

**The International Standards on Combating
Money Laundering: a Brazilian Perspective**

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TABLE OF CONTENTS

Section I – Introduction	2
Section II – Combating the profits of crime	3
A. The financial side of crime	3
B. Combating money laundering to fight crime	3
Section III – The FATF standards for combating money laundering	4
A. The FATF and its power for setting standards	4
B. The FATF 40 Recommendations on combating and preventing money laundering	7
C. GAFISUD and the role of Brazil	11
Section IV – The relevant conventional standards for combating money laundering	12
A. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances	12
B. The United Nations Convention against Transnational Organized Crime	18
C. The United Nations Convention against Corruption	27
Section V – Conclusions	31
Section VI – Bibliography	35

Section I – Introduction

This Paper will seek to analyze, from a Brazilian perspective, the standards for the combat to money laundering contained in the Recommendations of the Financial Action Task Force – FATF and those set forth by the relevant United Nations conventions: (i) United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, (also know as Vienna Convention); (ii) United Nations Convention against Transnational Organized Crime (also known as Palermo Convention); and (iii) United Nations Convention against Corruption (also known as Merida Convention).

The analysis will be done by the study of the FATF Recommendations and of the relevant conventions, from the perspective of the Brazilian legal enforcement framework on combating money laundering. The similarities, differences and cross-influence among those instruments will be discussed. Also, it may be found that, even if the FATF Recommendations are of a non-mandatory nature, the impact of these “soft law” standards in the Brazilian experience and law enforcement framework is even greater than that of the conventional obligations.

This Paper is not intended to evaluate the Brazilian adherence to its international commitments or to enter into deep detail of the matters it discusses, due to the typical couple of dozen pages length of a Minerva Paper and to the respective time constraints. Instead, selected facts will be collaged and discussed, hopefully collaborating for a reflection on the relevant international sources of the Brazilian anti-money laundering system and briefly commenting on the near future developments of that system.

Section II – Combating the profits of crime

A. The financial side of crime

Criminal organizations, just like any other businesses, rely on financial support to hold their activities. At the same time, the individuals within these organizations seek financial results from their actions.

One could argue that not all criminal activities seek profit. Of course criminal behavior may have strictly violent means, like in some cases of murder or aggression. Crime may be driven by non-financial factors, but when it comes to organized crime, it is mainly dedicated to make money, most of the times big money.

It is thus the responsibility of the legal enforcement authorities to stop criminals from making money, making sure that crime does not pay. We can compare criminal organizations with businesses and realize that, when the State combats organized crime solely by imprisoning transgressors, the activities of the criminal organizations might not be affected. That is so because the next natural step for these groups, after a member is arrested, will be to start a recruitment process, in order to fill the open position within the organization. Besides that, there are also instances in which leaders of these organizations may even manage to continue controlling their illegal businesses from inside jail.

That leads us to the conclusion that, if the financial flow of the criminal organization is not cut, or at least seriously affected by the repressive action of the State, the imprisonment of criminals will not have a strong strike on its activities.

B. Combating money laundering to fight crime

Taking into account the need to combat organized crime by removing its financial resources, most jurisdictions worldwide shifted from the traditional focus on punishing criminal activities solely with imprisonment to effectively suffocating their continuity by depriving them from financial support.

In a globalized framework, financial assets flow around the world in a quick manner. Borders offer virtually no resistance for the circulation of financial assets throughout the globe. Effective prevention and combat of the abuse of this intricate system by criminals can only be possible with the development of worldwide standards and by the implementation of surveillance of the financial operations, coupled with widespread information sharing and mutual legal cooperation between countries.

Money laundering consists in concealing the illicit source of assets originated from criminal activity, in order to mask the link between those funds and the criminal activity from which they derive, finally reintegrating them to the legal financial system, so that they can be freely utilized by their criminal holders. It is a process that criminals have to undergo if they intend to have their illicit assets integrated to the formal economy, so that they can be utilized without generating *prima facie* suspicion of the legal enforcement authorities. For the assets to be available to the criminals, without the existent constraints for the circulation of illegal assets, they need to be covered up and given a legal appearance. Criminals aim to achieve this legal appearance through the money laundering process.

So, combating and preventing money laundering was found by many jurisdictions worldwide to be the logical path for deterring criminal organizations, by means of taking away their financial support. Some international initiatives started to delineate what would be the main instruments to better define and achieve these goals. Among those, this Paper will focus on the FATF Recommendations and on the Vienna, Palermo and Merida Conventions. These are the most influential instruments and international *fora*, from a worldwide perspective, in the matter of combating and preventing money laundering. Other relevant initiatives that have some influence on the system exist, be it on specific regions or on certain sectors of activity, but they will not be discussed in this Paper, due to time and space constraints.

Section III – The FATF standards for combating money laundering

A. The FATF and its power for setting standards

The international standards for combating money laundering are largely set by the Financial Action Task Force – FATF (also known as GAFI, its French acronym), an

inter-governmental body created in 1989 by the G-7, comprising its members, the European Commission and eight other countries. Secretarial support was provided from the very beginning by the Organization for Economic Co-operation and Development – OECD.

As of January 2009, the FATF has 34 members, mainly countries and territories, but also some international organizations. Associate members also exist, as well as other bodies and international organizations, which have observer status. Updated information on membership, associate members and observers can be found on www.fatf-gafi.org.

The FATF studies, discusses, sets the standards for preventing and combating money laundering and monitors their implementation throughout the world. But how is it possible that such standards are set by a limited number of countries and a couple of international organizations, and still followed to a great extent by most jurisdictions worldwide?

In order to answer to the question posed in the latest paragraph, we must first understand that the FATF membership comprises many of the most important financial markets and influential countries and territories in the world: Argentina, Australia, Austria, Belgium, Brazil, Canada, China, Denmark, European Commission, Finland, France, Germany, Greece, Gulf Co-operation Council, Hong Kong - China, Iceland, Ireland, Italy, Japan, Kingdom of the Netherlands, Luxembourg, Mexico, New Zealand, Norway, Portugal, Russian Federation, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States of America.

Besides membership, it must be noted the observer status of India, the Republic of Korea and such international organizations as the International Monetary Fund, the World Bank, and the OECD (which provides secretarial support).

