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BRAZILIAN BANKING INSTITUTION AND ANTI-MONEY LAUNDERING FRAMEWORK: COMPLIANCE WITH INTERNATIONAL STANDARDS

Ednei Roza*

I. INTRODUCTION

THE crime of money laundering¹ is still a huge issue facing both the domestic and international financial communities.² Over \$1.5 trillion is laundered annually, an estimated 2 to 5 percent of global GDP.³ Due to the impact that such an activity has upon the world economy, international communities perceived the need to intervene to stop this illegal practice.⁴

This paper will address the Brazilian anti-money laundering framework as well as the financial system in compliance with international standards against money laundering. As such, the establishment of the Financial Action Task Force on Money Laundering (F.A.T.F.)⁵ has become a paramount agency in strictly regulating money laundering practices.⁶

More importantly, the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Con-

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1. BANKS: FRAUD AND CRIME, at v. (Joseph J. Norton & George A. Walker, eds., 2d. ed. 2000).

2. Michael Levi, *Money Laundering: Private Banking Becomes Less Private*, in GLOBAL CORRUPTION REPORT 2001 204, 205 (Robin Hodess et al. eds., 2001), available at http://www.transparency.org/publications/gcr/download_gcr/download_gcr_2001.

3. *Id.*

4. *Id.*

5. Financial Action Task Force on Money Laundering (F.A.T.F.) currently has thirty-three members (thirty-one countries and two international organizations). F.A.T.F. is considered an inter-governmental body created primarily to set standards and policies to combat money laundering ("the policy-making-body"). Brazil has adopted another nomenclature called *Grupo de Ação Financeira sobre Lavagem de Dinheiro*, well known by the French initials (G.A.F.I.). F.A.T.F. was created by the Group of Seven—represented by the seven richest countries in the world (Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States). See Financial Action Task Force on Money Laundering (F.A.T.F.), <http://www.fatf-gafi.org> (last visited Nov. 12, 2004) [hereinafter F.A.T.F.].

6. *Id.*

vention)⁷ and the subsequent establishment by other institutions of a legal framework to combat money laundering will be discussed as well. Money laundering still remains in action, whether associated with Al Capone⁸ and the Mafia or with the modern globalization of the financial institutions.⁹

II. OVERVIEW OF THE BRAZILIAN BANK REGULATION FRAMEWORK

A. THE ESTABLISHMENT OF THE FINANCIAL SYSTEM

The Brazilian National Financial System was established in 1964 by Law No. 4.595.¹⁰ This law¹¹ also sets forth the establishment of the National Monetary Council (C.M.N.), the Central Bank of Brazil (B.A.C.E.N.), the Bank of Brazil (B.B.), the National Bank of Economic Development (B.N.D.E.S.) and other public and private financial institutions.¹²

The National Monetary Council is the executive branch responsible for the regulation of the National Financial System (SFN).¹³ It is chaired by

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7. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. E/Conf. 82/16, reprinted in 28 I.L.M. 493 (1988), available at http://www.unodc.org/pdf/convention_1988_en.pdf (last visited Nov. 17, 2004) [hereinafter Vienna Convention].
 8. ANTONIUS SCHUDELARO, *ELECTRONIC PAYMENT SYSTEMS AND MONEY LAUNDERING: RISK AND COUNTERMEASURES IN THE POST-INTERNET HYPE ERA* 58 (2003).
 9. See e.g., Joseph J. Norton, *A "New International Financial Architecture?" – Reflections on the Possible Law-Based Dimension*, 33 INT'L LAW. 891 (1999).
 10. Lei No. 4.595, de 31 de dezembro de 1964, D.O.U. de 31.1.1995. (Brazil).
 11. This Law came into effect to establish important changes regarding the Brazilian Financial System. It was enacted during a rough time in Brazil, the beginning of the military regime period, which prevailed from 1964 to 1985. The Republic Federative of Brazil established new policies of the Banking System and other Financial Entities through Law No. 4.595, in its efforts to create a better financial system framework and to give to the people a more reliable and stable financial system.
 12. Lei No. 4.595, art. 1.
 13. It is important to mention that prior to Law No. 4.595, article 192 of the Federal Constitution of 1988 was the regulatory provision governing the National Monetary Council. However, the Brazilian Congress passed Constitutional Amendment No. 40 revoking nearly all of Article 192, which provided the legal framework for the Brazilian financial system. See C.F. de 5 de outubro de 1988 (Brazil). The original text of Article 192 stated that Congress should regulate the national financial system through one complementary law, which had to deal with the following subjects: (1) requirements for the operation and structure of financial institutions, insurance, social security and capitalization of companies, including rules on operational licenses to be issued by the Central Bank (which licenses shall be non-negotiable and shall be granted to a legal entity of proven economic capacity, whose directors are technically qualified and of uncompromised reputation); (2) conditions for the participation of foreign capital in the above-mentioned institutions considering national interests and international agreements; (3) rules about the organization, operation, and duties of the Central Bank and other public and private financial institutions; (4) requirements for the appointment of members of the board of directors of the Central Bank and other financial institutions, as well as their restrictions after leaving office; (5) creation of a fund or insurance, without the participation of federal resources, for the purpose of protecting the public economy, guaranteeing credits, investments, and deposits up to a certain amount;

the Minister of Treasury, the director of the Bank of Brazil, the director of Bank of National and Economic Development and seven other members appointed by the President of Brazil.¹⁴ The National Monetary Council has (among others) the duty to formulate the credit and currency policy anticipated by law as it relates to the social and economic development of Brazil.¹⁵

The Securities and Exchange Commission of Brazil (CVM) is another important branch under the Monetary Council control. It is entitled to rule and supervise the directives related to the securities market.¹⁶

Aimed at becoming part of the "consumer society,"¹⁷ banks in Brazil have to follow pertinent and very important rules as legal entities that constitute themselves for the exercise of banking activities. In this sense, in order to establish a financial institution in Brazil, the proposal entities must fulfill the requirements before the Governor of Central Bank, according to the terms of the Circular No. 45 of 1966.¹⁸

Financial institutions are established exclusively as public or private legal entities (corporations)¹⁹ and can operate their business solely with specific authorization (charter) issued by the regulatory entities.²⁰ Nevertheless, there are two different formalizations. For instance, if the financial institution is a national legal entity, the charter is issued by the Central Bank.²¹ On the other hand, if it is a foreign legal entity, the executive branch, pursuant to Law No. 4.595,²² has to decree the charter as such.

Taking into account that the classification of banks has lost its distinction,²³ structurally speaking, banking institutions in Brazil have also be-

(6) criteria restricting the transfer of savings from regions with income below the national average to more developed regions; and (7) requirements for the operation and structure of credit cooperatives.

