of financial and legal information in connection with specific funds, their owners and the crimes possibly committed by them.

Secondly, in the international arena there is an organization created in the context of the OECD that over the last fifteen years has centralized the preparation and continuous update of this criminal-policy: the FATF (Financial Action Task Force). In view of the above, its functions include regularly monitoring member and non-member countries of the said organization, so as to compel all countries with significant financial centers to incorporate the set of measures it has developed to impede “money laundering” and “terrorism financing”. These monitoring and evaluating activities made possible to collect and systematize information on normative and institutional transformation resulting from the incorporation of these measures by countries undergoing evaluation and by FATF itself.

In the third place, this criminal policy combines measures of a financial nature directed to the identification and recovery of funds with the logic and principles of the criminal justice system. Although the criminal sphere is able to contribute little to achieving the main objective – to prevent the circulation and use of specific assets – it offers a quite

reasonable list of justifications to domestic actors who should propose, approve and implement the package of measures: “to combat trafficking in drugs and organized crime”, “to impede the occurrence of terrorist attacks”, etc. These justifications are automatically accompanied by the structure and central components of the criminal justice system: criminal classification, deprivation of liberty, personal liability, criminal proceeding, etc. With these features, in slightly over ten years, this strategy has reached a status on the international agenda and has spread to an extent that others, such as human rights or environmental protection are far from reaching.

These three aspects find fertile ground to develop research on transnationalization in Latin American countries, especially Brazil and Argentina². Nowadays Brazil has a highly sophisticated financial system for an emerging country, with good performance indicators in recent years. Despite the serious crisis that Argentina underwent in the beginning of the 2000's, the economy is stable since 2002³. Coincidentally or not, the fact is that Brazil and Argentina were the only two in Latin America invited to join FATF without being members of the OECD. And, finally, there has been an understanding for many years in Brazil and Argentina that the simple creation of criminal laws should constitute the first and most widely used instrument to deal with all types of problems.

Despite these similarities, the actual result of the incorporation of the anti-money laundering system in Brazil and Argentina differs a lot. Research has shown that this difference is due to the way each country has been dealing with international pressure on combating money laundering: the Brazilian government seems to consider it a good way to solve internal problems and consequently has been trying to transform it into a “State policy”. Argentina, on the other hand, does not seem to recognize the problem FATF seeks to confront as theirs. Consequently, the Argentinean government limits itself to responding to international pressure and does not seek to build a national policy.

² It would be very interesting for this research to include Uruguay, as this small country is considered the “tax haven” of the region and has been a target of different international policies related to money laundering. Unfortunately the limitations of time and resources prevented any initiative in this sense. For a first approach of the anti-money laundering system in Uruguay see MACHADO, Maira Rocha. Internationalisation du droit en Amérique Latine. Le cas du blanchiment d'argent: Brésil, Argentine, Chili, Paraguay et Uruguay. Working Paper 12, available at www.direitogv.br.

³ See, in that sense, CARMO, Lie Uema do. “Mercado De Capitais: A Caminho Do Crescimento” in *Conjuntura Economica*, February 2006, p. 82. And “Brazil Attracts More Investors” in *Latin Finance*. Coral Gables: March, 2006, p. 01. And also, FATF, *Informe de Evaluacion Mutua sobre Lavado de Activos y Financiamiento del Terrorismo. Argentina*. (June, 2004), p. 3.

Therefore, in the context of anti-money laundering policies, the Brazilian State has gone through much deeper transformations than Argentina. Even so, the comparison is very useful: it helps to identify the intensity and extent of the Brazilian State transformation and, at the same time, the fragilities and potentialities of the FATF policy.

Thus, the objective of this work is to present and compare the process and the results of the implementation of the anti-money laundering system in Brazil and Argentina. Considering that the internal transformations cannot be discussed without a clear understanding of the international apparatus, attention will be given to the description of the “international policy” designed and conducted by FATF. Therefore, its incorporation into two different national realities, the Brazilian and the Argentinean ones, will shed light not only on the transnational transformations both States underwent but also on the anti-money laundering regime itself.

The text will focus on the changes made in the structure and functions of the organs that operate in the regulation and control of financial activities. Since the beginning of the implementation process, it has been possible to identify substantial changes, at least in Brazil, regarding the Achilles' heel of this system: the access of Judicial Power to financial information. From its standpoint, any initiative aimed at controlling money laundering depends upon the availability of extensive and updated information on customers and all their transactions and the possibility to provide this information to public agencies. It also depends on the ability to share these databases with other countries considering that the transactions usually take place in the international financial system.

Accordingly, in order to implement the anti-money laundering system several measures are required concerning the identification of customers and users of the financial system, the creation of new agencies in the sphere of the Executive Power so as to centralize information and State action, and the exchange of financial information between different Brazilian agencies and between the latter and international agencies.

This is an area that has witnessed, in several countries worldwide, an extended regulatory activity of the State on matters hitherto left to the discretion of the private players involved. In that sense, it is possible to interpret the arrival of the anti-money laundering system as a shift from self-regulatory to private-policing regimes that would be

taking place in some sectors, particularly those characterized by the political discourse of risk and globalization. According to Damian Chalmers,

“In such sectors, notably those of the electronic communications and financial services industry, this imposition of hybrid duties of policing and regulation on private actors has led to a new form of authoritarian capitalism, which has posed particular challenges”.

In addition,

“The money laundering regime suggests that private policing is likely to be most extensively taken up where it reinforces and extends existing forms of territorial power. It creates regimes where whole categories of population are disenfranchised from any form of voice and subject to systematic suspicion, surveillance and exclusion”⁴.

These paragraphs summarize the criticism FATF regime usually receives: an authoritarian policy based on suspicion and exclusion. Nevertheless, in this paper I will argue that even if we do not agree with the FATF policy as a whole – especially its unnecessary formulation as criminal policy⁵ - the implementation of an anti-money laundering system may contribute to expanding mechanisms for monitoring and government control over economic and financial activities. In other words, developing countries may also benefit from the regime.

To sum up, by describing the process and the result of the implementation of anti-money laundering system in Brazil and Argentina, this work means to discuss the argument

⁴ CHALMERS, Damian. “Private Policing, Self-regulation and the Emergence of an Authoritarian Capitalism within Europe”, p. 5 and 21, respectively. Paper presented at Law and Society Annual Conference – IRC Transnational Transformations of the State (Baltimore, 2006).

⁵ The inappropriateness of the criminal system to deal with problems like money laundering is taken for granted in this paper. For a detailed explanation of this see MACHADO, Maira Rocha. *Internacionalização do Direito Penal. A gestão de problemas internacionais pelo crime e pela pena* (Sao Paulo: ed. 34, 2004) and MACHADO, Maira Rocha. *As novas estratégias de intervenção sobre crimes transnacionais e o sistema de justiça criminal brasileiro. Novas Direções na Governança da Justiça e da Segurança*, Catherine Slakmon and others (org.), Ministério da Justiça, 2006.

of Chalmers adding three elements to debate. The first element deals with the context of emergence of the anti-money laundering system: the main rules for the financial industry were created in the late 1980's by banks of the wealthier countries. After that the discourse of financial globalization and successive episodes of systemic crises made clear a common value shared by the financial industry: the stability. The rules created by the anti-money laundering system were developed in this context and, I would suggest, thanks to it.

The second element copes with requirements of jurisdictional exercise in all cases where information on the origin, destination and course taken by specific funds are relevant to the development of the case. To have the international financial system organized in such manner that it can provide information connecting natural persons and corporations to the movement of a specific capital is an indispensable condition for jurisdictional fulfillment in certain cases. Providing consistent information and allowing the Judicial Power to access them becomes a key element in mechanisms for protection of public funds, persons and private actors victimized by fraud and other damages, etc.

The third element, directly linked with the comparison between Brazil and Argentina, indicates that the authoritarian character of the new regulatory regimes may be seen as fully dependent on the way a particular jurisdiction receives and implement them. In the same sense, private policing and surveillance techniques regarding the financial system may represent the best way to foster transparency in the administration and avoid social and political problems like corruption.

In order to explore these three elements, this paper presents a brief introduction on the emergence and development of the relationship between financial regulation and criminal-policy (1.). The two following sections are designed to present an overview of the anti-money laundering system in Brazil and Argentina (2.) and of the role of FATF in their implementation process (3.). The information gathered in these sections comes from interviews conducted in both countries during the first semester of 2007 and from official documents issued by each country and by international organs at 2006 and 2007. The fourth section presents two Brazilian examples of the possibilities to take full advantage of the FATF regime: the National Strategy to Combat Corruption and Money Laundering and the BacenJud, a communication channel between the financial system and the judicial power

(4.). To conclude, final comments will be presented in connection with the central questions of the project this paper is part of (5.).

1. Financial regulation as instrument of criminal policy

The “financial power” of certain activities considered “crime” has become a reason for concern after the late 1980's in the context of “war against drugs”⁶. The first international document in this field is the UN Convention Against Illicit Traffic In Narcotic Drugs And Psychotropic Substances (1988)⁷. The kernel of the strategy for intervention in transnational crime, this Convention mentions for the first time “money laundering”⁸ and mechanisms aimed at the confiscation of value equivalent to proceeds obtained through criminal practice. The preamble of this Convention summarizes the task that will be performed by the economic and financial dimensions in the formulation of strategies for criminal intervention, as follows:

“Aware that illicit traffic generates large *financial profits and wealth* enabling transnational criminal organizations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business, and society at all its levels,

Determined to *deprive* persons engaged in illicit traffic *of the proceeds of their criminal activities* and thereby *eliminate* their *main incentive* for so doing,

⁶ See GREEN, Penny. *Drugs, Trafficking and Criminal Policy. The Scapegoat Solution*. Winchester: Waterside Press, 1998, p. 31-44 on Americanization of drugs control and a history of the “war against drugs” in Europe.

⁷ The Convention became internationally effective on 11.11.1990 and was enacted in Brazil by Decree 154 dated 06.26.91. Et seqq. “UN, 1988”.

⁸ Article 3.1. (UN, 1988) presents an extensive description of conducts and activities that today we know by the name of “money laundering”.