With such a membership and support from worldwide important international organizations, we can start to picture how the FATF manages to export its standards to virtually every country and territory around the world, regardless of membership. Few countries would like to be against standards backed by such a host of important international players.

But that is not the only means by which the FATF expands the reach of its standards worldwide. The creation of FATF-Style Regional Bodies (FSRBs) was

encouraged, many of which today have an Associate Membership status at the FATF. These FSRBs are the Asia/Pacific Group on Money Laundering, the Caribbean Financial Action Task Force, the Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism, the Financial Action Task Force on Money Laundering in South America - GAFISUD, and the Middle East and the North Africa Financial Action Task Force. Additional FSRBs, which are not associate members of the FATF, include the Eurasian Group, the Eastern and Southern Africa Anti-Money Laundering Group and the Intergovernmental Action Group against Money Laundering in Africa.

The role of the FSRBs is to take the FATF's message to their members, helping them implementing its recommendations and assessing the respective results, as well as to function as a communication channel with the FATF.

Moreover, the FATF discussions are of a technical nature, and members send well prepared technicians to participate in the decision process. The seriousness and the technical basis of the Recommendations and of the supporting documents also serve as an incentive for compliance by non-members.

Also, in the past, the FATF relied on lists of Non-Cooperative Countries and Territories, which functioned as an eye opener for the international financial community, meaning that businesses with such jurisdictions should deserve additional attention. This list is no longer in use, but the FATF has recently created a new routine of releasing public statements about its concerns as regards to certain countries and territories. The creation of this routine shows that the FATF still faces the need to express its disagreement with the policies of some jurisdictions that do not meet its minimal standards.

Last, but certainly not least, another incentive for compliance with the FATF Recommendations is the United Nations Security Council Resolution 1617, issued in July 29, 2005, and which "*Strongly urges* all Member States to implement the comprehensive, international standards embodied in the Financial Action Task Force's (FATF) Forty Recommendations on Money Laundering and the FATF Nine Special Recommendations on Terrorist Financing".

So, non-FATF members are interested in complying with the FATF for various reasons. Among these reasons we could count, in no specific order: (i) the importance

of its members in the financial and political scenario; (ii) the regional initiatives to which they may be part; (iii) the technical nature and quality of the standards set; (iv) the impact that a declaration of concern by the FATF could have on a country's finances; and (v) the support from the United Nations Security Council.

This worldwide approach is of key importance, because reaching all jurisdictions is central for the effectiveness of the fight against money laundering. Acting only among FATF members could simply mean that the money would flow to non-FATF countries and territories, where less regulations and conditions could possibly be found. Not only dirty money (money from illegal sources) would evade FATF members' territories, but even legal money could seek simpler and less regulated markets, thus evading burdensome and sometimes costly proceedings derived from the FATF standards.

B. The FATF 40 Recommendations on combating and preventing money laundering

The 40 Recommendations on combating and preventing money laundering, issued by the FATF in 1990 and revised by it in 1996 and 2003, are the most important international standard for combating money laundering. The set of recommendations was increased in 2001 and subsequently in 2004, to include 9 Special Recommendations that deal with the issue of terrorist financing. Since then, the FATF Recommendations are referred to as the 40+9 Recommendations. Regardless of their key importance, we will not discuss the 9 Special Recommendations on this Paper, for the sake of focus on the anti-money laundering standards set by the 40 Recommendations.

Recommendations 1 and 2 define the scope of the money laundering offence. The key parts of that scope definition are contained in Recommendation 1, a part of which is reproduced below:

Recommendation 1:

Countries should criminalise money laundering on the basis of United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (the Vienna Convention) and United Nations Convention against Transnational Organized Crime, 2000 (the Palermo Convention).

Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences.

(...)

It is important to note above the mention to the United Nations' Vienna and Palermo conventions, as the basis for criminalization of money laundering. No mention is made to the Merida Convention (United Nations Convention against Corruption), as it was not yet in force by the time the Recommendations were last updated. It is also of note the fact that the "widest range" of predicate offences is recommended, that is, money laundering should not be linked solely to illicit money originated from drug trafficking, which was the standard in the early years of combating money laundering.

Provisional measures and confiscation are dealt with by Recommendation 3, which reads as follows:

Recommendation 3

Countries should adopt measures similar to those set forth in the Vienna and Palermo Conventions, including legislative measures, to enable their competent authorities to confiscate property laundered, proceeds from money laundering or predicate offences, instrumentalities used in or intended for use in the commission of these offences, or property of corresponding value, without prejudicing the rights of bona fide third parties.

Such measures should include the authority to: (a) identify, trace and evaluate property which is subject to confiscation; (b) carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property; (c) take steps that will prevent or void actions that prejudice the State's ability to recover property that is subject to confiscation; and (d) take any appropriate investigative measures.

Countries may consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction, or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law.

For the same reasons stated above, the Vienna and Palermo conventions' standards are mentioned, whereas the Merida Convention is not. The second part of Recommendation 3 deals with the measures that should be available to the legal enforcement authorities to investigate, trace and adopt provisional measures related to the assets to which the money laundering investigation is linked. The last part of this Recommendation is of key importance, because it requests countries to consider confiscating the proceeds and instrumentalities of crime prior to a criminal conviction.

Without this possibility the system may prove to be ineffective in most cases, because criminal convictions may take a very long time to be determined.

Recommendations 4 to 12 refer to customer due diligence and compliance by financial institutions. It is interesting to note that, differently from the FATF, the relevant conventions do not make recommendations for the financial institutions. This is because the conventions refer only to their parties (countries), because they have a more formal approach. This stricter approach has several roots, from which we could cite: (i) the fact that the conventions are multilateral instruments, thus the result of a consensus of several dozen countries; and (ii) the traditional view that only countries would be subjects of international law. Also, the FATF's mention to private institutions in its Recommendations shows that it has a more practical and detailed approach to the problem than the conventions.

Other measures to deter money laundering and terrorist financing are set by Recommendations 17 to 20. These Recommendations were originally dedicated only to combat money laundering, but they were complemented with terrorist financing combat provisions after the 9/11 attacks.