14. See Lei No. 4.595, art 6; Lei No. 5.362 de 30 de novembro de 1967, D.O.U 1.12.1967 (Brazil) (modifying the wording of Lei No. 4.595, arts. 1, 6, and 14).

15. Lei No. 4.595, art. 2.

16. See Maria Celina B. Arraes, *The Structure of Banking System: Case Studies: Brazil, in REFORM OF LATIN AMERICAN BANKING SYSTEMS: NATIONAL AND INTERNATIONAL PERSPECTIVES* 29, 40 (Ernesto Aguirre and Joseph Norton eds., 2000).

17. NELSON ABRÃO, *DIREITO BANCÁRIO* 20 (8th ed. 2002). Professor Abrão is the most distinguished scholar in Brazil on Banking Law.

18. Circular No. 45 de 6 de janeiro de 1967 (Brazil). (Circular and Resolution are the names of the regulatory provisions issued by the Central Bank.) Nevertheless, this Circular was later changed by Circular No. 87, de 18 de abril de 1967. On such considerations, see Circular No. 87, the General Standards annex 1, ch. VI, *available at* <http://www5.bcb.gov.br/pg1Frame.asp?idPai=NORMABUSCA&urlPg=/ixpress/correio/correio/DETALHAMENTOOCORREIO.DML?N=067000023&C=INSTITUI%C7%C3O&ASS=CIRCULAR+87> (text in Portuguese).

19. See Abrão, *supra* note 17, at 3.

20. See *id.* at 20.

21. *Id.*

22. Lei No. 4.595, art. 18.

23. Also, banks have become a type of "financial conglomerate" in structure. See Joseph J. Norton, *A Perceived Trend in Modern International Financial Regulation: Increasing Reliance on a Public-Private Partnership*, 37 INT'L LAW. 43, 44 (2003) [hereinafter Norton, *Perceived Trend*]; JOSEPH J. NORTON, *DEVISING INTERNATIONAL BANK SUPERVISORY STANDARDS* xxii (1995).

come quite irrelevant.²⁴ In other words, they are considered as a “universal bank,”²⁵ regardless of their individual environments for doing business. Moreover, the distinctions among different types of financial institutions such as banks have been considered “once-crucial”²⁶ and make “little difference.”²⁷ In addition, the process of bank mergers²⁸ has occurred on a large scale and the “left behind” institutions have been liquidated, along with the aggressive privatization of the public financial sector.²⁹ These institutions are primarily within the necessary size in order to compete with other corporations operating either in the domestic or international financial market.³⁰

B. THE ROLE OF THE CENTRAL BANK OF BRAZIL

As previously mentioned, the Central Bank of Brazil was created by Law No. 4.595.³¹ The Central Bank of Brazil plays a very important role as a regulatory and supervisory body of the National Financial System.³² Yet, it is an autonomous federal institution (autarky),³³ structured as a federal entity. The Central Bank of Brazil is chaired by one Governor

24. Abrão, *supra* note 17, at 22. Although there are distinct differences between the “functional and administrative organization among these institutions, they carry on their business and the scale of their operations in a common characteristic. These institutions besides great effort to become more and more powerful, they also provide to their customers with a complete array of financial services.” See Central Bank of Brazil, Sistema Financeiro Nacional depois da resolução No.1.524 de 21 de setembro de 1988, available at <http://www.bacen.gov.br/?SFN> (last visited Oct. 20, 2004).

25. See Abrão, *supra* note 17, at 21; Norton, *Perceived Trend*, *supra* note 23, at 44 (on the large and complex banking organization (L.C.B.O.)).

26. JONATHAN R. MACEY ET AL., *BANKING LAW AND REGULATION* 1 (3d ed. 2001).

27. *Id.*

28. See Joseph J. Norton and Christopher D. Olive, *A By-Product of The Globalization Process: The Rise of Cross-Border Bank Mergers and Acquisitions—The U.S Regulatory Framework*, 56 *BUS. LAW.* 591 (2001).

29. According to the Central Bank, “since July 1994, it has liquidated/intervened over 59 banks.” See Central Bank, <http://www4.bcb.gov.br/?SUPERVISAO>. Regarding privatizations, the Banerj Bank (Bank of the State of Rio de Janeiro) and the Banespa Bank (Bank of the State of São Paulo), both in Brazil, are the two largest state-owned banks that were under intervention due to bad administration. In this interventionist process, the ITAU Bank (Brazilian Private Bank) won the bid to administer Banerj and Grupo Santander (European Bank) won the bid for Banespa. In total, there were twelve (12) Brazilian State-owned banks privatized since 1997. See Central Bank, <http://www.bcb.gov.br/lid/gedes/instituicoesPrivatizadas.pdf>.

30. Central Bank of Brazil, Program of Incentives to the Reinstruction and Strengthening of the National Financial System (P.R.O.E.R.) (Nov. 31, 2000), available at <http://www.bacen.gov.br> (last visited Nov. 02, 2004) [hereinafter P.R.O.E.R.]; See generally Arraes, *supra* note 16.

31. See Law No. 4.595, art. 1.

32. The National Financial System (S.F.N.) assets at the end of 2003 were R\$1,333 billion, which accounts for nearly \$410 million. See BANCO CENTRAL DO BRASIL, FINANCIAL STABILITY REPORT (2004), available at <http://www.bcb.gov.br/?FSR> 200411.

33. See Abrão, *supra* note 17, at 39.

(appointed by the National Monetary Council)³⁴ and four Directors.³⁵ According to the Federal Constitution of 1988,³⁶ the Central Bank of Brazil is the exclusive depository of the National Treasury funds. Thus, the stability of the purchase power of the Brazilian currency and the soundness of the financial system are the Central Bank of Brazil's institutional objectives.³⁷

Understanding the different structures and constraints of financial markets in emerging market³⁸ economies like Brazil³⁹ may provide useful tools for creating safe and sound financial systems in order to promote stability in the region.⁴⁰ Notwithstanding its regulatory duties, and regardless of the fact that there are clearly differences between functional and administrative organization, the Central Bank of Brazil in the way it carries on the business and the scale of its operations shares a common characteristic of financial services.⁴¹ Through the Monetary Council, the Central Bank of Brazil has established a set of rules (e.g., Circulars and Resolutions) to prevent and fight against the use of the national financial system for money laundering practices. The regulations issued by the National Monetary Council and the Central Bank of Brazil, under the authority of Law No. 4.595 of 1964, cover prudential limits,⁴² prohibitions, and information reporting requirements to which licensed institutions must adhere. In other words, the Central Bank is the operational body that ensures that the rules issued by the National Monetary Council will be in compliance with applicable laws and regulations.⁴³ Moreover, taking itself as a strict regulator, the Central Bank in 1998 issued two Circu-

34. See Lei No. 4.595.

35. Lei No. 4.595, art. 14 (establishing the National Monetary Council, which is a federal body responsible for the issuance of regulatory provisions regarding the control and governance of the financial system. Before the creation of the Central Bank, the Brazilian monetary authorities were the Currency and Credit Superintendence (S.U.M.O.C.), the Bank of Brazil (B.B.) and the National Treasury); See The History of the Central Bank of Brazil, <http://www.bacen.gov.br/?HISTORIA> (last visited Nov. 04, 2004).