Desiring to *eliminate the root causes* of the problem of abuse of narcotic drugs and psychotropic substances, including the illicit demand for such drugs and substances and *the enormous profits derived from illicit traffic*” (UN, 1988, Preamble – italics added).

From now on economic and financial issues start to play a key role in the justification of criminal intervention in some activities. In addition to criminal punishment, the deprivation of proceeds of activities considered criminal becomes central in the structuring of the intervention model. The reasoning is based on the idea that the removal of property obtained through activities considered criminal can make them economically unattractive, so that the persons involved in would change their activity. In this discourse, dissuasion appears not only as a result of the application of punishment, but also as an effect of the removal of any benefit obtained through criminal activity.

The emergence of this strategy is closely connected to recent transformations of the international financial system. This occurs as liberalization and mobility of capital, diversity of financial products, speed and anonymity of operations in addition to the existence of financial markets with least possible banking, corporate and fiscal regulations are creating severe difficulties for governments in their attempts to locate and seize specific funds⁹. From the standpoint of the financial industry, the same transformations of the international financial system gave rise to other difficulties. In search of securing stability for markets in the decade of the 1990's we witnessed substantial change in the supervision and regulation of the financial industry.

The Basel Committee composed of representatives of G10 central bank played a key role in the definition of the new mechanisms for regulation of the financial industry. Toward the end of the decade of the 1980's the Committee released documents containing recommendations directed to the financial industry aimed at supervision of the financial industry with regard to risk prevention as well as to protection against money laundering.

⁹ With regard to impacts of technology expansion and financial market internationalization on law see FARIA, Jose Eduardo. *O Direito Na Economia Globalizada*. Sao Paulo: Malheiros, 1999, p. 59-110. And also ARNAUD, Andre-Jean. *Entre Modernidad Y Globalizacion. Siete Lecciones De Historia De La Filosofia Del Derecho Y Del Estado*. Bogota: Universidad Externado de Colombia, 2000 (translated by Natalie Gonzalez Lajoie), particularly “El Derecho De Los Mercados Financieros Entre Modernidad Y Globalizacion (leccion sexta), p. 201-238. And also, ARESTIS, Philip and BASU, Santona. “Globalizacao Financeira E Regulacao” in *Regulacao Financeira E Bancaria*. Rogerio Sobreira (org.). Sao Paulo: Atlas, 2005, p. 44-59.

The common denominator for these measures is gathering, processing and making available information originated in the domestic financial system.

In view of that, when Financial Action Task Force (FATF) began its activities in 1990, the financial industry already was inclined to expand mechanisms for control and attainment of information on operations and customers of the financial system. For criminal policy to affect the financial power of criminal organizations, the package of measures for the financial industry went through a long normative process. As can be seen after in this paper, from the guidelines provided by the Basel Committee (1988) specifically aimed at money laundering (1.1.) this package of measures developed into the "Forty Recommendations of the Financial Action Task Force on Money Laundering" (1990) (1.2), a soft law document par excellence, ratified in two UN Conventions: against transnational organized crime (2000) and against the financing of terrorism (1999) (1.3).

1.1. Basel Principles

The set of principles prepared by the Basel Committee focused on prevention of banking system use by funds derived from criminal activity through encouragement of ethical standards of professional conduct. The principles refer to appropriate identification of all customers; determent of transactions that do not appear to be lawful; cooperation with legal authorities; formal adoption by the banks of policies compatible with the said principles; and assurance that all employees of the banking system, wherever located, shall be informed of the content thereof ("Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering", Basle Committee on Banking Regulations and Supervisory Practices, 1988. Et seq., "Basel, 1988")¹⁰.

In the same month of December 1988 when the UN Convention against trafficking in drugs was adopted, the Basel Committee issued a document with the purpose of encouraging the banking industry, by means of a 'general statement of ethical principles', to adopt a common position so as to ensure that banks would not be used neither to hide nor launder funds obtained through criminal activities and, in particular, through trafficking in

¹⁰ Additional information on precursors of the anti-money laundering system, see MACHADO, Maira Rocha. *Internacionalizacao Do Direito Penal*. Sao Paulo: Ed. 34, 2004, p. 129-138.

drugs¹¹. According to the Committee's perspective, preventing the banking system from being intermediary in operations with funds derived from criminal activities is a response to essentially corporate needs. The main concern is that inadvertent association by banks with criminals could undermine public confidence in banks and hence the stability of the entire banking system.

In this document, the G10 representatives consider acceptable the assertion that “banks may have no means of knowing whether the transaction stems from or forms part of criminal activity,” and similarly, “in an international context it may be difficult to ensure that cross-border transactions on behalf of customers are in compliance with the regulations of another country”. Considering these difficulties, it recommends banks “to make reasonable efforts to determine the true identity of all customers”, and also recommend banks not to offer services or actively provide assistance in transactions which they have “good reasons to suppose are associated with money-laundering activities”. Additionally, the document suggests as “appropriate measure” to be adopted in view of “reasonable presumption” that a certain amount of money derives from criminal activity, to deny assistance, sever relations with the customer and either close or freeze the customer's accounts¹².

These principles act only as a base whereupon FATF structured obligations for the financial industry. Beginning as ethical principles, the recommendations have now become genuine legal obligations, as follows.

1.2. FATF Recommendations

Created by heads of State or Government of G7 and by the President of the Commission of European Communities, FATF initiated its activities with the preparation of a document entitled “Forty Recommendations”. Its objective was to establish guidelines for an anti-money laundering system based on the improvement of national judicial systems, increased participation of the financial system and strengthened international cooperation. Subsequent to the publication of the document in 1990, all OECD (Organization for

¹¹ GILMORE, William. *Dirty Money: The evolution of money laundering countermeasures*, 2nd ed., Belgium: Council of Europe Publishing, 1999, p. 86.

¹² Basel, 1988, Principles, II, III and IV.

Economic Cooperation and Development) member countries joined the group and began to implement the “Forty Recommendations” at the same time as other non-OECD countries were also invited to participate¹³. The initial membership of FATF was altered in 2000 with the addition of Brazil, Argentina and Mexico – an OECD member - and in 2003 with the inclusion of the Russian Federation and South Africa. China was welcomed as an observer in 2005, South Korea and India in 2006. They could become effective members once they implement the “key FATF Recommendations”¹⁴.

Officially FATF is not an integral part of the OECD. However, considering that some members belong to both, share the physical location and that some of the most important documents are subscribed to by both organizations, FATF describes itself as “an inter-governmental body whose purpose is the development and promotion of policies, both at national and international levels, to combat money laundering and terrorist financing”. And adds, “the FATF Secretariat is housed at the OECD”¹⁵.

The “Forty Recommendations” were updated in 1996 and 2003 in order to adjust the original text with regard to difficulties detected by member countries and the dynamics of the international financial system. After September 11, 2001, FATF extended its original mandate, thus far limited to anti-money laundering, so as to include combating the financing of terrorism. In October of the same year, during a special session, it issued the document “FATF's Eight Special Recommendations”, aimed at establishing new international standards for “combating the financing of terrorism”. These special recommendations became “Nine” in 2004 with the recommendation on the transnational transport of values. Since then all its activities incorporate, together with anti-money laundering activities, strategies specifically directed to freezing and confiscating funds intended for financing of terrorism.

¹³ The founding members (Canada, France, Germany, Italy, Japan, United Kingdom, United States of America and European Commission) were promptly followed by Australia, Austria, Belgium, Luxembourg, Netherlands, Spain, Sweden and Switzerland. In 1991 the group was joined by additional OECD countries (Denmark, Finland, Greece, Ireland, Iceland, New Zealand, Norway, Portugal and Turkey) in addition to Hong Kong, Singapore and the Gulf Cooperation Council.

¹⁴ FATF, *Annual Report, 2007-2008*, 30.06.2008, p. 2. All FATF documents mentioned in this paper are available at www.fatf-gafi.org.

¹⁵ Excerpt reproduced in all press releases of the organization.

Three central axes have guided the activities of FATF since its creation. The first axis consists of preparation and continuous update of a “national regime” involving criminal law, administrative and financial regulation.

The second axis focuses on international dissemination of the aforementioned model, which includes expansion of the number of FATF member countries conditional on admission criteria, encouragement of the creation of regional agencies mirroring FATF objectives and cooperation with other international agencies (World Bank, International Monetary Fund, United Nations, Europol, among others)¹⁶.

Continuous monitoring of implementation and functioning of the “national regime” constitutes the third axis. Through regular evaluations, the monitoring program and the type of reaction to non-incorporation of FATF recommendations are different for member and non-member countries. With the former the primary technique used is peer pressure based on the results of rounds of mutual evaluation¹⁷. In contrast, non-member countries can be included in a widely disseminated list as “non-cooperate country or territory” (NCCT) and submitted to counter-measures aimed at preventing FATF member countries from having business or transactions with natural persons and corporations from the said countries¹⁸.

Therefore, the objective is to make sure that all countries – or at least those that have relevant financial centers – implement the same *state action model* to deal with money laundering. Operational for just over fifteen years, now it is possible to assert that to a greater or lesser degree depending on the country, this model already has been incorporated, with its essential characteristics, in many countries.

¹⁶ The list of international organizations with whom FATF maintains connection, their jointly developed activities and a summary of the members and activities of the five FATF-style regional organizations in operation – Caribbean, Europe, Asia-Pacific, East and South Africa and South America – are all in the annual reports published by FATF on its own Web page. As indicated below, the FATF style body for Latin America is called GAFISUD and has been operative since 2002.

¹⁷ The annual report includes a summary of the results accomplished in the evaluated member countries (*FATF, Annual Report*,..., p. 08-11). For a full version of the evaluation guide containing basic criteria, adjustment levels and interpretations of each recommendation, see *FATF, Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF 8 Special Recommendations*, 02.27.2004.

¹⁸ The evaluation criteria and counter-measures adopted with regard to non-member countries can be referred to in another document of FATF (*FATF, Annual Review of Non-Cooperative Countries or Territories*, 10.06.2005). For a critique about the evaluation process and utilization of counter-measures, see MACHADO, Maira Rocha. *Internacionalizacao*. p. 168-183. In Brazil, the publication of the list of non-cooperating countries is made by means of a Carta-Circular issued by COAF (Council for Financial Activities Control) of the Brazilian Ministry of Finance (Ministerio da Fazenda).