Non-compliance with the FATF standards by countries is the matter of Recommendations 21 and 22. As stated before, non-compliance with the FATF standards by members or even by non-member countries would result in the failure of the system, as assets would flee to less regulated markets, where money laundering would not be a concern.

Regulation and supervision of the financial institutions and other relevant professionals are dealt with by Recommendations 23 to 25. Once again, this is a measure of the practical approach of the FATF, in contrast with the more formal approach of the relevant conventions, which are aimed solely at countries and do not contain rules targeted directly to the private sector.

Recommendations 26 to 32 detail the proposed institutional framework for combating money laundering and terrorist financing, mentioning the necessary competent authorities, their powers and resources. Countries' commitments to the FATF standards are only going to be met within a certain jurisdiction if the appropriate institutional framework is in place.

Transparency of legal persons and arrangements are the subject of Recommendations 33 and 34. Since tracing the money is key to money laundering investigations, it is very important to be able to know, in a timely manner, who is the beneficiary owner of the assets suspected to have been laundered. Thus, the transparency of the legal persons and arrangements is a rule of great importance within the FATF Recommendations.

Recommendation 35 refers to the need for international cooperation and mentions some conventions to which the countries are recommended to become Parties:

Recommendation 35

Countries should take immediate steps to become party to and implement fully the Vienna Convention, the Palermo Convention, and the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism. Countries are also encouraged to ratify and implement other relevant international conventions, such as the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the 2002 Inter-American Convention against Terrorism.

Once again, the Vienna and Palermo conventions are mentioned, whereas the Merida Convention is not, since it was not yet in force. It is also recommended that countries become a party to other conventions relevant to aspects such as terrorist financing and the search, seizure and confiscation of the proceeds from crime.

Continuing on the subject of international cooperation, Recommendations 36 to 39 set the standards for international legal cooperation, including extradition, relating to the combat to money laundering and terrorist financing.

Recommendation 40 concludes the document referring to other forms of co-operation, opening a door for almost any kind of cooperation that a country would possibly give to another in regards to combating money laundering, “without unduly restrictive conditions”.

As one can see, the FATF 40 Recommendations endeavor to provide worldwide standards for countries as regards to the combat to money laundering, in such a manner that, if there is general compliance to these rules, effective prevention, detection and combat to money laundering is possible.

Besides, a whole set of side-tools has been designed to build a solid method for assessing the adherence of countries to the recommendations and best practices published by the FATF: (i) interpretative notes to key recommendations; (ii) a glossary;

(iii) a very detailed methodology for assessing compliance; and (iv) and a handbook on evaluations and assessments for countries and assessors. Additional details about these tools can be found on the FATF's website, *www.fatf-gafi.org*.

C. GAFISUD and the role of Brazil

GAFISUD is an FATF Style Regional Body – FSRB, founded under the leadership of Brazil and Argentina, in order to facilitate the application of the FATF standards on South American countries which are not members of that task force and also to function as a communication channel between the countries of the region and the FATF. Brazil and Argentina play a key role in GAFISUD, helping to shape the regional system as a mirror of that of the FATF.

GAFISUD was formally created in December 8th, 2000, in Cartagena de Indias, Colombia, when the constitutive Memorandum of Understanding was signed by representatives of Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru and Uruguay.

Adherence of GAFISUD to the FATF Recommendations is formally referred to in Article I of the Memorandum of Understanding, in which the subscribers agree that one of its objectives is:

- b) to recognize and apply the 40 Recommendations of the Financial Action Task Force and the Recommendations and measures that GAFISUD adopts in the future.

GAFISUD counts with the following observers: Germany, the World Bank, the Inter-American Development Bank, the Egmont Group, Spain, the United States of America, the International Monetary Fund, France, INTERPOL, INTOSAI, the United Nations and Portugal. The regular meetings are also attended by invited organizations, such as the FATF, CFATF (the Caribbean FSRB) and the Organization of the American States - OAS.

The Brazilian commitment to GAFISUD is the highest possible, beginning from the foundation of the group. Brazil has exercised a very active role in the Group's meetings and evaluation processes, participating and sometimes leading many of its activities.

Section IV – The relevant conventional standards for combating money laundering

Many international standards for combating money laundering originate from conventions of the United Nations. There are several conventions that deal with the subject and with that of countering terrorism and its financing. This Paper is focused on the anti-money laundering provisions of the most important of those in relation to combating this offense: The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption.

A. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted on December 19th, 1988, is the first of a series of fundamental international instruments for combating money laundering worldwide. Adopting the approach of attacking the financial activities of drug traffickers, it provides for the criminalization of money laundering and for mutual assistance in order to locate and seize their assets.

Also known as the Vienna Convention (or “Vienna 1988”), it is thus a landmark in the fight against money laundering, because this offense was not foreseen by its two direct predecessors, the 1961 Single Convention on Narcotic Drugs, and the 1971 Convention on Psychotropic Substances, both also of the United Nations.

The Vienna Convention counts 187 Parties (as of February 2009), which are urged to exchange information, forfeit illegal assets and to provide legal cooperation to the other Parties, as well as to enforce their domestic money-laundering statutes.

The Convention consists of 34 articles, out of which we will focus our comments on those having a direct impact in the matter we discuss here, that is, the combat to money laundering. Also, analyzing specific cooperation and mutual legal assistance provisions would demand more space for discussion. Thus, we will mention

the provisions of the following articles, which provide the general framework under which money laundering is dealt with throughout the Convention: 1 - Definitions; 2 - Scope of the Convention; 3 - Offenses and Sanctions; and 5 – Confiscation.

Among the definitions contained in Article 1, the following are particularly relevant for the context of this Paper:

(...)

f) “Confiscation”, which includes forfeiture where applicable, means the permanent deprivation of property by order of a court or other competent authority;

(...)

l) “Freezing” or “seizure” means temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or a competent authority;

(...)

p) “Proceeds” means any property derived from or obtained, directly or indirectly, through the commission of an offence established in accordance with article 3, paragraph 1; and

(...)

q) “Property” means assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets.

The scope of the Convention is defined in Article 2, and its Paragraph 1) deserves special attention:

1) The purpose of this Convention is to promote co-operation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension. In carrying out their obligations under the Convention, the Parties shall take necessary measures, including legislative and administrative measures, in conformity with the fundamental provisions of their respective domestic legislative systems.