36. C.F., art. 164 de 5 de outubro de 1988. (Brazil) (stating: (1) The authority of the Republic to issue money is exercised exclusively by the Central Bank; (2) it is forbidden for the Central Bank to directly grant loans to the National Treasury and to any agency or entity which is not a financial institution; (3) the Central Bank may purchase and sell instruments issued by the National Treasury in order to regulate the money supply of the interest rate; and (4) the available cash of the Republic has to be deposited at the Central Bank; that of the States, of the Federal District, of the Municipalities, and of the agencies or entities of the Government and of the companies controlled by the Government, at official financial institutions, excepting the cases established in the law.).

37. See Abrão, *supra* note 17, at 34; The History of the Central Bank, *supra* note 35.

38. See generally EMERGING FINANCIAL MARKETS AND SECURED TRANSACTIONS (Joseph J. Norton & Mads Andenas eds., 1998).

39. For an overview of the Brazilian Banking System, see Arraes, *supra* note 16, at 35.

40. On domestic consideration, whether the "safety and soundness" should be a real concern among the regulators, see NORTON, DEVISING INTERNATIONAL BANK SUPERVISORY STANDARDS, *supra* note 23, at 23.

41. Central Bank of Brazil, *Supervision Manual* (November 2003), available at <https://www3.bcb.gov.br/msv/pesquisa/validate.jsp> (last visited Nov. 12, 2004).

42. See Arraes, *supra* note 16, at 39.

43. See Lei No. 4.595, art. 9.

lars (Nos. 2.852 and 2.826)⁴⁴ in order to force all the members in the financial system to adopt procedures so as to be more proactive against financial crimes. The procedures include keeping records of files and information of any customer involved with transactions up to R\$10 million.⁴⁵ There is also a mandatory requirement to report any suspicious transactions that may be interpreted as circumstantial evidence of a laundering crime.⁴⁶ In addition, such communication to the Central Bank shall be made within twenty-four hours if, for instance, there is a large deposit made without a compatible and reasonable income or other explanation to justify the balance as such.⁴⁷

1. *The Brazilian Payment System*

Aimed at strengthening the financial institutions and the operation of banking activities, the Brazilian payment system, reformulated by the Central Bank, established a new item (4.2.1) into the prior set of regulations, called *Sistema de Transferência de Reservas* - STR (Reserves Transfer System).⁴⁸ This reformulation represents a new phase of the operational payment system. Yet, the STR now plays a very important role in minimizing the credit risk assumed by the Central Bank of Brazil through its operations and control transfers.⁴⁹

Presently, the completion of fund transfers depends on the existence of a sufficient balance in the settlement account, which curbs the possibility of overdrafts by the involved parties.⁵⁰ In addition, the other main purpose of this improvement was to respond to the supervisors' concerns to restrain the public sector's presence in banking activities as well as mergers, and the resulting possible crisis that might occur in the financial system.⁵¹

44. Banco Central of Brazil, Circular No. 2.852 de 03 de março de 1998 and 2.826 de 29 de julho de 1998.

45. Banco Central of Brazil, Circular No. 2.852 de 03 de março de 1998, at art. 4(I). The "real" (currency) in Brazil is worth three times less than the U.S. dollar.

46. Law No. 9.613, de 3 de março de 1998, D.O.U 04.03.1998 (Brazil), available at http://www.fazenda.gov.br/coaf/ingles/i_laws.htm.

47. Circular No. 2.852, *supra* note 44, art.1.

48. CENTRAL BANK OF BRAZIL, THE BRAZILIAN PAYMENT SYSTEM (May 2003), available at <http://www.bacen.gov.br/?SPB> (last visited Nov. 09, 2004).

49. *See id.* The Central Bank of Brazil provides bank reserve accounts which are mandatory for institutions taking demand deposits and optional for investment banks. In this sense, the financial institutions are fulfilled by the requirements set by the Central Banks as for the use of settlement purpose.

50. *See id.* According to the Central Bank, the "Brazilian payment system reform, however, goes beyond the launch of STR." In order "to reduce the systemic risk, main goal of the reform, legal changes were also made." *Id.* at 1. For example, Law 10.214, enacted in March 2001, recognizes multilateral netting in the environment of a clearing and settlement system and sets forth that, in all multilateral netting system considered systemically important by the Central Bank, the corresponding clearing house must act as central counterparty.

51. As I was doing research for this paper, there was a new case in Brazil where the 21st largest bank (Banco Santos) had gone under intervention by the Central Bank due to the Capital issue. There are four possible ways for the Banco Santos to begin to work again. They are: (1) the capitalization by the owner of the bank of

III. THE BRAZILIAN ANTI-MONEY LAUNDERING FRAMEWORK

A. SCOPE OF THE MONEY LAUNDERING IN BRAZIL

The Chief Justice of the Supreme Court of Brazil, Judge Nelson Jobim, stated that “in our legal system, this illicit act (money laundering) will always be the root of a crime, which even primarily or originally subordinated will produce values, money.”⁵² For a long time, nations throughout the world have dealt with studies directed at a more proficient anti-money laundering regulation.⁵³ For instance, the battle against money laundering in Brazil has been a progressive though slow war against this illicit and “pernicious activity.”⁵⁴ The latent signs of the advanced money laundering operation, which transforms in a short time dirty money into “clean assets,” have been seriously taken into account by international agreements with hopes to create a more efficient framework to combat the money laundering scheme as such.⁵⁵ The role of the Brazilian government in combating money laundering is therefore fundamental and important, and in spite of the difficulties, Brazil has positively addressed international legal frameworks after ratifying the 1998 Vienna Convention.⁵⁶

B. REGULATORY PROVISIONS

The globalization⁵⁷ of international finance has, unfortunately, contrib-

around R\$700 million (\$250 million) to meet the minimum assets required by the Central Bank provision in compliance with the Basel standards; (2) sale of the bank to someone possibly interested; (3) out-of-court liquidation; or (4) bankruptcy. The owner, as the principal shareholder, has a period of sixty days to present a report. According to the Central Bank, the intervention will be shorter than that. See *Jornal Hoje*, *Banco Santos era o 21º na lista das maiores instituições do país*, GLOBOONLINE, Nov. 14, 2004, <http://oglobo.globo.com/online/economia/146992454.asp> (on file with author).