The numbers are a little different at this point. FATF indicates that its “standards have been endorsed directly by more than 150 jurisdictions around the world...”.¹⁹ But considering only the countries in which it is possible to follow the incorporation of the anti-money laundering regime through FATF public documents the number falls to 76: in addition to 31 member countries, 24 non-member countries evaluated in 2001 were considered “approved” in accordance with FATF criteria and another 21 non-member countries on the list of non-cooperating countries were removed from it after having implemented the minimum conditions required by FATF, before the issue of the new recommendations on financing terrorism²⁰. Interviews suggested that the FATF mathematics is due to the inclusion of the countries that are members of the regional FATF style bodies, even if they were not evaluated by the FATF itself.

In any case, this picture seems to indicate that FATF rules have a truly binding character. This allows the creation of a special category for “FATF's Forty Recommendations”: *binding soft law* instruments²¹. This concept is an attempt to describe FATF rules and the like that share two main components: the absence of the binding character of the rules – which are not international legal obligations – and the existence of effective mechanisms that induce their implementation. In short, *binding soft law* tries to designate a non legal international State responsibility regime directed to foster the harmonization of national legal systems through an international reference of legal content but not of a legally binding character²².

This national regime - called here “anti-money laundering system” - is structured around three main points. The first consists of making autonomous the investigation of

¹⁹ FATF, *Annual Report*,... p. 2.

²⁰ Out of the 23 countries considered “non-cooperative countries” only three were on the list since 2001: Myanmar, Nauru and Nigeria (*FATF. Annual Review of Non-Cooperative Countries or Territories*, 10.06.2005, Executive Summary). Nauru was de-listed in October 2005, after it abolished its “400 shell banks”, and Nigeria in June 2006. (*FATF. Annual Review of Non-Cooperative Countries or Territories*, 23.06.2006, Executive Summary).

²¹ For FATF recommendations and the *binding soft law* concept see MACHADO, Maira Rocha. *Internacionalizacao...*, p. 45 and p. 207. For soft law instruments, see NASSER, Salem Hikmat. *Fontes E Normas Do Direito Internacional: Um Estudo Sobre A Soft Law*. Sao Paulo: Ed. Atlas, 2005.

²² For a discussion on the blurring between categories of norms, see PICCIOTTO, Sol. “Expertise, National Interest and Universal Values in the Transnational Transformation of the State”. Paper presented at Law and Society Annual Conference – IRC Transnational Transformations of the State (Berlin, 2007). FATF’s Recommendations are considered here an example demonstrating that “despite their formally ‘soft’ character, such codes often have considerable normative force, as much or more than does ‘hard’ international law, which in any case mainly relies on consensual rather than coerced compliance”.

money laundering in relation to the proceedings on the predicate offence. The legal definition of money laundering is composed of two essential elements: the *movement or occultation of funds* and the *illegality of origin*. The first element refers to all kinds of operations and transactions one can make in financial and economic life – selling, buying, changing, trading, transferring, having in deposit, importing, exporting, etc are all forms of “moving funds”. The concealment is nothing more than a movement with a specific purpose – conceal or dissimilate the nature, origin, localization, etc²³. The second element – illegality of origin – is one of the most important connections of the anti-money laundering regime with the criminal system. In this context, only the funds that come from activities considered a crime by a certain country are illegal. Funds that come from activities considered illegal by administrative or civil law are normally excluded. Moreover the “illegality of the origin” is frequently determined by a list of criminal offences, defined by each country at the moment of defining “money laundering” in criminal legislation, as we will see in the next section concerning Brazil and Argentina.

The second point consists of attributing to a group of natural persons and corporations that operate either directly or indirectly in the financial system the legal obligation of identifying customers, keeping data records updated and reporting of suspicious transactions. In financial industry, successive updates of “FATF's Forty Recommendations” significantly expanded the number of obliged persons. If in the beginning they were only applicable to banking system operators, today they reach non-banking institutions inside and outside regulation regimes, as well as economic segments that handle large amounts (casinos, real estate brokers, accountants, etc.).

The creation of a “financial intelligence unit” constitutes the third point around which the anti-money laundering system is structured. Its attributions include the centralization of reports made by financial operators, application of administrative sanctions against those that do not fulfill legal obligations, in addition to information exchange with foreign authorities. The result of the implementation of these measures in Brazil and Argentina will be detailed afterward.

Each one of these three points synthesizes one or more of “FATF's Forty Recommendations.” These recommendations establish points that should be incorporated

²³ This very broad definition of money laundering is part of the Brazilian legislation (9.613/98, section 1).

into national laws, leaving a margin for specific elements that may be defined consistent with the legal, institutional and organizational characteristics of each country. In this margin the full verification of the degree of adjustment to said recommendations by FATF member countries is carried out in rounds of mutual evaluation. Since 2004 these evaluations have been developed based on the document *Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF 9 Special Recommendations* that establishes evaluation criteria that should be adopted by assessors in addition to specifying and illustrating the content of the recommendations. This document “was agreed by the FATF Plenary at its meeting in February 2004 and approved by the Executive Boards of The International Monetary Fund and the World Bank in March 2004”²⁴. In conjunction with the control exerted by FATF over the level of implementation of systems and the failures and gaps thereof, the publication of summaries of the reports prepared by assessors also helps to understand systems adopted in different countries and to follow the modifications these systems will undergo in order to comply with FATF recommendations. This is an important source of information used in this paper.

1.3. UN Conventions

Through FATF action, therefore, measures directed to the financial industry and the criminal justice system, were disseminated and incorporated in multiple countries according to results of the monitoring performed by FATF. Only in the beginning of the present decade when FATF was reaping these results the UN Conventions against transnational organized crime and financing of terrorism granted *hard law* status to this criminal policy.

On September 29, 2003 became internationally operative the UN Convention against transnational organized crime formerly adopted in New York on November 15, 2000²⁵. The Convention applies to money laundering crime (Article 6), corruption (Article 8), organized crime (Article 5) and all serious offences (punished with deprivation of

²⁴ FATF, *Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF 9 Special Recommendations*, 02.27.2004, p. 05 and 82.

²⁵ The Convention was enacted in Brazil by way of Decree No. 5015 dated 03.12.2004. In 2005, this convention already had been subscribed by 147 countries and ratified by 102. Et seqq., “UN, 2000”.

liberty of which the maximum period is not less than four years) on condition that they have a “transnational character”²⁶ and involve the action of an “organized criminal group”²⁷. The Convention establishes together with the criminal classification of these activities a series of non-criminal measures to confront and prevent the said activities (Article 7, 9, 30 and 31).

The UN Convention for the Suppression of the Financing of Terrorism adopted in New York on December 09, 1999²⁸, internationally operational since 2002 is structured around the following premise stated in its preamble: “the number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain”. Based on the foregoing premise, it establishes as Convention objectives, in first place, to prevent and counteract, *without impeding in any way the freedom of legitimate capital movements*, direct or indirect financing of terrorist activities and the movement of funds suspected to be intended for terrorist purposes²⁹. And, secondly, to intensify the exchange of information concerning such funds. The Convention further establishes for each crime under its jurisdiction a group of “non criminal” measures.

In both Conventions these measures reproduce at least with regard to money laundering, the same aspects proposed by FATF since early 1990's: the requirement that financial institutions identify customers, maintain updated records and report suspicious operations and also that information exchange be carried out by means of a “financial intelligence unit to serve as a national center for the collection, analysis and dissemination of information” (UN, 2000, Article 7.1. a, b and UN, 1999, Article 18.1.b). In the case of

²⁶ “... an offence is transnational in nature if: (a) it is committed in more than one State; (b) it is committed in one state but a substantial part of preparation, planning, directing or control takes place in another state; (c) it is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) it is committed in one State but has substantial effects in another State” (UN, 2000, Article 3.2).

²⁷ “Organized criminal group shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established by the Convention, in order to obtain, directly or indirectly, a financial or other material benefit.” (UN, 2000, Article 2(a)

²⁸ This Convention is internationally in operation since 04.10.2002. In Brazil, the Convention was approved by the National Congress on 06.30.2005 and enacted by the President of the Republic by way of Decree No. 5640 dated 12.26.2005. Et seqq. “UN, 1999”. Since 2005 the Convention comprises 132 signatory countries and 54 State Parties, of which 50 ratified the instrument after September 11, 2001.

²⁹ The concern with threaten to legitimate capital movement is also expressed in the Convention against transnational organized crime, not in the Preamble but in the article on measures to combat money laundering. Which include means to “detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital.” (UN, 2000, Article 7.2).

financing of terrorism, the Convention includes measures to ensure that “institutions verify the identity of the real owners of such transactions” and “the legal existence and the structure of the customer by obtaining, either from a public register or from the customer or both, proof of incorporation” (UN, 1999, Article 18.1.b. i, ii). In addition, the two Conventions contain long articles regulating the freezing or seizure of proceeds, funds or equivalent value and the domestic and the international procedure for this purpose (UN, 2000, Article 12 and 13 b and UN, 1999, Article 8), which was also regulated, however, in a less detailed manner, by the Convention against illicit traffic in narcotic drugs (UN, 1988, Article 5).

* * *

These three normative moments of the formulation of a policy to deal with money laundering are strategically conceived to foster general acceptance. “Financial power of criminal organizations” and the “instability of national economies” have appeared in a series of official documents, in specialized articles and in newspapers, as well as in the discourse of those who operate the system. The preamble of the UN Convention (UN, 1988)³⁰, many documents prepared by FATF³¹ and by COAF³², the Brazilian Financial Intelligence Unit, to mention only a few, identify these two aspects as “the problem” to confront by means of the anti-money laundering system.

Particularly in the course of a decade marked by successive crises, the stability argument seems as persuasive as that of “combating crime”, although from the standpoint of the financial industry the “illicit-origin-capital” ingredient plays an almost insignificant

³⁰ “Recognizing the links between illicit traffic and other related organized criminal activities which undermine the legitimate economies and threaten the stability, security and sovereignty of States,” (UN, 1988, Preamble).