This Paragraph is of key importance because it limits the scope of the Conventions’ provisions and, in its second part, creates an obligation to the Parties to take the relevant legislative and administrative measures to implement the Convention.

This scope limitation is expected in a Convention targeted at a specific criminal activity, that is, illicit drug trafficking. What emerges from this is that the first

coordinated efforts of the international community against money laundering were limited to the drug issue. As we shall see, this was a good start, but represents limitations for legal enforcement authorities.

Offenses and sanctions are dealt with in Article 3. Those relevant for the matters discussed here are Paragraphs 1, 4 and 10. Subparagraph 1) a) lists the offenses directly linked to illicit trafficking in drugs; Subparagraph 1) b) deals specifically with money laundering; Paragraph 4) a) sets the basis for pecuniary measures of enforcement; and Paragraph 10 deals with cooperation.

Paragraph 1 of Article 3 states that “Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:” and proceeds to listing such offenses in Subparagraph 1) a).

Subparagraph 1) b) is the most relevant part of this Convention as regards money laundering, because it defines that offense for the first time in the context of a United Nations instrument:

b)

i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;

ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph a) of this paragraph or from an act of participation in such an offence or offences;

It must be noted, however, that the offense of money laundering, as set forth in the Vienna Convention, is limited to “property (...) derived from any offence or offences established in accordance with subparagraph a) of this paragraph”, that is, offenses related to illicit drug trafficking.

Other United Nations conventions would later broaden this concept, but the biggest contribution in this regard can be found in the FATF's 40 Recommendations, as can be seen on the appropriate section of this Paper.

Still on Article 3, Paragraph 4) establishes that sanctions shall include confiscation and pecuniary sanctions:

4)

a) Each Party shall make the commission of the offences established in accordance with paragraph 1 of this article liable to sanctions which take into account the grave nature of these offences, such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation.

Paragraph 10) of Article 3 is of great importance for mutual legal assistance among the Parties, because it deals with trying to avoid the denial of cooperation on the basis of characterizing the offense as one of a fiscal or political nature:

10) For the purpose of co-operation among the Parties under this Convention, including, in particular, co-operation under articles 5, 6, 7 and 9, offences established in accordance with this article shall not be considered as fiscal offences or as political offences or regarded as politically motivated, without prejudice to the constitutional limitations and the fundamental domestic law of the Parties.

As we have already mentioned earlier in this Paper, the main purpose of combating money laundering is to generate disincentives for criminality that go beyond incarceration. Crime must not pay also in a financial sense, and thus the seizing, freezing and confiscation of the proceeds of crime have been proven to be an important law enforcement tool.

The Vienna Convention's Article 5 pioneers on this matter, stating in its Paragraph 1 that the Parties shall adopt measures for the confiscation of:

a) Proceeds derived from offences established in accordance with article 3, paragraph 1, or property the value of which corresponds to that of such proceeds;

Paragraph 2 expands the obligation from proceeds or the corresponding property value to instrumentalities of crime.

2) Each Party shall also adopt such measures as may be necessary to enable its competent authorities to identify, trace, and freeze or seize proceeds, property, instrumentalities or any other things referred to in paragraph 1 of this article, for the purpose of eventual confiscation.

Paragraph 3 of Article 5 may seem at first glance to be stating the obvious, but this information is crucial for money laundering investigations and this is a major commitment by the Parties. Keeping financial records and making them available to national authorities and to the other Parties' authorities is a basic need for the enforcement of money laundering statutes and regulations.

3) In order to carry out the measures referred to in this article, each Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. A Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

Special attention is needed as regards the last part of this Paragraph, as banking secrecy is one of the main reasons stated by non-cooperative countries and territories not to provide information on financial activities that have taken place within its jurisdiction.

This kind of refusal of cooperation may represent not less than the total failure of the whole money laundering investigational procedure. One of the phases of money laundering is "layering", when criminals move their assets over different places and types of investments, so that tracing the proceeds of crime becomes more difficult.

By not providing information about one of these "layers", a jurisdiction could be denying enforceability of the requesting Party's anti-money laundering laws in that specific case.

Paragraph 5 is of great importance, as it starts the trend, followed and deepened by many other later international legal instruments, of providing for the sharing of assets as an incentive for legal cooperation among Parties.

b) When acting on the request of another Party in accordance with this article, a Party may give special consideration to concluding agreements on:

(...)

ii) Sharing with other Parties, on a regular or case-by-case basis, such proceeds or property, or funds derived from the sale of such proceeds or property, in accordance with its domestic law, administrative procedures or bilateral or multilateral agreements entered into for this purpose.

Since then, this idea has been further developed and incorporated by many bilateral and multilateral treaties, including the Palermo Convention. The Merida Convention went a step further, as we shall see in the appropriate section of this Paper,

providing for the effective return – instead of simply sharing – of stolen assets derived from corruption.

Paragraph 7 refers to the possibility of reversing the burden of proof regarding the origin of the proceeds to be confiscated. This is a facultative measure, which may be considered to be the case with this whole Article, if we read Paragraph 9 in a broad sense. More about this will be discussed when Paragraph 9 is discussed.

7) Each Party may consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation, to the extent that such action is consistent with the principles of its domestic law and with the nature of the judicial and other proceedings.

Paragraph 8 features protection to *bona fide* third parties, which can be interpreted broadly to also include the rights of victims.

8) The provisions of this article shall not be construed as prejudicing the rights of bona fide third parties.

As we mentioned earlier, Paragraph 9 creates the possibility for the Parties to allege incompatibility with their domestic law when dealing with the definition and the implementation of confiscation measures contained in Article 5. Even if this is a common clause in international treaties, it is one that brings about less effectiveness to the rules to which it applies.

9) Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a Party.

One could argue that States only follow international law up to their own convenience and that this is an unnecessary clause. This is a cynical approach and usually arises in moments in which States decide not to fulfill their obligations in the international field. The mere inclusion of such a clause reflects the dubious approach that States have to international law, as they subject it to the Parties' domestic laws.