52. See Nelson Jobim, *A Lei No. 9.613 e Seus Aspectos*, in ANAIS DO SEMINÁRIO INTERNACIONAL SOBRE LAVAGEM DE DINHEIRO, BRASÍLIA, 2000 *A Lei No. 9.613 e Seus Aspectos* (1999), available at <http://www.cjf.gov.br/revista/cadernos.htm> (last visited Nov. 14, 2004) (text in Portuguese) [hereinafter *Brazilian International Seminar on Money Laundering*].

53. See Abrão, *supra* note 17, at 21.

54. Council for Financial Activities Control (C.O.A.F.), *Money Laundering: Brazilian Law* (2002), available at http://www.fazenda.gov.br/coaf/ingles/i_download.htm (last visited Nov. 17, 2004) [hereinafter *Money Laundering: Brazilian Law*].

55. *Id.*

56. See Vienna Convention, *supra* note 7. Such ratification was legally established in Brazil through the Legislative Decree No. 162 of June 26, 1991. Furthermore, in analyzing the Convention itself, Article 10 sets forth the international co-operation and assistance and Item 3 says “. . . [t]he parties may conclude bilateral or multilateral agreements or arrangements to enhance the effectiveness of international co-operation pursuant to this article and may take into consideration financial arrangements in this regard.” *Id.* at art. 10(3).

57. See generally International Monetary Fund, *Globalization: Threat or Opportunity?* (Corrected January 2002), available at <http://www.imf.org/external/np/exr/ib/2000/041200.htm> (last visited Nov. 18, 2004); Joseph J. Norton & Heba Shams, *Money Laundering Law and Terrorist Financing: Post- September 11 Responses-Let us Step Back and Take a Deep Breath?*, 36 INT’L LAW. 103, 103 (2002).

uted to the growth of organized crime. Although efforts have been made to establish a specific and efficient regulatory provision against money laundering,⁵⁸ the launderers take advantage of the country's resorts and the absence of specific provisions to act illicitly.⁵⁹ Brazil is a beautiful and natural country, and unfortunately money launderers have taken advantage of its resorts and geographic location.⁶⁰ According to a report of the U.S. State Department, the absence of laws against money laundering, the highly developed financial sector, increasing local drug consumption and trafficking, and other local issues contributed to making Brazil a money laundering center until 1998.⁶¹

However, in response to that, Brazil made significant progress in strictly combating organized crime when the former President of Brazil, Fernando Henrique Cardoso, signed into law the first anti-money laundering provision, Law No. 9.613 of 1998.⁶² The law "addresses the crimes of money laundering or concealment of assets, rights, and valuables, the measures designed to prevent the misuse of the financial system for illicit actions as described in this law, creates the Council for Financial Activities Control (COAF),⁶³ and addresses other matters."⁶⁴ According to the anti-laundering provision set forth in Law No. 9.613, money laundering is "considered in relation to drug trafficking and white-collar crime."⁶⁵ Article 1 defines money laundering as an attempt:

[T]o conceal or disguise the true nature, origin, location, disposition, movement, or ownership of assets, rights and valuables that result directly or indirectly from the following crimes: (I) Illicit trafficking in narcotic substances or similar drugs; (II) [t]errorism and its financing; (III) [s]muggling or trafficking in weapons, munitions or materials used for their production; (IV) [e]xtortion through kidnapping; (V) [a]cts against the public administration, including direct or indirect demands of benefits on behalf of oneself or others, as a condition or price for the performance or the omission of any administrative act; (VI) [a]cts against the Brazilian financial system; [or] (VII) [a]cts committed by a criminal organization.⁶⁶

The sentence imposed for money laundering by Law No. 9.613 is incarceration for a period of three to ten years and a fine.⁶⁷

58. See *Brazilian International Seminar on Money Laundering*, *supra* note 52, at 19.

59. *Id.* at 90.

60. *Id.* at 80.

61. U.S. DEP'T OF STATE, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT—2003 (March 2004), available at <http://www.state.gov/p/inl/rls/nrcrpt/2003/vol2/html/29920.htm>.

62. Lei No. 9.613.

63. See Council for Financial Activities Control (C.O.A.F.), available at <http://www.fazenda.gov.br/coaf/ingles/index.asp> [hereinafter C.O.A.F.]. See also Vienna Convention, *supra* note 7, art. 4(3).

64. Lei No. 9.613, at ch. 1.

65. *Id.* White-collar crime means "a nonviolent crime usually involving cheating or dishonesty in commercial matters." BLACK'S LAW DICTIONARY 1627 (8th ed. 2004).

66. Law 9.613, art. 1.

67. *Id.*

The law also includes asset seizure and forfeiture provisions to deal with those assets that result from the illegal practices.⁶⁸ Although sometimes called “washed money,” the money laundering originally refers to illicit activities, such as: corruption, trafficking, smuggling, and others, which are defined by the internal legislation of the countries.⁶⁹ For a long time, the gross revenue from these transactions was freely integrated into the financial market and society. Financial institutions and commercial companies are targeted in the attempt to make the “dirty money” acquired by illegal activities appear legitimate.⁷⁰ The United Nations states that money laundering is a vital component of all financial crimes.⁷¹ By “disguising” the source of the illegal earnings without compromising the involved persons (that is, the criminals), money laundering occurs through a dynamic process.⁷² The main objective is to minimize the risk that the money will serve as a dangerous connection with criminal practices.⁷³ However, concerns with the impact that such crime can have on the financial system and concerns over the crime’s capacity to harm the integrity of state-owned administrations, weakening the economic, social, and political systems, have forced the Brazilian authorities to adopt the first set of provisions to fight money laundering.

1. *The Rule of the Council for Financial Activity Control (COAF)*

Thus, Law No. 9.613⁷⁴ came into force in 1998 to establish not only the first anti-money laundering regulation framework, but also created the Council for Financial Activity Control (COAF). COAF is the most important legal entity designed to bring about a rapid and efficient response in the struggle against money laundering.⁷⁵ The main purposes of this Council are to coordinate and to propose mechanisms of cooperation, and to exchange information allowing for efficient and swift actions in the

68. See Lei No. 9.613, art. 4 (establishing that “during investigations or judicial proceedings, . . . the judge may order the seizure or detention of assets, rights and valuables that constitute the object of the crimes referred to in this Law, and which belong to the defendant or are registered under his/her name”). On jurisdiction matters, see generally Bruno Nascimento Coelho, *A competência para o processo e julgamento dos crimes de lavagem de dinheiro (The Jurisdiction to the Process and Decision of the Money Laundering Crimes)* (Apr. 2004), available at <http://www1.jus.com.br/doutrina/texto.asp?id=5886> (text in Portuguese).