³¹ “In order to ensure the stability of the international financial system and effective prevention of money-laundering, it is desirable that all financial centres in the world should have comprehensive control, regulation and supervision systems” (FATF/OECD, Rel. NCCT, Feb 2000, item 03).

³² “Money laundering is one of the most effective ways through which criminals are able to safeguard and promote their suspicious interests. In addition, it deteriorates relationships between nations and impairs the development of economies, directly or indirectly affecting the social and political stability of the Country. (...) The concern with the impact of this crime upon the financial system and its capacity to undermine the integrity of state administrations and weaken social and economic policies prompted Brazilian authorities to adopt initial measures to fight money laundering.” COAF, *Relatorio de Atividades*, 2000, Introduction.

role in the recipe for stability³³. Anyway, this combination of “threats” seems to give rise to the political motivation required for the orderly incorporation of this set of rules in both Brazil and Argentina.

2. The anti-money laundering system in Brazil and Argentina

The anti-money laundering system in Brazil and Argentina is presented here by focusing on the three central points proposed by FATF: (2.1.) the criminalization of the offence of money laundering, (2.2.) the creation of a financial intelligence unit and (2.3.) the obligation of several economic segments to identify customers, maintain records and report transactions considered suspicious.

2.1. The money laundering offence

Brazil and Argentina have a complex description of the money laundering offence. In both countries, the law seeks to encompass the different economic activities and financial transactions. The result is long and confusing sections with description of conducts, exemptions, forms of application and various possibilities of increasing the penalty³⁴. The basic structure of the money laundering offence in Brazil and Argentina is presented below (**box 1**).

³³ Even to Vito Tanzi, from IMF, one of the few authors who include the money laundering issue in macroeconomic analyses and a committed advocate of markets control standardization so as to prevent money laundering, “dirty money” does not play a significant role in stock market decline. “The volume of dirty money annually entering the financial system is too high. Nobody knows for sure how much it amounts to, but it surely exceeds US\$ 3 Billion. Unbelievable, isn't it? However in a vast and liquid international financial market operating over US\$ 1 Trillion per day it would not draw much attention, would it?” told Tanzi to the magazine *Revista Bovespa* in December 1997 (Year V, No. 51, p. 06). As CORTEZ demonstrates, there is not even consensus around the causality relationship between financial stability and banking industry's regulation itself. As there are authors who attribute the increased instability to “macroeconomic maladjustment combined with increased volatility of the international economy”. CORTEZ, Tiago Machado. “O conceito de risco sistêmico e suas implicações para a defesa da concorrência no mercado bancário” in *Concorrência e Regulação no Sistema Financeiro*. Campilongo, Celso et al. (orgs.). Sao Paulo: Max Limonad, 2002, p. 329.

³⁴ Just to give an example, the first and second paragraphs of the Brazilian section 1 add to the description of the money laundering offence the conversion into licit assets; acquisition, receipt, exchange, trade, giving or receipt in security and safekeeping, storage, handling or transfer, and import or export of assets other than for

It is worth mentioning that in Argentina the offence refers to assets originating from any criminal activity, while Brazil indicates a list of these predicate offences. FATF strongly supports the extension “to the widest range of predicate offences”³⁵. A new Brazilian law on money laundering is being discussed to eliminate the list of offences, among many other changes.

Box 1 – The (basic) money laundering offence

	Brazil	Argentina
Law³⁶	9613/1998 – section 1	25.246/2000 – section 3
Description of the conduct	“concealment or dissimulation of the nature, origin, location, availability, handling or ownership of assets, rights or valuables directly or indirectly originating from criminal activities ...” listed below.	“Whoever converts, transfers, manages, sells, encumbers or applies in any other way money or another kind of goods arising from a crime in which he has not participated”
Predicated offences	trafficking in drugs; terrorism and financing; smuggling or trafficking in arms; kidnapping for ransom; acts detrimental to government authorities; acts detrimental to the Brazilian financial system; acts performed by criminal organizations and crime performed by an individual against the public administration of another country.	Any crime “with the possible consequence that the original goods or the substitutes thereof appear to come from a lawful source, provided that their value be over fifty thousand pesos (\$ 50,000)”
Penalty	“three to ten years’ imprisonment and a fine”	“two to ten years’ imprisonment and a fine of two to ten times the amount of the operations made”

the actual value thereof in order to conceal or dissimulate the use of assets, rights or valuables originated from preceding crimes. And also, uses in economic or financial activities, any assets, rights or valuables knowingly originated from any of these crimes and participate in a group, association or office, although cognizant of the fact that the major or ancillary activity thereof is directed to commitment of one of these crime.

³⁵ FATF, *Methodology ...*, 2004, p. 7.

³⁶ Both laws are available in English in the UIFs web sites: www.coaf.fazenda.gov.br and www.uif.gov.ar

2.2. The Financial Intelligence Unit (FIU)

Considering that the report of suspicious transactions and the exchange of information are fundamental to start and develop investigations on money laundering, the creation of a national agency to centralize the functioning of the system is extremely important.

In this regard, Brazilian and Argentinean experiences differ considerably. Although both countries formally created the FIU in the Laws that established the money laundering offence, the Brazilian FIU started to operate right away, in 1998, while Argentina started two years after the formal creation, in 2002.

Since then, the Argentinean FIU has been trying unsuccessfully to hire a permanent staff. To develop the activities of the organ, 10 specialized people were hired, according to information concerning 2006³⁷. On the other hand, Brazilian FIU has expanded the staff gradually, reaching 32 members and a reasonable infra-structure in 2006³⁸.

This situation is clearly reflected in the reports prepared annually by both organs. The Brazilian report concerning 2005³⁹ contains detailed information and statistics about the suspicious reports received and sent to the appropriate authorities, the value involved, the timing of the answers, exchange of information inside the country and with other FIUs, and also figures on investigation, prosecution and condemnations. The data refer to more than sixty thousand reports received since 1998⁴⁰. On the other hand, the Argentinean report contains information on the final results of the two thousand suspicious reports received since 2002⁴¹. Just for comparison, it is worth noting that the Brazilian UIF received almost eighteen thousand reports in the first four years of operation (1998-2002). The different dimensions of the Brazilian and Argentinean financial systems and the serious crisis this latter country underwent at the beginning of the decade clearly indicate that the number of reports cannot be compared.

³⁷ *Informe al Congreso de la Union* (Unidad de Información Financiera, 2006, p. 8 e 9) [Available only in Spanish at www.uif.gov.ar](http://www.uif.gov.ar)

³⁸ Information obtained through interview with UIF members.

³⁹ The 2006 report has not been published until July, 12.

⁴⁰ *COAF Report*, 2005. Available only in Portuguese at COAF website.

⁴¹ *Informe al Congreso de la Union* (Unidad de Información Financiera, 2006, p. 13)

Certainly, many other factors have contributed to the disparities concerning the FIU operation. An important one seems to be the fact that Argentina took many years to pass a Law authorizing the financial system to send the information requested by the Financial Intelligence Unit. When the Argentinean FIU started operations in 2002, banking institutions and the Federal Administration of Public Revenue used to argue bank and tax secrecy to avoid sending the information requested by the FIU. In many cases it was necessary to start a judicial case, even with an insufficient basis, and ask for the removal of the bank or tax secrecy. In April 2006, Law 26087 determined that in the context of the suspicious report system, the economic and financial sectors obliged to report could not argue bank or professional secrecy nor even legal or contractual commitments of confidentiality. Moreover, it indicated that the Federal Administration of Public Revenue could only remove the tax secrecy when the organ itself reports the suspicious transactions and in relation only with the persons (natural or juridical) directly involved in the transaction reported. In all other cases, the FIU must request a federal judge for the tax secrecy removal and he has at most 30 days to decide⁴².

Brazil also had to change its tax and bank secrecy law to allow FIU operation. This change was requested by FATF during the first evaluation when Brazil became a member. As explained afterwards (3.), a few months later, in 2001, Brazil passed a new law admitting unrestricted access to COAF.

Box 2 – The Financial Intelligence Unit

	Brazil	Argentina
Law	9613/1998 – section 14-17 and COAF Bylaws, Article 7, IX	25.246/2000 – section 3 and 1038/03
Name	COAF	UIF Argentina
Operative since	1998 (new bank secrecy law: 2001)	2002 (new bank secrecy law: 2006)

⁴² *Informe al Congreso de la Union* (Unidad de Información Financiera, 2006, p. 31).

Jurisdiction	Economic Ministry	Ministry of Justice and Human Rights of the Nation
Function	To centralize communication of suspicious operations, to process and provide this information to the competent authorities (Public Prosecution Service or Police Authorities) and to exchange information with other units of financial intelligence	
Representatives members of the board.	Central Bank, CVM (Securities and Exchange Commission), SUSEP (Agency of Private Insurances), SPC (Secretary of Complementary Social Security), Attorney General of The National Treasury Secretariat (PGFN), Federal Revenue and Customs Secretariat (SRF), Brazilian Intelligence Agency (ABIN), Brazilian Federal Police (DPF), Ministry of Foreign Relations (MRE), and General Controller Secretariat (CGU)	Central Bank, Federal Administration of Public Revenue, Securities and Exchange Commission, Secretariat of Programming for the Prevention of Drug Addiction and Fight against Drug Trafficking (when appropriate); Ministry of Justice and Human Rights, Ministry of Economy and Production; Ministry of Internal Affairs.

2.3. The obligations to the economic and financial sectors

The third axes of the FATF anti-money laundering system is the mandatory report of suspicious transaction. According to this recommendation, each country should define a list of persons subject to the obligation of identifying their customers and keeping updated record thereof and reporting suspicious transactions.

In Brazil, each supervisory agency is in charge of providing specific regulation regarding content of obligations and defining what should be considered “suspicious operation”. This regulation is the responsibility of the Central Bank, CVM (Securities Commission), SUSEP (Agency of Private Insurances) and SPC (Secretary of Complementary Social Security) in their respective areas of operation. And of COAF in all other areas subject to obligations provided in the law, such as: real estate promotion; lotteries and raffles; trading in jewelry, precious stones and metals; bingos; credit card administration; commodity exchanges and their brokers operating thereat; trading of artwork and antiques; non-financial companies engaged in distribution of cash; and

factoring. Argentina has a very similar list of “obliged persons” as has the FATF Recommendations⁴³.