Treaties, especially those of a multilateral nature, tend to be more general and to include safeguard clauses like this one. Fearing entering into international obligations that will afterwards represent serious difficulties for implementation, States may tend to make treaties' language less assertive and the rules therein less detailed.

That could be one of the causes for the widespread feeling that “soft law” rules have had greater impact and success in the field of combating money laundering. This is

the case all the more with multilateral conventions, when consensus has to be achieved among a huge number of Parties, with different backgrounds and interests.

B. The United Nations Convention against Transnational Organized Crime

The United Nations Convention against Transnational Organized Crime, adopted in Palermo, Italy, on December 15th, 2000, is also known as “the Palermo Convention” and features as the main international instrument in the fight against transnational organized crime. Particularly interesting for the subject of this Paper, the Palermo Convention sets some of the most relevant standards for the combat to money laundering.

The Convention is complemented by three Protocols, which, even if regarded as important advances for the matters they regulate, are not specifically relevant for the purpose of the subjects that we will discuss here. These are the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.

The Palermo Convention counts 147 Parties (as of February 2009), which commit themselves to taking a series of measures against transnational organized crime, including the creation of domestic criminal offences, as the participation in an organized criminal group, money laundering, corruption and obstruction of justice, as well as the adoption of new frameworks for mutual legal assistance, including extradition, and law enforcement cooperation, among others.

The Convention consists of 41 articles, from which we will focus on the ones directly related to the combat of money laundering. Although they encompass many practical implications, specific cooperation and mutual legal assistance provisions will not be detailed here, for the sake of objectiveness. Thus, we will mention the provisions of the following articles, which provide the general money laundering combat framework put forward by the Convention: 1 – Statement of purpose; 2 – Use of terms; 5 - Criminalization of participation in an organized criminal group; 6 - Criminalization of the laundering of proceeds of crime; 7 - Measures to combat money-laundering; 12 -

Confiscation and seizure; and 14 - Disposal of confiscated proceeds of crime or property.

The purpose of the Palermo Convention is stated in its Article 1: "... to promote cooperation to prevent and combat transnational organized crime more effectively." Once again, in comparison to the Vienna Convention, a specific problem is dealt with by the Convention. The reach of the Palermo Convention is much broader, though, while it is not tied to any specific set of crimes, but to crimes committed by a transnational organization.

One of the strengths of the Palermo Convention is its broad application field, as it is not tied to a substantive set of crimes, as drugs in the Vienna Convention case, or corruption, when it comes to the Merida Convention. Instead, its scope is bound to a subjective limit, that of the transnational criminal organizations.

The Palermo Convention definitions are entitled "Use of terms" and are contained in Article 2:

- a) "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 in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit;
- b) "Serious crime" shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty;
- c) "Structured group" shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure;

Note that the above definitions are specific to the Palermo Convention, when compared to the Vienna Convention. Nevertheless, many of the definitions are common to both conventions and were kept equal (e.g. "Property", "Freezing or seizure" and "Confiscation") or strikingly similar (e.g. "Proceeds [of crime]").

- d) "Property" shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets;
- e) "Proceeds of crime" shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;

This last provision deserves special attention, because it clearly stresses the difference between the Vienna Convention and the Palermo Convention. Here, the proceeds of crime concerned are derived from any offence, as long as it has been committed by a transnational organization. For further details, refer to Article 3 of the Palermo Convention, which defines its scope and is rather self-explanatory. Back to the terms defined in Article 2:

- f) “Freezing” or “seizure” shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;
- g) “Confiscation”, which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority;
- h) “Predicate offence” shall mean any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 6 of this Convention;

One can clearly find a trend for repetition of the language of the definitions from the Vienna Convention that did not demand changes, which denotes the intention of keeping consistency among the conventional texts. This might also have made the negotiation efforts of these specific texts a little easier, as in the multilateral field, sometimes it may be very difficult to reach consensus.

The criminalization of participation in an organized criminal group is one of the main parts of the Palermo Convention. Article 5 states that:

- 1) Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
 - a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:
 - i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;
 - ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:

- a. Criminal activities of the organized criminal group;
 - b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;
- b) Organizing, directing, aiding, abetting, facilitating or counseling the commission of serious crime involving an organized criminal group.

This Article provides for two different definitions for the criminalization of participation in an organized criminal group [Paragraph 1) a) i) and ii)]. The way this provision was constructed shows the difficulty in defining such activities, a situation which is also known to happen in national contexts and that was most probably amplified by the multilateral environment of the negotiations.

Criminalization of money laundering is provided for in article 6 of the Palermo Convention. The terms are very similar to those provided for in the Vienna Convention. The most relevant distinction is that the Palermo terms are broader, as they refer to the “proceeds of crime”, whereas in the Vienna Convention the scope is limited to the offences related directly or indirectly to illicit drug trafficking.

The broader range of predicate offences (the crime from which the proceeds are to be laundered) of the Palermo Convention leads to more simple definitions of the money laundering offence, contained in Paragraph 1) of Article 6:

- 1) Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

a)

(i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

b) Subject to the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

- (ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

Paragraph 2) of Article 6 reflects once again the broader approach of the Palermo Convention, as it dissociates definitely the offence of money laundering from predicate offences related to illicit drugs trafficking. In fact, the language of Subparagraph 2) a) refers to “(...) the widest range of predicate offences”:

2) For purposes of implementing or applying paragraph 1 of this article:

- a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;
- b) Each State Party shall include as predicate offences all serious crime as defined in article 2 of this Convention and the offences established in accordance with articles 5, 8 and 23 of this Convention. In the case of States Parties whose legislation sets out a list of specific predicate offences, they shall, at a minimum, include in such list a comprehensive range of offences associated with organized criminal groups;

(...)

Article 7 of the Palermo Convention, “measures to combat money laundering” has no parallel on the Vienna Convention, but it clearly reflects the standards set by the FATF in its 40 Recommendations. This is an interesting case of the hardening of “soft law” provisions. While contained in the recommendations of an international organization, these rules were categorized as “soft law”, since they were not legally binding, strictly speaking. On the other hand, when included in the Palermo Convention text, the same rules were converted into a legally binding obligation for the Parties of that Convention, thus, gained “hard law” status. Let us have a quick look at the language of Article 7 of the Palermo Convention:

1) Each State Party:

- a) Shall institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer identification, record-keeping and the reporting of suspicious transactions;

The process of “hardening” “soft law” provisions into conventional obligations, though, suffers from the difficulties faced in the multilateral environment, where only consensus among a very large number of parties is reflected in the final language of the convention. Subparagraph 1) a), above, is a much summarized and lighter version of detailed standards contained in several FATF Recommendations.