69. PETER LILLEY, *LAVAGEM DE DINHEIRO—NEGÓCIOS ILÍCITOS TRANSFORMADOS EM ATIVIDADES LEGAIS (DIRTY DEALING: THE UNTOLD TRUTH ABOUT GLOBAL MONEY LAUNDERING)* 16 (2001).

70. *Id.* at 18.

71. Vienna Convention, *supra* note 7.

72. See C.O.A.F., *supra* note 63; Lei No. 9.613.

73. See C.O.A.F., *supra* note 63.

74. See Lei No. 9.613. In order to respond to the threat of money laundering and to begin implementing a comprehensive anti-money laundering program, this provision lays out the principal preventive measures, which are customer identification, record keeping, and suspicious transaction reporting. See C.O.A.F., *supra* note 63; see generally John William Anderson, Jr., *Regulatory and Supervisory Independence: Is There a Case for Independent Monetary Authorities in Brazil?* 10 L. & BUS. REV. AM. 253, 292 (2004).

75. See *Money Laundering: Brazilian Law*, *supra* note 54.

battle against the dissimulation of property, rights, and valuables.⁷⁶

Article 14 of Law No. 9.613 sets forth the rules of the COAF as a regulatory body responsible for ensuring the applicability of the law against the money laundering scheme.

Article 14 says:

[T]his law creates the Council for Financial Activities Control (COAF), under the jurisdiction of the Ministry of Finance, for the purpose of regulating, applying administrative sanctions, receiving pertinent information, examining and identifying any suspicious occurrence of the illicit activities defined in this Law. The actions of COAF shall not conflict with the jurisdiction of other agencies.⁷⁷

In addition, the COAF has to discipline, applying administrative sentences, the criminals of alleged criminal acts and communicate the findings to competent authorities.⁷⁸ Since its creation, the COAF has been determinate in the support and strengthening of the international and national efforts against money laundering.⁷⁹ Moreover, the COAF is managed structurally by the Council through the Bylaws.⁸⁰ As such, Decree No. 2.799 of October 8, 1998, approved by the Presidency, established the Bylaws in the exercise of the powers conferred by article 84(V)(VI) of the Federal Constitution.⁸¹

The COAF works in accordance with the guidelines established and created by the international community regulatory entities⁸² and is considered a Financial Intelligent Unit (F.I.U.) under the framework established by the Egmont Group in 1995.⁸³ The main purpose of the Egmont Group was to establish better communication between the F.I.U.s throughout the ninety-four current member countries so that an efficient

76. *Id.*

77. *See* Lei No. 9.613, art. 14.

78. *Id.*

79. On the one hand, the C.O.A.F. seeks out internally partnerships with other entities, such as the public administration, to enhance the quality of its job. The success of such partnerships reinforces with certainty the need for interaction among national authorities to fight against money laundering. On the other hand, international cooperation is an important facet of highlighting the development of the C.O.A.F.s activities. *See* Council for Financial Activities Control (C.O.A.F.), *Relatório de Atividades 2000 (Activities Report 2000)*, available at <https://www.fazenda.gov.br/coaf/portugues/sobrecoaf/rel2000.htm> (text in Portuguese) [hereinafter *Activities Report 2000*].

80. *See Id.*

81. *Id.*

82. *Id.*

83. Egmont Group is an informal group created in 1995 in Belgium with the primary objective of serving as the forum for discussion and implementation of issues that were considered common to the financial entities, known as Financial Intelligence Units (F.I.U.s). The information-exchange process among the F.I.U.s has created a more realistic framework to curb crimes such as money-laundering. Exchanging data will, at least, help the other countries/governments deal with and be more proactive against the matter. *See* Egmont Group Financial Intelligent Unit, available at <http://www.egmontgroup.org/> (last visited Nov. 20, 2004) [hereinafter *Egmont Group*]; F.A.T.F., *supra* note 5.

global network could be formed.⁸⁴

2. *The Banking Secrecy Act v. Anti-Money Laundering*

Banking secrecy in Brazil is considered a constitutional issue.⁸⁵ The Constitution is frequently seen as protecting against the disclosure of information, which is the most crucial tool in the fight against money laundering. In Brazil, whether secrecy law provisions apply to banking institutions is an enormous concern with respect to the applicability of anti-money laundering laws. In this sense, Law No. 4.595, article 38, which established the first provisions on this matter, provided for all the possibilities in which the government and its official entities could disclose information regarding financial transactions.⁸⁶ However, none of

84. See Egmont Group, *supra* note 83. Under the jurisdiction of the Ministry of Finance, C.O.A.F. was created for the purpose of regulating and applying administrative sanctions, receiving pertinent information, and examining and identifying suspicious occurrences of illicit activities related to money laundering. C.O.A.F. is the Brazilian F.I.U. that establishes procedures for international cooperation, as proposed by the Vienna Convention. See also Vienna Convention, *supra* note 7.

85. The Brazilian Constitution sections X and XII provide privacy and secrecy as individual and collective rights and duties. Henceforth, according to article 5, "everyone is equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property." Section XII of the same article says: "[t]he secrecy of correspondence and of telegraphic,[sic] data and telephone communications is inviolable, except, in the latter case, by court order, in the situations and manner established by law for purposes of criminal investigation or the fact-finding phase of criminal prosecution." Understanding as well as interpreting the law has led to much discussion by jurists and legislators. Notice that due to the interpretation of the term used in the part b, section XII, "the secrecy of correspondence . . . data and telephone communications is inviolable, except, in the case, by court order." The majority of the advocates and legal jurists have understood the word "data" as including bank records, thereby necessitating a court order to obtain them. See C.F., art.5(X, XII), de 5 de outubro de 1988. (Brazil); Aylton Dutra Leal, *Sigilo Bancário e a Administração Tributária Federal (Bank Secrecy and Federal Administrative)* (2001), available at <http://www.receita.fazenda.gov.br/historico/EstTributarios/direitotributario/AdministracaoSigilo.htm> (last visited Oct. 12, 2004) (text in Portuguese); JULIANA GARCIA BELLOQUE, *SIGILO BANCARIO: ANALISE CRITICA DA LC 105/2001* (2003).