The suspicious transactions report system will be described below, particularly regarding the regulation provided by the Brazilian Central Bank. The documents and interviews gathered until now do not allow a reconstitution of the Argentinean report system for comparison. Anyway, it is worth noting that

“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.”⁴⁴

And also,

“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

⁴³ See FATF Recommendations 13 and 16. Brazil defines this list at Law No. 9613/98, section 9-11 and an updated version of Argentina’s list can be found at *Informe al Congreso de la Union* (Unidad de Información Financiera, 2006, p. 11).

⁴⁴ Machado; Maíra R. and Jorge, Guillermo. “Anti-Money-Laundering and Governance in Latin America”, p. 27, paper presented at the “Workshop on Global Administrative Law issues in Latin America”, sponsored by University of San Andrés and New York University Institute for International Law and Justice in March 2007. The paper is available at www.iilj.org/GAL/GALBuenosAires.asp and also at www.direitogv.com.br (working paper 04).

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”⁴⁵

The picture seems to be quite different in the case of Brazil. In the years that followed the enactment of Law No. 9613/98, the supervisory agencies issued norms and regulations so as to detail obligations in their respective areas. These norms specify the type of information that reference files should consist of, which operation records should remain stored at the institution for a period of five years and the information to be entered in these records, in addition to the category of operations that should be reported to COAF and other supervisory authorities.

With regard to the obligation to report suspicious operations, the resolutions provide objective criteria – the operation of whose value is equal to, or greater than, a certain value or repeated operations that add up to a figure that is close to this value – as well as specific characteristics of operations that should be given “special attention”.

In the case of COAF resolutions, directed to all sectors that do not have their own specific supervisory authority, these operations are annexed in “list of suspicious operations”⁴⁶. In general, the description of operations listed in this annex refers to: sudden and continued increases in collection or in the volume of assets sold or transferred; lack of apparent economic or legal basis; payment using funds proceeding from foreign bank accounts; in addition to specific situations in each sector⁴⁷. This annex also include a standard item contemplating “operations that, as regards the involved parties, amounts and form of execution (...) could hypothetically correspond to offences specified in Law No. 9613/98 or bear relationship thereto”. The situations described are considered “suspicious”

⁴⁵ Machado; Máira R. and Jorge, Guillermo. “Anti-Money-Laundering and Governance in Latin America”..., p. 27.

⁴⁶ Even though all resolutions refer to “suspicious operations”, COAF's last report, dated February 2005 began to designate them as “atypical operations”.

⁴⁷ Some examples include “sudden occurrence of high value bets in a given game mode, with possibility of closing the possible combinations”, COAF Resolution No. 03/99, Attachment, Item 03 (lotteries and raffles); or “the proposal to sell precious stones or metals in raw state (...) where the declared mining claim area has no tradition in the relevant product (...)”, Resolution do COAF n° 04/99 (jewels, precious stones and metals), Attachment, Item 04.

and subject to obligatory communication when they “may constitute serious indications of crimes specified in Law No. 9613/98”. That is, consistent with current legal provision present in all COAF resolutions, transactions should be reported if, in addition to having “suspicious” characteristics they also offer indications of association with money laundering.

Table 1 – Suspicious transactions report received by COAF (1999-2006) ⁴⁸

⁴⁸ Information based on 2003, 2004 an 2005 COAF reports. Figures on 2006 provided by a COAF staff member. For a very brief reference to economic, political and regulatory justifications of the variation of the number of communications in each sector, see *COAF. Relatório de Atividades 2004*, February 2005, p. 08.

	1999	2000	2001	2002	2003	2004	2005	2006	Total
1. Atypical Operations									
1.1. Sectors regulated by COAF									
Bingos	35	1.412	960	55	19	7	0	0	2.488
Real Estate Purchase & Sale	206	769	610	741	619	630	750	747	5.072
Factoring	32	20	37	1	1	27	12.892	7610	20620
Jewels & Precious Stones and Metals	6	7	1	1	0	1	0	0	16
Loteries & Raffles	0	133	167	97	140	84	101	101	823
Artwork & Antiques	0	0	0	0	1	2	0	0	3
Subtotal	279	2.341	1.775	895	780	751	13743	8458	29.022
1.2. Sectors with specific regulatory agency									
Financial System(Central Bank)	544	4.308	4.521	4.697	5.405	7.086	12.593	10.942	50.096
Insurance (SUSEP)	0	0	7	361	879	1.169	2.505	3.100	8.021
Stock Exchanges (CVM)	0	0	10	9	13	12	178	192	414
Pension Funds (SPC)	0	1	9	0	2	28	105	201	346
Subtotal	544	4.309	4.547	5.067	6.299	8.295	15.381	14.435	58.877
2. Cash operations									
2.1. Sector with specific regulatory agency									
Financial System(Central Bank)	-	-	-	-	33.358	76.102	129.489	171.107	410.056
Total (1+2)	823	6.650	6.322	5.962	40.437	85.148	158.613	194.000	497.955

Banking industry regulation, responsible for most communications, defines three types of obligation in three different resolutions. The first one defines the obligation to report transactions involving any asset that could be converted in cash totaling R\$ 10,000 or more when they “could be an indication of a criminal occurrence” (Carta Circular No. 2852 dated 12.03.1998) (**Table 1 – 1.2., first line**).

However, the second resolution lists 43 operations or situations that “could be indications of offences provided by Law No. 9613/98...” These operations are divided into four categories – (i) cash or traveler's check operations in situations relating to (ii) current account maintenance, (iii) international activities, and (iv) institutions' employees and representatives. They include “overdrafts with same-day coverage”, “movement of funds in border markets”, “transactions involving non-resident customers”, activity “not compatible with financial capacity,” among other situations that are “not justified” or “unusual”

(Circular Letter No. 2826 dated 12.03.1998) (**Table 1 – 1.2., first line**). In this case the financial system operator does not need to make any subjective reasoning on the suspected criminal action as the plain occurrence of stipulated facts is enough to create the obligation to report.

On the other hand, the third resolution establishes that all financial institutions should register in SISBACEN (Central Bank Information System) all deposits or withdrawals greater than or equal to R\$ 100,000.00, “not considering any analysis or measure” (Carta Circular No. 3098 dated 07.11.2003) (**Table 1 – 2.1**). This register should be made on the same date as the respective deposit or withdrawal and should include the name and tax roll registration number (CPF or CNPJ) of the owner or beneficiary of the money, as well as of the person who makes the said deposit or withdrawal, in addition to information on the relevant bank agency, current account and account holder name(s). The same registration obligation applies to deposits and withdrawals under R\$ 100,000.00 that “present indications of occultation or concealment of the nature, origin, location, disposition, movement or ownership of assets, rights and valuables...”⁴⁹.

These three types of obligations perform very different functions as regards the relationship between judicial intervention and the financial industry. The first set of obligations specifies as criteria for communication the possibility of “existence of offence” therefore transferring a complex task performed by the criminal justice system after a series of steps and the involvement of several agencies to financial system operators. Furthermore, other factors take part in the formation of judgment in addition to the occurrence of a presumably illicit fact, such as the existence of an author to whom the illicit fact could be imputed, criminal intent, etc.

In contrast, the second and third resolutions provide parameters with different degrees of specificity which are not dependent on assessment of a possibility of criminal occurrence. They operate as mediation between the operation and the possibility that this operation is qualified as an offence upon the action of agencies of the criminal justice system. Accordingly, operations having certain characteristics should be reported so that COAF and subsequently the criminal system could verify the plausibility of a criminal

⁴⁹ These “indications” refer to the criminal type of money laundering as provided in Law No. 9613/98. It is worthy mentioning that in the two hypotheses of registration obligation, the resolution makes reference to “cash deposit, cash withdrawal or request of provision for cash withdrawal” (Article 1).

occurrence. By listing these parameters the resolution presumes “they can be indication of criminal occurrences” and, therefore, exempts the financial system operator from making such judgment. The same occurs in the case of transactions over R\$ 100,000.00. Therefore, in the second and third cases the obligation of the financial operator is not “contaminated” by criminal regulation. On the contrary, objective criteria were established so that the facts could be identified in an expert manner by technically qualified people.

3. The role of FATF in the implementation process in Brazil and Argentina.

Box 3 below summarizes the chronology of the anti-money laundering system implementation in Brazil and Argentina and also allows a comparison with its development in the global and regional arenas. The role played by FATF will be discussed by pointing out the importance of FATF membership for the creation of the system and influence of the FATF mutual evaluation process on the permanent reformulation of the system.

Box 3⁵⁰ - The anti-money laundering system: global, regional and national levels

Global	Regional (Latin America)	Brazil	Argentina
1988: UN Convention			

⁵⁰ This is an enlarged version of the box prepared for the paper Machado; Maíra R. and Jorge, Guillermo. “Anti-Money-Laundering and Governance in Latin America”...

Against Illicit Traffic In Narcotic Drugs And Psychotropic Substances			
1990: FATF : 40 Recommendations.			
1995: Egmont Group			1995: Laundering of proceeds of drug trafficking criminalized
	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.	
		1998: Law 9613/98 criminalizes laundering of proceeds of a list of serious crimes and creates the Financial Intelligence Unit - COAF – (Treasury Ministry).	
1999: FATF invites Brazil, Argentina and Mexico to join as observers at a Plenary Meeting.	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. Extension of the money laundering offence to include all existing crimes in the Penal Code. Formal creation of FIU 2000: First FATF evaluation in Argentina. Argentina was considered compliant with the minimum conditions to become a member and several deficiencies were pointed out.
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: FATF threat for non compliance
2002: UN Convention for the suppression of the financing of terrorism entry in international force.	2002: GAFISUD (a FATF style body for Latin America) started operations.		2002: FIU started operations (Dec.1038/03)
2003: UN Convention against the transnational organized crime		2003: Creation of a National Agenda (GGI-LD – ENCLA) 2003: Terrorism financing is considered a previous offence of money laundering (Law 10.701/03). 2003: “on-site” visit of the second	2003: “on-site” visit of the second evaluation (October, 20). 2003: Criminalization and forfeiture rules amended, partially complying with Recommendations

		evaluation (November).	
		2004: UN Convention on transnational crime entry in force 2004: GAFISUD second evaluation report approved by the FATF Plenary Meeting 2004: Creation of DRCI (Minister of Justice)	2004: GAFISUD second evaluation report approved by the FATF Plenary Meeting.
		2005: UN Convention for the suppression of terrorism financing entry in force.	
			2006: FATF High Mission Visits Argentina to verify its improvement (March, 30) 2006: FIU receives unrestricted access to bank and securities records (Law 26087 – April, 24). 2006: Board of FIU restructured (Law 26119 – July, 26) 2006: Financing Terrorist draft sent to Congress (December, 20)

First of all, it is worth noticing that Brazil created the anti-money laundering policy before becoming a FATF member while the development in Argentina was closely linked to FATF initiatives.