Subparagraph 1) b), reproduced below, is a good example of the lighter language of the Convention in comparison to the relevant “soft law” provision. While FATF Recommendation 26 provides that “Countries **should establish** a Financial Intelligence Unit (...)”, Subparagraph 1) b) of the Palermo Convention states that Parties “(...) **shall consider** the establishment of a Financial Intelligence Unit (...)”.

b) Shall, without prejudice to articles 18 and 27 of this Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering.

The same trend of providing for lighter and summarized versions of the FATF Recommendations can be seen on Subparagraph 2), below, which also has a much more detailed version on the FATF Recommendations:

2) States Parties shall consider implementing feasible measures 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. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.

Paragraphs 3) and 4) appear to have, among other objectives, that of providing a certain amount of legitimacy for other standards, among which, of course, the FATF Recommendations feature prominently. They also serve as an incentive to international cooperation at the global, regional, subregional and bilateral levels. This may also implicate in an increase in the legitimacy of the FSRBs, as well as that of the FATF itself.

3) In establishing a domestic regulatory and supervisory regime under the terms of this article, and without prejudice to any other article of this Convention, States Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering.

4) States Parties shall endeavour to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.

As we have been sustaining throughout this Paper, attacking the financial side of crime is the main purpose of combating money laundering. Criminals wish to use the profit of their activities and, to do so in a comprehensive manner, they have to resort to the legal financial system, which is when they leave traces that allow legal enforcement agents to prove the illicit origin of the assets and to confiscate them.

Taking away the financial rewards of crime tends to have a harsher effect on criminal organizations than imprisonment of their members. Deprived from money, they do not enjoy the benefits of engaging in crime and also face operational difficulties. This is why all of the international instruments referred to in this paper dedicate a session to the confiscation of illicit assets.

The Palermo Convention provides for the confiscation and seizure of the proceeds and instrumentalities of crime in Article 12:

1) States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:

- a) Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds;
- b) Property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention.

As we stated when we started referring to this Article, tracing the proceeds and instrumentalities of crime is a key procedure. The language of this Paragraph is very similar to its correspondent in the Vienna Convention, as can be seen on Paragraph 2) of the Article in discussion:

2) States Parties shall adopt such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

Once again, the language of the Vienna Convention is almost repeated when it comes to Paragraph 6, that deals with keeping financial records and making them available to national authorities and to the other Parties' authorities. This a key component of any legal instrument that aims at effectiveness of mutual legal assistance in criminal matters related to financial matters:

6) For the purposes of this article and article 13 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. States Parties shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

Paragraph 8 states that bona fide third parties shall have their rights respected, which, in order words, had also been referred to in the Vienna Convention:

8) The provisions of this article shall not be construed to prejudice the rights of bona fide third parties.

The language in Paragraph 9 is exactly the same as in the correspondent part of the Vienna Convention. The matter of confiscation and of mutual legal assistance in this regard is very sensitive, so Parties choose to have a safeguard to allow them to use it or not. Of course this has negative effects for the system as a whole, but this was probably the only way to reach consensus, which is always difficult, especially in the multilateral field:

9) Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party.

Article 14 of the Palermo Convention deals with the disposal of confiscated proceeds of crime or property:

1) Proceeds of crime or property confiscated by a State Party pursuant to articles 12 or 13, paragraph 1, of this Convention shall be disposed of by that State Party in accordance with its domestic law and administrative procedures.

2) When acting on the request made by another State Party in accordance with article 13 of this Convention, States Parties shall, to the extent permitted by domestic law and if so requested, give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners.

Paragraph 2 introduces the concept of the return of assets to the requesting party, as opposed to internal destination by the confiscating party and a step beyond the sharing of assets with that party, dealt with by Subparagraph 3) b), below:

3) When acting on the request made by another State Party in accordance with articles 12 and 13 of this Convention, a State Party may give special consideration to concluding agreements or arrangements on:

(...)

b) Sharing with other States Parties, on a regular or case-by-case basis, such proceeds of crime or property, or funds derived from the sale of such proceeds of crime or property, in accordance with its domestic law or administrative procedures.

Asset sharing with the cooperating party is a very interesting tool for mutual legal assistance. On the basis of provisions like Subparagraph 3) b), above, or of any other international treaty, national law or regulation, States may decide to share illicit assets due to international cooperation in order to determine its illegal origin, to trace it or to confiscation it. If a party cooperates with another in the recovery of such assets, one of these frameworks can provide the basis for asset sharing. This functions as an incentive and as a compensation for the cooperating party, which spends human and financial resources on the recovery of such assets.

Brazil has developed the entire necessary framework for asset sharing, beginning with Paragraph 2 of Article 8 of the Brazilian anti-money laundering statute, Law 9.613, of March 3rd, 1998:

2) In the absence of an international treaty or convention, the assets, rights or valuables seized or detained upon request of a competent foreign authority or the proceeds resulting from their detention shall be evenly divided between the Country that makes the request and Brazil, safeguarding the rights of victims or bona fide third parties.

The development of this tool in Brazil was furthered by the creation, in 2004, of the Department of Assets Recovery and International Legal Cooperation, within the National Secretariat of Justice, in the structure of the Ministry of Justice – DRCI/SNJ. This Department is responsible for fostering mutual legal assistance in criminal and civil matters, for recovering illicit assets, especially those sent to or received from abroad, and for promoting the articulation of the Brazilian legal enforcement authorities responsible for combating money laundering.

C. The United Nations Convention against Corruption

The United Nations Convention against Corruption was opened for signature on December 9th, 2003, in Merida, Mexico. Also known as the Merida Convention, it represents the most important multilateral standard aimed at combating corruption. Its relevance for this Paper derives from the strong links between corruption and money laundering, reflected in the Convention's text.