86. The revoked Article 38 said: "Financial institutions shall maintain secrecy in their asset and liability credit operations and in the services rendered. Paragraph 1. The information and clarifications required by the Judicial Branch, provided by the Central Bank of Brazil or by financial institutions, as well as the judicial exhibition of books and documents, shall always be invested with this same character of secrecy, only legitimate parties to the litigation having access to them and these parties being prohibited from availing themselves of this access for purposes extraneous to the litigation. Paragraph 2. The Central Bank of Brazil and the public financial institutions shall provide information to the Legislative Branch, being able, on the basis of relevant motives, to solicit the maintenance of said information in reserve or secrecy. Paragraph 3. Parliamentary Inquiry Commissions, in the exercise of its constitutional and legal competence of full investigation (Article 53 of the Federal Constitution and Law N.1579, of March 18, 1952), shall obtain necessary information from the financial institutions, including by way of the Central Bank of Brazil. Paragraph 4. The requests for information to which paragraphs 2 and 3 of this Article refer, should be approved in Plenary Session of the Chamber of Deputies or of the Federal Senate and, in the case of a Parliamentary Commission of Inquiry, by an absolute majority of its members. Paragraph 5.

them provided for money laundering scheme investigations as one of the possibilities.

Due to article 38's complexity, however, as well as the need for a better mechanism to prevent both encroachments on privacy and money laundering crimes, Brazil passed Complementary Law 105 of 2001,⁸⁷ a very important provision revoking the former article 38 of Law No. 4.595.⁸⁸ While it was specifically created as a privacy law by which financial institutions must keep confidential all information related to customers' transactions, the law now allows disclosure to the government and its official entities when there is an implicit suspicion of a money laundering crime. This new provision also protects the financial institutions against any action for breaching the duty of confidentiality.⁸⁹

Thus, Law No. 105 sets forth that the duty of confidentiality⁹⁰ may be breached when it is necessary to verify the occurrence of any illicit activity in any stage of an investigation or legal proceeding, especially in the case of money-laundering or concealment of assets, rights, and valuables.⁹¹ However, with the enactment of Law No. 105 of 2001, practitioners raised some considerations to Congress, arguing the unconstitutionality of the law as such.⁹²

Those considerations are based on the fact that Law No. 105 of 2001 gives a wider range of possibilities to the public agents in accessing bank records without prior authorization (for example, from the judicial branch). This information was formerly protected by law 4.595, in accor-

Tax agents of the Federal and State governments only may proceed to examine documents, books and records of deposit accounts when process has been initiated and when said material is considered indispensable by the competent authority. Paragraph 6. That disposed in the previous Article is equally applicable to the provision of clarifications and information by financial institutions to fiscal authorities, said material and the investigations always being maintained in secrecy and being utilized only with reservation. Paragraph 7. The breach of secrecy, dealt with in this Article, constitutes a crime and subjects those responsible to imprisonment penalty of one to four years; the Penal Code and the Code of Penal Process being applicable where relevant, without prejudice to other appropriate sanctions." Lei No. 4.595, art. 38.

87. Lei Complementar [Complementary Law] No. 105, de 10 de janeiro de 2001, D.O.U. de 11.1.2001.

88. *Id.* art. 12.

89. *Id.* art. 2; *See generally* MARIA JOSE OLIVEIRA LIMA ROQUE, SIGILO BANCÁRIO & DIREITO A INTIMIDADE (Jurua ed., 2003); *see also* PAULO QUEZADO AND ROGÉRIO LIMA, SIGILO BANCÁRIO (Dialectica ed., 2002).

90. *See* BELLOQUE, *supra* note 85, at 37.

91. "The breach of confidentiality may be ordered, when it is necessary to verify the occurrence of any illicit activity, in any stage of investigations or legal proceedings, and especially in the case of the following crimes: (I) terrorism; (II) illicit trafficking in narcotic substances or similar drugs; (III) smuggling or trafficking in weapons, munitions, or materials used for their production; (IV) extortion through kidnapping; (V) acts against the Brazilian financial system; (VI) acts against the Public Administration; (VII) acts against the fiscal and social security order; (VIII) money laundering or concealment of assets, rights, and valuables; (IX) acts committed by a criminal organization." Lei No. 105, art. 1, § 4.

92. Direct Action of Unconstitutionality, No. 2397 de 30 de janeiro de 2001, *available at* http://www.presidencia.gov.br/ccivil_03/Adin/adin_2001.htm/ (last visited Nov. 03, 2004) (text in Portuguese).

dance with the Federal Constitution.⁹³

In short, pursuant to article 6 of Law No. 105 of 2001,⁹⁴ tax officers of the Federal Revenue and Customs Secretariat⁹⁵ can now access bank records without judicial authorization. It also says, however, that although tax officers can access a financial institution's records, they will do so only if an administrative process has begun.⁹⁶ Thus, the polemic discussion remains as to how far those agencies can go.

IV. THE INTERNATIONAL STANDARDS FOR ANTI-MONEY LAUNDERING ACTIVITIES

A. INTERNATIONAL SCOPE

Banks and financial institutions are the primary aim (and sometimes tool) of money launderers.⁹⁷ In this sense, institutions should find the best way to avoid and prevent such practice.⁹⁸ This is a great challenge and must be taken seriously due to the role that banks and financial institutions indirectly play in these criminal acts, by converting dirty money into clean assets.⁹⁹

Money laundering has become undoubtedly a "crucial" issue reaching far into economic and political matters, not only in the domestic communities but also in the international environment.¹⁰⁰ In addition, money laundering has been seen as a prominent way to aid "terrorism" in certain countries.¹⁰¹ Therefore, the international entities standards became paramount in establishing legal frameworks that are capable of avoiding this

93. See C.F. de 5 de outubro de 1988 (Brazil).

94. Article 6 says: "The authorities and the tax agents of Federal, State, Municipal and Federal District administrations shall only examine documents, books and records of the financial institutions, including those relating to deposit accounts and financial investments, when administrative proceedings or tax proceedings have been initiated and said examination is considered indispensable by the competent administrative authority." Lei Complementar No. 105, art. 6.

95. The Secretariat of Federal Revenues (S.R.F.) was created with the main objectives "[1] to present itself to the taxpayer as the sole representation of the federal tax administration; [2] to make the tax administration dynamic, enabling it to manage several federal taxes and customs duties, thereby maximizing the use of material and human resources; and [3] to define clear and efficient decentralization criteria, allowing for a great deal of autonomy in the local units." S.R.F. Objectives, *available at* <http://www.receita.fazenda.gov.br/principal/Ingles/objetivomissao/objetivo.htm> (last visited Nov. 12, 2004).

96. Lei Complementar No.105, art.6.

97. See GUY STESSENS, *MONEY LAUNDERING: A NEW INTERNATIONAL LAW ENFORCEMENT MODEL 200* (2000).

98. *Id.*

99. See generally Ronald K. Noble & Court E. Golumbic, *A New Anti-crime Framework for the World: Merging the Objective and Subjective Models for Fighting Money Laundering*, 30 N. Y. U. J. INT'L L. & POL. 79, 81 (1998).