According to the authors of the 1998 Brazilian Law, the FATF 40 Recommendations represented one reference, among others, for the establishment of a national policy, including a broad and autonomous definition of money laundering, the creation of a Financial Intelligence Unit and a mandatory report system of suspicious transactions⁵¹. The interview with the Minister of Justice at the time of creation of this Law, thus its author and subscriber, indicates that at that time Brazilian interest in this policy was determined more by contacts with USA representatives on drug issues than by the initiative of FATF. Even though, the FATF report that formalizes the Brazilian invitation to become a member recognizes that “Brazil has, in a relatively short time, developed and begun implementing a comprehensive anti-money laundering program.” The only problem identified at that time was the lack of successful prosecutions and convictions

⁵¹ The explanatory note of Law 9613 makes reference to the 40 Recommendations as a document of the “European Communities”, but also quotes different national legislations, most from central Europe, and the Model Regulation on Drugs, issued by the Organization of American States in 1996 (EM 692/MJ).

considered by FATF due to “the relatively recent establishment of the Brazilian anti-money laundering system”. And the report concludes: “the Brazilian anti-money laundering system is built on sound principles, and all authorities involved in implementing and overseeing it appear to be firmly committed to making it succeed”⁵².

In the case of Argentina, on the contrary, efforts to implement international rules on money laundering started after the invitation to join a FATF meeting as an observer. Law 25246 passed in April 2000 – meeting the essence of 40 the Recommendations - is seen by FATF as a first sign of Argentina’s commitment to FATF that needed to be greatly improved⁵³. Consequently, the decision to invite Argentina to become a member was made despite many deficiencies identified by FATF in 2000⁵⁴.

After becoming members, both countries were closely followed by FATF and by GAFISUD⁵⁵, the FATF style body created in 2002 to conduct the evaluation process in Latin American countries, among other things.

Brazil and Argentina have been evaluated twice. The first evaluations took place at the beginning of 2000 to review the fulfillment of minimum requirements for admission to the FATF. The second round of evaluations was conducted by FATF and GAFISUD representatives during 2003 with the objective of identifying the level of compliance of the anti-money laundering systems and providing recommendations for their improvement.

In its Annual Report dated July 2004 FATF published the “executive summary” of the second evaluation of the anti-money laundering system concerning Brazil and Argentina⁵⁶. The evaluation was based on information collected by the FATF assessors that visited both countries in 2003 during meetings held with Judicial Power and Executive Power agencies, in addition to financial institutions and private sector organizations⁵⁷.

⁵² *FATF Annual Report*, 2000, p. 11.

⁵³ *FATF Annual Report*, 2000, p. 9.

⁵⁴ “Despite the substantial exceptions to the applicability of Argentina’s new anti-money laundering legislation, Law 25.246...” is sufficient to meet the pre-conditions required to become a member. *FATF Annual Report*, 2000, p. 9.

⁵⁵ Gafisud members are Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru and Uruguay.

⁵⁶ The summary report in English of these evaluations is available at the *FATF Annual Report. Annex C* (FATF, 2004).

⁵⁷ In the case of Brazil, this information was complemented by the Brazilian delegation that took part in the FATF Plenary Meeting held in Paris in June 2004 in which the evaluation results were discussed and approved. These results became publicly known in Brazil only in June 2005 with the reedition of the report under the International Monetary Fund seal, which put Brazil on the front page of the daily *Folha Dinheiro* of wide circulation in the country. The reproduction of the report within IMF sphere can be found in “Brazil:

As indicated above, the evaluation process conducted by FATF – the same model is followed by GAFISUD – includes “on-site visits” from a commission of experts from member countries, the preparation of the report detailing progress and deficiencies, its approval by the plenary of FATF and also, when it is considered necessary to strongly encourage national action, FATF sends a “high-level mission” to the country to reinforce the importance of compliance with the recommendations.

Although the non-compliance procedure for FATF member countries has been suppressed from the new version of the document that regulates the evaluation process⁵⁸, the report prepared by Argentina and interviews clearly indicates that they received a “high-level mission” in March 2006⁵⁹. According to previous FATF documents, the “high-level mission” is one of the five steps that should be taken “to encourage jurisdictions to take the necessary measures”⁶⁰. This is the step previous to the application of Recommendation 21 that requests “special attention to business relationships and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply the FATF Recommendations”⁶¹. The next step is expulsion from FATF.

The main problem identified in the Argentinean system, which generated the “high-level mission” was the inexistence of a Law criminalizing the financing of terrorism. As we can see in box 3 above, a project was sent to Parliament a few months after the visit⁶².

Brazil has been also closely monitored, but has never been subject to non-compliance policies. At the first evaluation FATF considered Brazil fully compliant with the recommendations then in effect, with one exception: the regulation regarding financial

Report on the Observance of Standards and Codes – FATF Recommendations for Anti-Money Laundering and Combating the Financing Of Terrorism”. *IMF Country Report n° 05/207*, June 2005. Available at www.imf.org). In Brazil the report was published as “Brasil e Criticado por Lavagem de Dinheiro. Estudo Divulgado pelo FMI Ataca Rigidez do Sigilo Bancario, Falta de Leis Claras e Facilidade para Uso de Laranjas”. *Folha de Sao Paulo*, Folha Dinheiro, B1, 06.21.2005).

⁵⁸ *Methodology for Assessing Compliance with the FATF 40 Recommendations and FATF 8 Special Recommendations* (FATF, 2004)

⁵⁹ *Informe al Congreso de la Union* (Unidad de Información Financiera, 2006, p. 19).

⁶⁰ *Review of FATF Anti-Money Laundering System and Mutual Evaluation procedures 1992-1999*, (FATF, 2001, p. 43).

⁶¹ Recommendation 21 adds: “Where such a country continues not to apply or insufficiently applies the FATF Recommendations, countries should be able to apply appropriate countermeasures”. (FATF 40 Recommendations).

⁶² The other deficiencies identified in Argentina are presented in the summary report of GAFISUD, page 3-6. *Primera Ronda de Evaluaciones sobre los sistemas de lavado de activos de Gafisud*. (GAFISUD, 2004). Available only in Spanish at www.gafisud.org.

secrecy limited the access of COAF to communication of suspicious transactions and required that the exchange of information in financial secrecy with other countries be made via rogatory-letter. Just over six months after the publication of the report on the evaluation of Brazil, Parliament enacted Complementary Law No. 105 dated 01.10.2001 eliminating the specified deficiencies⁶³.

Few years later, the procedure for National Congress approval of UN Convention for the Suppression of the Financing of Terrorism (1999), signed by Brazil on 11.10.2001 was handled in urgent manner since the presentation of Legislative Bill No. 986 dated 11.10.2003, few weeks before the FATF “on-site” visit. Even so, a few months later the Commission of Foreign Relations and National Defense, where the Bill was then being handled, received and approved Request No. 25/2004 requesting a Public Hearing that would include, among others, the President of COAF, on the need of urgency in the handling of this Convention. In the justification of this request, FATF is mentioned to indicate that non-ratification of the Convention by Brazil “represents one of the main gaps in the Country's evaluation before FATF” and also that the proposal should be accepted “in view of the proximity of the evaluation of Brazil by FATF”. The Convention was finally approved by the National Congress on June 30, 2005 (Legislative Decree No. 769/05) and enacted by the President of the Republic on December 26, 2005 (Decree No. 5640/05)⁶⁴.

The report of the second evaluation also indicates, with regard to each item of the anti-money laundering system, which ones are completely fulfilled by Brazil and what action should be taken regarding the remaining ones so as to “improve the legal and institutional infrastructure”. Particularly with regard to the financial industry, the change concerning financial secrecy remains on the list, this time in order to extend the access to information contained in communications of suspicious transactions to the Securities Commission (CMV). As to identification of customers, FATF recommends the adoption of

⁶³ The result of evaluation performed by FATF can be found in *FATF. Annual Report, 1999-2000*, 06.22.2000, §36. Article 2, Paragraph 6 of this Law provides that the Central Bank, CVM and the other supervisory agencies must provide COAF with reference file information and movement of assets as provided by Article 11, Section I of Law No. 9613/98, when there are indications of the offences set forth in or related to this Law. And Article 2, Section 4, Paragraph II of the same Complementary Law No. 105/2001 authorizes the Central Bank and CVM to enter agreements with equivalent institutions of other countries aimed at mutual cooperation and exchange of information for investigation of activities and operations in connection with illicit conducts

⁶⁴ The Request (REQ 25/2004 CREDN) and the remaining legislative documents are available at www.camara.gov.br.

measures to improve the identification of account holders, especially of corporations. The routines of operations monitoring and information maintenance are considered totally completed. And with regard to communication of suspicious operations, FATF recommends the suppression of the minimum limit values in use so that all suspicious operations are reported. The performance of the Brazilian government in connection with the changes recommended in the first evaluation seems to indicate that these new points will soon be incorporated into Brazil's anti-money laundering system.

It is worth mentioning that on July 2008, Brazil assumed FATF's presidency. Since the creation of FATF, it is the first time that a Latin-American and non-OECD country reaches the presidency. According to Antonio Gustavo Rodrigues, President of the Brazilian Financial Intelligence Unit (COAF) for the last four years and FATF Presidency for 2008-2009, "offering the presidency to Brazil was a way to democratize the ideas" considering that FATF "create norms to the whole world (...) despite created and controlled by the group of the richest countries"⁶⁵.