The Merida Convention counts 131 Parties (as of February 2009), which are committed to the content of its 71 articles. For the purposes of this Paper, we will focus on the following articles: 2 – Use of terms; 23 – Laundering of proceeds of crime; 24 – Concealment; 31 – Freezing, seizure and confiscation; and 51 – [Asset recovery] General provision.

One of the main achievements of the Merida Convention was the establishment of the return of assets as a fundamental principle therein, in accordance with its Article 51. The underlying principle is that the money sent abroad by corrupters has never ceased to be the property of the country from which it was embezzled. Therefore, one must not refer to asset sharing of corruption proceeds, because these are to be returned to their real owners.

Apart from the great advance that the return of assets concept represents, the Merida Convention reiterates the money laundering combat standards of the Vienna Convention, of the FATF Recommendations and of the Palermo Convention.

Article 2 of the Merida Convention – Use of Terms, sets the definitions, of which the following are the most relevant for the purpose of this Paper:

- d) “Property” shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets;
- e) “Proceeds of crime” shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;
- f) “Freezing” or “seizure” shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;

g) “Confiscation”, which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority;

h) “Predicate offence” shall mean any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 23 of this Convention;

All of these definitions are virtually identical to those of the Palermo Convention and of the Vienna Convention. The only difference worth of note is that the Vienna Convention does not have a definition of “predicate offence”, as at that time money laundering was attached to predicate offences related to illicit drugs trafficking alone. Palermo and Merida, on the other hand, feature the extension of that concept, so they contain such a definition.

Article 23 of the Merida Convention provides for the offence of money laundering:

1) Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

a)

(i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

b) Subject to the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

The above terms are exactly equal to those of the Palermo Convention and similar to those provided for in the Vienna Convention. The most relevant distinction is that the Palermo and Merida terms are broader, as they refer to the “proceeds of crime”,

whereas in the Vienna Convention the scope is limited to the offences related directly or indirectly to illicit drug trafficking.

The broader range of predicate offences (the crime from which the proceeds are to be laundered) of the Palermo Convention leads to more simple definitions of the money laundering offence, contained in Paragraph 2) of Article 23:

2) For purposes of implementing or applying paragraph 1 of this article:

- a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;
- b) Each State Party shall include as predicate offences at a minimum a comprehensive range of criminal offences established in accordance with this Convention;

Paragraph 2) of Article 23 is very similar to text of the Palermo Convention. These definitions reflect once again the broader approach of the Merida and of the Palermo Convention in relation to the Vienna Convention, as they dissociate definitely the offence of money laundering from predicate offences related to illicit drugs trafficking. Because of this, in the same way as the Palermo Convention, the language of Subparagraph 2) a) refers to “(...) the widest range of predicate offences”, as can be seen above.

The offence of “concealment” is introduced by the Merida Convention in its Article 24, meaning that a criminal offence is committed even if a person had no participation in the previous offences, including the predicate offences and money laundering, but knowingly conceals property derived from them:

Without prejudice to the provisions of article 23 of this Convention, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally after the commission of any of the offences established in accordance with this Convention without having participated in such offences, the concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with this Convention.

The Merida Convention provides for the freezing, seizure and confiscation of the proceeds and instrumentalities of crime in Article 31:

- 1) Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:

- a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;
- b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.

The language of this Paragraph is very similar to its correspondents in the Palermo and the Vienna Convention, as can be seen on Paragraph 2) of the Article in discussion:

- 2) Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

Once again, the language of the Vienna and Palermo conventions is almost repeated in Paragraph 7, which regulates the keeping of financial records and the need to make them available to national authorities and to the other Parties' authorities:

- 7) For the purpose of this article and article 55 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

Paragraph 9 deals with the respect to bona fide third parties' rights and also has very similar languages as those of the Vienna and Palermo Conventions:

- 9) The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.

The language of Paragraph 10 is exactly the same as in the correspondent part of the Vienna and Palermo conventions. The sensitiveness of States to matters related to confiscation and the correspondent mutual legal assistance is translated into these provisions. This is a regular feature of the multilateral process, in which the need for consensus among an enormous number of parties leads to safeguards like these, which could eventually threaten the very effectiveness of the envisaged measure:

- 10) Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party.

The Merida Convention's greatest achievement is contained in Article 51, which declares that the return of assets is a fundamental principle of the Convention:

The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.

As mentioned briefly in the beginning of this Section, Article 51 is the first of a whole Chapter dedicated to the return of assets, with detailed definitions contained in the following articles. The concept of the return of assets is, as we have already pointed out, a major landmark in the fight against money laundering and for the recovery of assets, when these are derived from corruption. The underlying principle is that the assets belong to the State from which they were embezzled. Thus, it would be unfair to discuss asset sharing in these cases, as the assets must be returned to their original owners.

Section V – Conclusions

When it comes to combating transnational organized crime, modern legal enforcement systems are not limited to the imprisonment of criminals. As criminal organizations depend on financial support for the continuity of their activities, stopping the money flow of these organizations has become a fundamental tool to combat them. This approach not only deprives the organization from its funding, but reduces the incentives of crime, aiming at making sure that crime does not pay.

Combating money laundering has been the main tool for legal enforcement authorities to stop the financial flow derived from criminal activities. Since criminals intend to use the proceeds of crime far from the eyes of justice, they try to disguise the unlawful origin of the money and to reintroduce it in the financial system with a legal façade. It is by following the traces that this process leaves and by impeding that illegally sourced funds can be used by criminals that governments all over the world have been combating money laundering, in order to fight organized crime.

Since crime obeys no borders, and due to the ease with which money can be transferred worldwide nowadays, this fight is naturally of an international character. This is why a global framework for combating money laundering has been taking shape since the late 1980's. This framework is comprised, mainly, of the following instruments: (i) The United Nations Convention against Illicit Traffic in Narcotic Drugs

and Psychotropic Substances 1988 (Vienna Convention); (ii) The United Nations Convention against Transnational Organized Crime (Palermo Convention); (iii) The United Nations Convention against Corruption (Merida Convention); and (iv) The FATF 40 Recommendations on Combating and Preventing Money Laundering.

These international instruments influence each other and seek consistency in their language and definitions. They also, to the possible extent, aim at forming a system in which each of the pieces reinforces the others.