100. *Id.*

101. See, e.g., Norton and Shams, *supra* note 57; see also Amy Walters Note, *The Financial Action Task Force on Money Laundering: The World Strikes Back on Terrorist Financing*, 9 L. & BUS. REV. AM. 167 (2003).

type of financial crime.¹⁰²

Because international money laundering schemes have become more sophisticated at invading domestic communities, and trillions of dollars circulate the world daily, financial institutions, primarily banks, carry a greater responsibility than just processing and dealing with money and the payment system itself.¹⁰³ In response, international entities have worked very hard in creating mechanisms capable of curbing as much as possible the illegal practices that have made illicit fortunes throughout the world and consequently weakened the financial system as a whole.¹⁰⁴ Toward this end, the International Monetary and Financial Committee (IMFC) and the World Bank are working together and recently issued a joint paper on specific roles in combating money laundering and financial crime to protect the international financial system.¹⁰⁵ In this joint paper these entities stated that the terms "financial abuse and financial crime are far less precise, and in fact are sometimes used interchangeably."¹⁰⁶ The paper provided some clarification on this issue.

B. THE BASEL STANDARDS ON MONEY LAUNDERING¹⁰⁷

In August of 1981, the Basel Committee on Banking Regulations and Supervisory Practices issued the second revision on Banking Secrecy and International Co-operation in Banking Supervision where the Committee stated that an effective international system should rely upon two main fundamentals.¹⁰⁸ First, that a national system should be able to supervise their international bank transactions among other institutions.¹⁰⁹ Second, national agencies with regulatory power should be motivated to co-operate in monitoring the activities of their oversea transactions as well as the

102. INTERNATIONAL MONETARY FUND, OFFSHORE FINANCIAL CENTERS, A PROGRESS REPORT AND THE FUTURE OF THE PROGRAM (July 31, 2003), available at <http://www.imf.org/external/np/mae/oshore/2003/eng/073103.htm>.

103. See Levi, *supra* note 2, at 205.

104. *Id.* See also Stessens, *supra* note 97, at 209. For more on U.S. anti-money laundering mechanisms, see BANKS: FRAUD AND CRIME, *supra* note 1, at 201.

105. INTERNATIONAL MONETARY FUND, FINANCIAL SYSTEM ABUSE, FINANCIAL CRIME AND MONEY LAUNDERING- BACKGROUND PAPER (Feb. 12, 2001), available at <http://www.imf.org/external/np/ml/2001/eng/021201.pdf>.

106. *Id.* On the abuse of financial system, see also Basel Committee on Banking Supervision, *Sharing of Financial Records Between Jurisdictions in Connection with the Fight Against Terrorist Financing* (Apr. 2002), available at <http://www.bis.org/publ/bcb89.pdf>.

107. The Basel Committee on Banking Supervision (BASEL) was established in 1975 by the central bank Governors of the Group of Ten industrialized countries. See The Basel Committee on Banking Supervision, <http://www.bis.org/bcbs/aboutbcbs.htm> (last visited Oct. 22, 2004). Most importantly, the Basel Committee is the legal framework of regulators that provide for the security and safeguard of the financial system, especially regarding banking regulation.

108. Basel Committee on Banking Regulations and Supervisory Practices, *Banking Secrecy and International Cooperation in Banking Supervision*, BS/81/16, Aug. 1981, available at <http://www.bis.org/publ/bcb800f.htm#pgtop> [hereinafter Basel, Banking Secrecy Document of 1981].

109. *Id.*

international banks with business in their own land.¹¹⁰ As banks and financial institutions are considered the main way through which criminals launder money, the Basel Committee on Banking Regulation was one of the most important institutions to address this issue regarding its bank supervision role.¹¹¹

Another important document issued by the Basel Committee in 2001 was the set of regulations called Customer Due Diligence for Banks.¹¹² These regulations address basic "Know your Customer" (K.Y.C.) strategies, which recommend the identification of customers when they open a checking account to minimize the banking risks.¹¹³ There are four control groups in these regulations structured and divided as: (1) customer acceptance procedures; (2) customer identification procedures; (3) on-going monitoring of accounts and transactions procedures; and (4) risk management.¹¹⁴

In March of 2003, the Basel Committee on Banking Organization (B.C.B.S.), International Organization of Securities Commissions (I.A.I.S.), and International Association of Insurance Supervisors (I.O.S.C.O.)¹¹⁵ gathered for a Joint Forum in Hong Kong. The organizations agreed that anti-money laundering strategies/strategies combating the financing of terrorism (AML/CFT) provided by each member ought

110. *Id.*

111. In 1997, the Basel Committee issued regulatory principles, called the "Core Principles," which became an efficient and thorough regulatory model on banking control and policies to combat financial crimes. See Basel Committee on Banking Supervision, *Core Principles for Effective banking Supervision* (Apr. 9, 1997), available at <http://www.bis.org/publ/bcbs30a.pdf>. In April 2001, Basel issued a new framework related to banking supervision under the same Core Principles, called, "Conducting a Supervisory Self-Assessment - Practical Application." According to the Basel Committee the main objective is "to produce a comprehensive, credible and action-oriented overview of the national banking supervisory system based on the Basel Core Principles for Effective Banking Supervision and the Core Principles Methodology." Basel Committee on Banking Supervision, *Conducting a Supervisory Self-Assessment—Practical Application* (Apr. 2001), available at <http://www.bis.org/publ/bcbs81.pdf>. See Christopher D. Olive & Matthew S. Morgan, *Money Laundering and Banking Institutions: The US Framework*, in BANK: FRAUD AND CRIME 201 (Joseph J. Norton & George Walker eds., 2d ed. 2000).

112. See Basel Committee on Banking Regulation, *Customer Due Diligence for Banks* (Oct. 2001), available at <http://www.bis.org/publ/bcbs85.pdf> (last visited Nov. 24, 2004).

113. *Id.*

114. *Id.* The Central Bank of Brazil has fully adopted these standards and has applied them before the banks and financial institutions. The procedures established by this document (K.Y.C.) act as a paramount differential because they regulate their transactions and because of the great risk they represent to the global economy. See CENTRAL BANK OF BRAZIL, *INSTABILITY REPORT 2003 109-190* (May 2003), available at http://www.bcb.gov.br/htms/estabilidade/2003_mai0/portugues_capitulo6.pdf (last visited Dec. 03, 2004) (text in Portuguese).