4. A national agenda for national needs

The last two sections have shown that the Brazilian and Argentinean systems are formally very similar. Except for the results of the FIU, both countries have been following the FATF recommendations on criminal policy and on financial regulation issues. Moreover, the mutual evaluation system plays a fundamental role in the reform and updating of both systems. In spite of this, a closer look at how Brazil and Argentina deal with the anti-money laundering system and at the level of internal transformations each country has gone through indicates huge differences between them.

As pointed out at the beginning of this paper, what seemed to be the most consistent explanation for these differences is the way each country faces the problem that is behind the anti-money laundering system: the absence of public control over financial and economic activities.

⁶⁵ "Entrevista Antonio Gustavo Rodrigues: uma visão mais pragmática do direito penal" in *Revista Getulio*, sept. 2008, p. 36.

In the case of Argentina, interviews have shown that “money laundering” is regarded as an external phenomenon and public control over financial activities is not a priority for the country. Argentina would never have established measures in this direction without FATF pressure. As mentioned above, it took six years to remove, even partially, the secrecy restrictions that prevented the FIU from functioning.

The Argentinean 2006 FIU report illustrates this situation clearly, as it seems to have been written for FATF staff members and not for national organs or for public opinion. It indicates in every new section that “a measure was taken” or a “reform was made” to meet FATF’s 40 recommendations or the specific recommendations Argentina received after the first and second evaluations⁶⁶. The report gives the impression that its problem is not how to control certain types of financial and economic activities, but it is the FATF pressure itself.

Guillermo Jorge summarizes this situation in the following terms:

“In contrast with the Brazilian experience, (...) the Argentine experience has been blocked by conflicting interests so far and policy changes have been improvised reactions to FATF pressures”.⁶⁷

Finally, as far as this research could determine, all Argentinean efforts were and still are focused exclusively on the 40 Recommendations framework.

The picture is quite different in Brazil.

The implementation of the anti-money laundering system was taken seriously by the Brazilian administrations, even facing budget restrictions. Consequently, a number of transformations in the Brazilian State were necessary. They can be divided into two groups: (i) the creation of new organs and rules and (ii) the definition of new tasks in the old organs. The creation of the financial intelligence unit (Minister of Economy) 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

⁶⁶ *Informe al Congreso de la Unión* (Unidad de Información Financiera, 2006, p. 2, 4, 8, 15, 25 and 33).

⁶⁷ Machado; Maíra R. and Jorge, Guillermo. “Anti-Money-Laundering and Governance in Latin America”..., p. 25-26.

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. At this point of the research, we can easily assume that the FATF evaluation policy strongly encourages both sets of transformations.

But besides the transformations directly determined by FATF recommendations or evaluations procedures, in this section we would like to briefly present two examples of Brazilian initiatives that appeared to deal with national deficiencies as identified domestically and not internationally⁶⁸. The first example is the creation of a National Strategy to Combat Corruption and Money Laundering (ENCCLA) in 2003 (4.1.). The second is the development of BACENJUD, an information request system via Internet that allows information exchange between the financial industry and the judicial system (4.2.). Both examples indicate the efforts of some sectors of the administration to foster transparency and coordination among different organs of the State.

4.1. ENCCLA: decentralizing the reformulation of public policy to deal with money laundering and corruption.

Since 2003, Brazil has had its own machinery to evaluate the anti-money laundering system and the problems which lie behind it.

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 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 system⁶⁹. Consequently, there were no common training programs for public agents or sharing of database policy and technological standards.

⁶⁸ The tension between “national interests” and “the aims of the specific regulatory regimes” is discussed at PICCIOTTO, Sol. “Expertise, National Interest and Universal Values in the Transnational Transformation of the State”. Paper presented at Law and Society Annual Conference – IRC Transnational Transformations of the State (Berlin, 2007).

⁶⁹ See, for example, Encla Report, 2004, p. 03 (available in Portuguese at www.mj.gov.br)

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. Since then, a group of high and middle range representatives of many public organs meet annually to discuss internal deficiencies, identify overlapping tasks and formulate plans of action open to public opinion and civil society⁷⁰. A cabinet of management (GGI-LD) was also created to serve as the secretariat of ENCLA.

At the end of 2006, when the importance of public control over financial and economic activities to face corruption was recognized, it was decided to add a “C” to ENCLA and definitely incorporate the idea of combating not only money laundering but also corruption. Corruption was part of the strategy from the beginning as the General Controller Secretariat (CGU) – an organ with the status of Ministry that was created in 2003 to centralize the efforts and monitoring process against corruption – has participated in ENCCCLA since its creation. The new name of the strategy was merely a recognition of this.

At this meeting, 52 organs were present: 29 from different sectors of the administration⁷¹, 5 from the judiciary, 6 from the public prosecution, 4 from the legislative body and 3 linked to the financial sector (one public, one private and Febraban - Brazilian Banking Federation). 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.

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 were accomplished⁷². 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 ENCCCLA. The objective of another 33% of the goals was the development of studies or projects to increase the

⁷⁰ Besides the representatives of the organs, associations of judges and lawyers, banks and law schools are also invited to participate in the meetings. Some plenary meetings are open to the press. A report describing the whole plan of action is permanently available at the Minister of Justice homepage.

⁷¹ Mainly justice, foreign affairs, economy, tax issues, transparency issues and police.

⁷² 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.

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 ENCCLA can merely exert pressure as the legislative power is the only one able to accomplish the goal.

Box 4 – Accomplishment of ENCCLA goals (2004-2006)⁷³

GOAL/YEAR	2004	%	2005	%	2006	%	total	%
not accomplished	6	19%	4	9%	2	7%	12	11%
not accomplished and reformulated	1	3%	7	16%	1	3%	9	8%
not started or delayed	0	0%	0	0%	0	0%	0	0
ongoing goal	0	0%	5	12%	12	41%	17	16%
partially accomplished	7	22%	5	12%	4	14%	16	15%
accomplished	18	56%	22	51%	10	34%	50	48%
without information	0	0%	0	0%	0	0%	0	0
TOTAL	32	100%	43	100%	29	100%	104	

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.

In the 2006 report, the Argentinean FIU points out the creation of a “National coordinator” to represent Argentina in FATF and GAFISUD. Among its activities is the formulation of a national project to deal with money laundering issues. The idea is to invite the public administration organs that are involved to participate in the process. Interviews have shown that this is not a coincidence; Argentinean representatives have been closely following the ENCCLA experience and probably trying to organize something similar in their country.

⁷³ Prepared by GGI-LD for internal monitoring of the goals’ accomplishment.

4.2. BacenJud: encouraging mediation between the financial industry and judicial intervention

Information of financial nature is extremely relevant to decisions involving a wide range of legal areas. Bankruptcies, tax evasion, diversion of public funds, larceny and of course offences against the national financial system invariably entail requests of such information by the parties. In Brazil it is assumed that the Federal Constitution safeguards financial information, therefore the removal of financial secrecy is conditional on legally based decisions⁷⁴. To ensure that in these cases the judgment may effectively rely on financial information it is necessary, in first place, that these institutions maintain updated customer reference files and transaction records.

At least in the sphere of the banking industry the implementation of these measures in Brazil has a favorable environment as a result of the modifications in the model of supervision that then were underway. During the process of financial liberalization⁷⁵, Brazil incorporated the recommendations of the Basel Agreement (1988) establishing, among other things, rules on risk assessment factors in the banking industry, which marked Brazil's adhesion to prudential regulation⁷⁶. Until then the supervisory activity focused on the economic-financial status of institutions, operating procedures and compliance with norms. In addition, the supervisory activity was particularly directed "toward collecting

⁷⁴ According to the systematization proposed by BELLOQUE, Complementary Law 105/2001 regulating legal hypotheses for the lifting of banking secrecy, the Brazilian model contemplates the possibility of access to financial information in five situations. As a result, the following situations are excluded from violation of the obligation of secrecy: (i) information exchange between financial institutions for the purposes of reference files and provision to credit protection entities with regard to issuers of checks lacking funds and defaulting debtors; (ii) the Central Bank and CVM (Securities Commission) in the exercise of their controlling activities and the COAF; (iii) legislative assessments carried out in Parliamentary Commissions of Inquiry (CPIs), (iv) criminal investigation, and (v) fiscal investigation. Even in view of these legal possibilities, the author considers that "Judicial Power is the only legitimated one, in the Brazilian Constitutional State, to decree the removal of financial secrecy, an act of restriction to the fundamental right of privacy." For additional information and critiques about these provisions, see BELLOQUE, Juliana Garcia. *Sigilo Bancario. Analise Critica Da Lei Complementar 105/2001*. Sao Paulo: Revista dos Tribunais, 2003, p. 90-98 and 122.

⁷⁵ On financial liberalization process in Brazil, see HERMANN, Jennifer. "Liberalizacao Financeira e Crise Cambial: A Experiencia Brasileira no periodo de 1987-1999" in *Regulacao Financeira e Bancaria*. Rogerio Sobreira (org.). Sao Paulo: Atlas, 2005, p. 210-258.

⁷⁶ LIMA, Gilberto Tadeu. "Evolucao Recente da Regulacao Bancaria no Brasil" in *Regulacao Financeira e Bancaria*. Rogerio Sobreira (org.). Sao Paulo: Atlas, 2005, p. 185-209.

information for analysis and adoption of preventive measures”⁷⁷. Under the new rules, the supervisory activity is established in connection with the level of credit risk generated by operations.

The changes begun in 1994 became more intense in 1997 with the incorporation of the principles proposed by the Basel Committee on Banking Supervision consolidated in the document *Core Principles for Effective Banking Supervision* (Bacen, 2003: 46). Numerous Normative Acts were then issued for the purpose of adjusting the Brazilian financial system to international standards⁷⁸.