It is, though, important to note that the FATF 40 Recommendations represent the most detailed and the most influential of those instruments. As noted earlier in this Paper, the level of detail of the FATF's standards is made possible by the limited number of participants of that Task Force and by their strong commitment to their common goal of combating and preventing money laundering.

As for its worldwide influence, even with a limited membership, the FATF's standards are being implemented in most jurisdictions around the world. This is so because of: (i) the importance of its members in the financial and political scenario; (ii) the regional initiatives to which they may be part; (iii) the technical nature and quality of the standards set; (iv) the impact that a declaration of concern by the FATF could have on a country's finances; and (v) the support from the United Nations Security Council.

In this context, even if the FATF Recommendations are of a non-mandatory nature, the impact of these "soft law" standards in most jurisdictions' practices and law enforcement framework is even greater than that of the conventional obligations.

That is so also in the Brazilian case. Brazil is a party to all of the relevant United Nations conventions that deal with the matter of combating money laundering and is also an active member of the FATF.

On July 17th, 1991, Brazil ratified the Vienna Convention. The Palermo Convention was ratified by Brazil on January 29th, 2004. Brazil also ratified the Merida Convention, in June 15th, 2005.

Since the ratification of these conventions, Brazil has taken major steps towards its implementation on a national level. At the same time, Brazil has been strongly active in the existing Conference of the Parties of these conventions, as well as developing partnerships with the United Nations, via its Office on Drugs and Crime (UNODC) for

spreading the word about them both domestically and internationally. Latin America and the Portuguese speaking countries have been the main focus of these international outreach initiatives undertaken by Brazil, in conjunction with the UNODC.

Brazil is a founding member of GAFISUD, where it exercises a major leading role. Brazil is also a full member of the FATF and takes part on its peer-to-peer evaluation process, showing a high commitment to its standards. In the last mutual evaluation of the Brazilian anti-money laundering system, in 2004, the country was deemed compliant to 31 Recommendations, not receiving a single rating below “Largely Compliant”.

The Brazilian anti-money laundering legislation is based on the framework provided by Law n° 9.613, of March 3rd, 1998. The Law contains the provision of the money laundering offence, the preventive measures, the suspicious reporting system and procedures for international cooperation.

Law n° 9.613 and the updates made to it follow the international standards set by the FATF and the relevant United Nations conventions, specifically the Vienna Convention, the Palermo Convention, and the Merida Convention. The same law created the Brazilian Financial Intelligence Unit (Council for Financial Activities Control – COAF), a collegiate body formed by the relevant governmental agencies which counts with an Executive Secretariat under the structure of the Ministry of Finance.

The most significant legal measure by Brazil since Law n° 9.613 is Complementary Law n° 105, of January 20th 2001, which changed banking secrecy rules, including the extension to COAF of the access to such information. It is also important to note that Law n° 10.701, of July 9th, 2003, included the financing of terrorism as a predicate offence for money laundering, provided additional authority for the FIU to obtain information from reporting parties, and created a national registry of bank accounts.

With respect to the preventive measures, Brazil has designated the appropriate competent authorities to supervise financial institutions. The legislation and regulations cover the requirements for increased diligence for unusual or suspicious transactions as well as for transactions involving jurisdictions with deficient anti-money laundering regimes.

Brazilian law enforcement authorities have adequate access to information and investigative techniques for investigations and prosecutions. The Federal Police and the General Attorney's Offices have increased the number of money laundering investigations and specialized federal courts have been established.

Since 2003, the Ministry of Justice, by means of its Department for Assets Recovery and International Legal Cooperation, of the National Secretariat of Justice - DRCI/SNJ, organizes the national strategy for fighting corruption and money laundering, known by its Portuguese acronym, ENCCLA. All of the relevant ministries and agencies are involved, both at Federal and State levels, as well as the National Congress, General Attorneys, and the Judiciary Power, also in Federal and State levels.

ENCCLA and the COAF Plenary meetings are the main governmental fora in Brazil dedicated to foster the combat to money laundering. Throughout the years, both have shown consistently great interest and support for the implementation of the international standards for combating money laundering. Not only has this had a strong impact in the national scene, but the prominence of Brazil in this field led to the President of COAF, Mr. Antonio Gustavo Rodrigues, being nominated, subsequently, to the Presidency of GAFISUD and then of the FATF.

Even if very important, that is only the most visible evidence of the commitment of Brazil to the international standards on combating money laundering. Institutional, legal and procedural changes in the Brazilian framework for this combat have been solidly building since the late 1990's. Today, Brazil relies on a state-of-the-art mutual legal assistance system, counts with a fully functional Financial Intelligence Unit (COAF), has been developing specialized courts and is increasingly building inter-institutional horizontal cooperation through ENCCLA, all in favor of the fight against money laundering.

The Brazilian fight against transnational organized crime would benefit from the continuity of these policies. The National Secretariat of Justice should keep on being consistently endowed with the resources necessary for the continuing success of the national coordination efforts represented by ENCCLA.

Finally, it is important to note that the Brazilian system for combating money laundering and the financing of terrorism is about to be re-evaluated by the FATF. The importance that the Brazilian Government dedicates to its policies in this regard and to

this evaluation can be measured by the issuance of the Inter-Ministerial Executive Order 145, of March 26th, 2009, signed jointly by three Ministers (Justice, Finance and Social Security) and by the President of the Central Bank. This Executive Order creates an Inter-Ministerial Working Group to coordinate the activities of preparation for the FATF evaluation.

The dedication of the Brazilian Government to the fight against money laundering, thus, is the greatest possible. It is undeniable that there have been continuing coordinated efforts and full commitment of all of the relevant agencies, supported by their highest hierarchical level, which have led to a successful policy that has been proving consistent over the years.

The FATF evaluation process is the main tool for examining in deep detail the institutional, legal and practical framework within a country for combating money laundering. Brazil has done very well in its last evaluation, as mentioned before, and a new evaluation is nearing. The steps taken since the last evaluation will be analyzed by the Inter-Ministerial Working Group created for that purpose. This Working Group may also identify possibilities for improvement and suggest them to the governmental agency responsible for each specific matter. This is a great opportunity for further improving the system, even in the context where there already exists a strikingly well-developed framework in place.

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