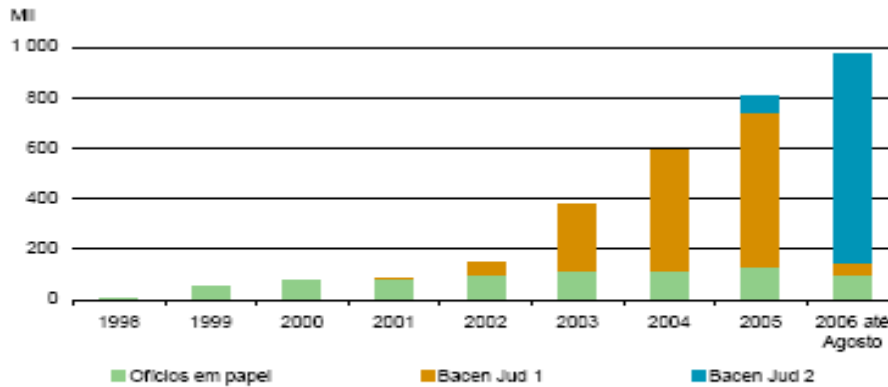
The change from prescriptive model to prudential model focused on risk imposed major changes in the Management of Inspection organization at the Central Bank, in addition to the creation of new instruments and procedures for following-up, monitoring and inspecting institutions of the national financial system (Bacen, 2003: 47). Based on the premise that “qualification, processing and availability of information proceeding from the financial system is the first stage of the supervisory process” (Bacen, 2003: 103), in 1999 the Central Bank restructured its department in charge of information management. The creation of a specific area for project management in this department had the “specific purpose of renewing routines for collecting and processing existing information as well as developing new information systems to provide support for several areas of the Central Bank as a result of transformations occurring in the financial system itself and in the modus operandi of the supervisory area” (Bacen, 2003: 94). Among the various projects developed for these purposes the BacenJud will be presented in detail.⁷⁹

⁷⁷ Central Bank of Brazil. *Relatorio de Atividades da Diretoria de Fiscalizacao* (1995-2002), 2003, p. 45. Et seq. “Bacen, 2003”. This report and all other documents of the Central Bank mentioned in this work are available at www.bacen.gov.br

⁷⁸ A synopsis of the new regulatory framework for bank supervision post-Basel Agreement can be found in MARQUES, Newton Ferreira da Silva. “Quatro Decadas de Atuacao do Banco Central do Brasil na Fiscalizacao e Supervisao Bancaria” in *Revista De Direito Bancario e do Mercado de Capitais*, Year 8, No. 30, Oct-Dec 2005, p. 242-282, and particularly p. 260-264.

⁷⁹ For a report on projects of the information department, see Bacen, 2003, 92-103.

**Table 2 – Official letters received by the Central Bank of Brazil from the Judicial Power
- Ordinary request and BacenJud (1998-2006)⁸⁰**



Recent years have witnessed a sharp increase in the number of requests for financial information to the Central Bank by the Judicial Power (**Table 2**). These requests were received by the Central Bank and forwarded by it to financial institutions. The latter would then make copies of the account statements or other requested bank documents and send them to the requesting judicial authority. This procedure entailed extensive paperwork and was very time-consuming. It was changed in 2001 with the implementation of BacenJud, an information request system via Internet. This system allows judges with previously registered passwords to request financial information that is automatically forwarded to the respective financial institutions. Using data encryption technology, the system recognizes orders for the lifting of financial secrecy as well as for the freezing and unfreezing of bank accounts. According to Central Bank this system allowed considerable savings in labor costs, materials costs and the requests processing time. The system recognizes “court orders for bank account and financial assets freezing and unfreezing, communication of bankruptcy decrees and dismissal decrees, request for information on existence of bank

⁸⁰ Central Bank of Brazil. Fiscalization Department. *BacenJud Statistics* (September, 2006). Available at http://www.bcb.gov.br/fis/pedjud/ftp/estatisticabacenjud_200608.pdf (last accessed on 11.07.2007).

accounts and financial investments, account balances, account statements and addresses of customers of the financial system”⁸¹.

However, the national financial system did not have a unified reference file with information on customers of financial institutions. Only in 2005 was Law No. 9613/98 which introduces the anti-money laundering system in Brazil amended so as to include the Central Bank’s obligation to maintain a “centralized register” of customers and their attorneys-in-fact. Less than one month after the legal effect of the new law the Central Bank implemented the “National Financial System Customers Reference File” (CCS). This reference file “should allow the safe, timely, dependable and highly automated indication of where customers of financial institutions maintain bank accounts, savings accounts and/or investment accounts” domiciled abroad, in addition to other assets, rights and valuables, in their own names or in the name of legal representatives and attorneys-in-fact⁸². The data should be daily updated by the financial institutions that are also responsible for the accuracy and timeliness of the said information. According to its implementation timetable, this system has been fully operational since February 2006⁸³.

In December 2005, the Central Bank implemented the BacenJud 2.0. an improved version of the so-called BacenJud 1.0. One of the most important features of this new version is that the financial system answers directly to the judiciary, without intermediation of the Central Bank⁸⁴.

5. Final remarks

To conclude I would like to present some remarks on the central questions of the research project “Transnational Transformations of the State”. From the information

⁸¹ Central Bank of Brazil. Fiscalization Department. *BacenJud Statistics* (September, 2006)

⁸² See Law 10.701 dated July 09, 2003 which included Article 10-A in Law 9613/98, Central Bank Carta Circular No. 3287 dated July 21, 2005 establishing CCS and the Financial Stability Report, (Central Bank, November 2005).

⁸³ “CCS – Cadastro de Clientes do SFN. Orientacao Tecnica. Versao 1.1.3, Central Bank, 02.20.2006, p. 13.

⁸⁴ Central Bank of Brazil. Fiscalization Department. *BacenJud Statistics* (September, 2006)

gathered in this paper, it is possible to identify changes, at least in the Brazilian State, at the three levels of interest of this project.

First of all, concerning the transformation in the substantive tasks of the State, the FATF's activity led to the formation of a different policy to deal with some crimes. This policy relies strongly on financial regulation. Consequently, two major changes can be identified.

The first is the creation of new organs in the national administration – the COAF in Brazil and the UIF in Argentina – to take over tasks that used to be performed by the judicial power or the judicial police (as discussed at section 2.2.). It is worth noticing this is exactly on the opposite direction of HALLIDAY's finding concerning bankruptcy in China, Indonesia and Korea. While presenting what he called “moving power among agencies of the State” he highlighted that the most important shift of power is from executive agencies to legislatures and courts⁸⁵.

The second is the importance given to the financial and economic sectors in this policy. As they are responsible for feeding the database of the “antimoney laundering world system”, they become central actors in a state criminal policy (section 2.3.).

The first change seems to indicate the expansion of the administration. And the second can be interpreted as the development of a hybrid (private-public) mechanism.

Secondly, regarding the transformation of relations and institutional structures within the State, the creation of ENCCLA in Brazil seems to reveal the formation of alliances among institutions that are for the first time sitting together to discuss common issues, as indicated above (section 4.1.).

In the third place, as far as the transformation of legitimacy claims and expectations within the State is concerned, this paper tries to show that FATF's monitoring activity is decisive for the specific changes in both Brazilian and Argentinean law and institutions (section 3.). Even so, discussion about the legitimacy of the FATF policy becomes much

⁸⁵ HALLIDAY, Terence C.. “Architects of the State: International Organizations and the Reconstruction of States in the Global South”. Paper presented at Law and Society Annual Conference – IRC Transnational Transformations of the State (Berlin, 2007).

more complex in view of the results of this research⁸⁶. It is possible to divide this discussion into two topics: the participation in the formulation of the policy and their general acceptance or the popularity of the policy.

If legitimacy is discussed only in terms of the first topic, the diagnosis of state transnationalization as “Americanization” or “Europeanization” of juridical and institutional practices must prevail. This phenomenon is considered to guide the debate on the incorporation of international norms, especially in issues relating to trafficking in drugs, organized crime and recently, terrorism. Transnationalization appears in this context as a one-way flow between Northern and Southern countries, or as a phenomenon that is watched but not participated in. The lack of full participation of developing states in the decision-making process could suggest that the final result of the incorporation of these criminal policies could be tainted by inadequate legitimacy of the process. From the perspective of Brazil and Argentina, the formation of criminal policy on money laundering guided by FATF provides excellent illustrations of this. **Does the Brazilian presidency change this picture? This is very important question for further research.**

Likewise, it is difficult to measure the popularity of some decisions taken to receive FATF’s approval. The changes in bank secrecy regulation for example, may be welcome by public sectors interested in the dream of recovering the fortune taken away from the Brazilian economy through corruption fulfilling. At the same time, some sectors connected with the rights of defense consider the new bank secrecy regulation as a violation of citizenship rights. In any case, the incredibly rapid approval of the new bank secrecy regulation seems to show that there was strong political agreement in the background.

However, as the paper attempts to demonstrate, it is possible to identify internal gains, particularly in financial system. These gains are connected with the extended possibility of jurisdictional control over the financial market – which somehow minimizes its *no-man’s-land* condition present at the outset of capital liberalization. In this sense, financial rules and the mandatory report system in particular could lead to the expansion

⁸⁶ In a previous work (MACHADO, Maira Rocha. *Internacionalização...* 2004) FATF policy was considered so tainted by “modern criminal rationality” that it had become purely rhetoric and was totally inappropriate to deal with the problem: the absence of public control over financial and economic transactions. According to this approach, the implementation of anti-money laundering in developing countries serves only to facilitate or permit the investigations conducted by northern countries. The “modern criminal rationality” still remains as an obstacle to the management of the problem but the global policy can be seen differently.

and consolidation of judicial control mechanisms over financial transactions. At least from the point of view of the asset recovery dreamers, these mechanisms, which can only be reached transnationally, may be interpreted as opportunities to strengthen local democracy.

In any case, in order to interpret and implement the FATF rules it is necessary to consider the great limitations faced by the criminal justice system regarding the performance of these functions. “Preventing the circulation of illicit capital” and “fostering stability of the financial system” are appropriate illustrations of the criminal system's propensity to establish unrealistic purposes. By recognizing the limitations of this system to, among other things, deal with matters of extreme technical complexity, such as financial transactions, the formulation of public policies seems to have only two alternative courses: to avoid using the instruments of this area of Law to intervene in these issues, or to focus on the creation of the mechanisms for mediation between the financial and the criminal spheres. The latter one is a mid-term solution towards which the continuous updating of the anti-money laundering system seems to be directed. The first alternative, undoubtedly better adjusted to the current state of knowledge of the criminal system, is just beginning to be seriously considered by some countries in connection with certain topics.