115. See Basel Committee on Banking Supervision (BCBS), International Organization of Securities Commissions (IAIS) & International Association of Insurance Supervisors (IOSCO), *The Joint Forum: Initiatives by the BCBS, IAIS and IOSCO to Combat Money Laundering and the Financing of Terrorism* (June 2003), available at <http://www.bis.org/publ/joint05.pdf> (last visited Nov. 19, 2004) [hereinafter Joint Note].

to be more consistent.¹¹⁶ Although a more specific and concise framework in combating money laundering and terrorism financing is highly necessary, the institutions' members also implied that the note issued by the Committee is more "descriptive rather than prescriptive."¹¹⁷

The Joint Note is divided into two parts.¹¹⁸ The first part is the "Overall Assessment," which mandates that all AML/CFT common fundamentals be in compliance with the F.A.T.F. 40 Recommendations.¹¹⁹ The second part is the "Sector Contributions," which encompasses three sub-items:¹²⁰ "Nature of customer relationship and specific vulnerabilities of each sector;" "Guidance provided to address vulnerabilities;" and "Ongoing and future work."¹²¹ Thus, in a sense, as a whole compliance with F.A.T.F. Recommendations constitutes compliance with the Basel Standards.

Interestingly, the Basel Committee on Banking Supervision's regulatory framework recommendations¹²² have no legal force.¹²³ However, although the "Core Principles" are not binding on the individual countries' authorities, they have been endorsed by them in order to establish a stable market and reduce risk, especially in emerging countries.¹²⁴

Basically, this provision dealt with how problems could be overcome in light of different regulations in different countries, which can impede information disclosure regarding, for instance, banking secrecy laws.¹²⁵ Unfortunately, the banking secrecy law in Brazil has been misused on behalf of criminals who hide behind it. The privacy issue, specifically disclosure of customer information, remains a huge topic of discussion among legislators. As such, Brazil, in 2001, enacted a new set of provisions¹²⁶ regarding the new banking secrecy provision.

C. THE UNITED NATIONS PERSPECTIVES

The 1988 United Nations Convention (Vienna Convention)¹²⁷ was the primary treaty created to establish an international legal framework capable of combating money laundering and labeling such practice as a

116. *Id.*

117. *Id.*

118. *Id.*

119. The Joint Note states, the "40 Recommendations are currently under review and will lead to further changes in the standards prescribed." *Id.*; see also F.A.T.F., *supra* note 5, at ch. IV. D.

120. Joint Note, *supra* note 115.

121. *Id.*

122. See Anna V. Morner, *Financial Services and Regional Integration: A Comparative Snapshot*, 7 L. & BUS. REV. AM. 549, 553 (2001).

123. *Id.*

124. *Id.* See also Basel Committee on Banking Supervision, *International Convergence of Capital Measurement and Capital Standards: A Revised Framework* (June 2004), available at <http://www.bis.org/publ/bcbs107.pdf>.

125. See Basel, Banking Secrecy Document of 1981, *supra* note 108.

126. Lei Complementar No. 105.

127. See Vienna Convention, *supra* note 7.

crime.¹²⁸ Previous treaties did not go that far.¹²⁹ The 1988 Convention was undoubtedly paramount in initiating the integration among international communities to combat money laundering.¹³⁰

According to the "Background and Overview of the Drug and Crime Situation" given by the United Nations Office and Drug Crimes (UNODC),¹³¹ poverty (a huge problem in Brazil) is accelerating, among other things, drug use, and consequently facilitates ongoing money laundering practices.¹³² Furthermore, they state that Brazil has not only a sophisticated anti-money laundering provision to counter these activities,¹³³ but it also takes part in all international efforts to combat money laundering schemes.¹³⁴

The UNODC, as a guideline issuer that cooperates with its counterparts,¹³⁵ developed the Strategic Programme Framework for the Brazilian Government, which established a time frame of 2006 to reduce drug and crime rates (including rates of money laundering).¹³⁶

Among other issues, the UNODC will help the Brazilian Government fulfill international agreements signed and ratified under the United Nations General Assembly Special Session on Drugs.¹³⁷ The main objectives expected by the Programme Framework are:

- i) Implementation of a national drug control strategy; ii) Fostering inter- and inter-sectoral links and engaging civil society in actions against drugs and crime; iii) setting up selective partnerships on drugs and crime issues between governmental and civil society organizations with the aim of producing a real impact and generating best practices; iv) encouraging further collaboration and the exchange of experiences and knowledge amongst the five countries covered by the UNODC office in Brazil- Namely, Argentina, Brazil, Chile, Paraguay and Uruguay; and v) fostering south-south collaboration between Brazil and other countries in Latin America, Africa, Asia, Eastern Europe, etc.¹³⁸

128. See U.N. Econ. & Soc. Council, *Second Biennial Report on the Implementation of the Outcome of the Twentieth Special Session of the General Assembly, Devoted to Countering the World Drug Problem Together*, U.N. Doc. E/CN.7/2003/2 (2003).

129. See Joanne Greig, *Combatting [sic] Money Laundering*, 8 CRIM. L.F. 485, 487-488 (1997). According to Greig the "1988 Convention focused in greater detail on confiscation issues and included more extensive provisions on drug-related money laundering."

130. *Id.* at 488.

131. United Nations Office and Drugs Crime (UNODC), *Regional Office Brazil* (2005), available at http://www.unodc.org/pdf/brazil/brazil_country_profile.pdf (last visited Nov. 20, 2004) [hereinafter UNODC Regional Office Brazil].

132. *Id.*

133. *Id.* For more on Law No. 9.613, see *supra* note 46.

134. See UNODC Regional Office Brazil, *supra* note 131.

135. See *Id.*

136. UNODC, *Strategy Programme Framework* (Brazil 2003), available at http://www.unodc.org/pdf/brazil/brazil_strategic_programme_framework.pdf (last visited Nov. 21, 2004) (on file with author).

137. *Id.*

138. *Id.*

Thus, the Brazilian government's perspectives regarding money laundering are very positive. During the International Meeting against Money Laundering in Brazil, President Luis Inácio Lula da Silva stated that Brazil wants to improve international cooperation in combating money laundering and asset seizure.¹³⁹ In his statements he affirms that "it is very sad that a person who was punished and after years in the jail, the institution cannot get back even one cent of what was stolen."¹⁴⁰

D. THE FINANCIAL ACTION TASK FORCE OVERVIEW

The F.A.T.F. is a global task force primarily engaged in the development of money laundering standards and policies on the domestic and international levels.¹⁴¹ The basic fundamentals of the F.A.T.F. are: "to monitor and coordinate international enforcement of anti-money laundering and terrorism financing."¹⁴² Hence, the F.A.T.F. Recommendations have also been recognized as the international standards applied by the two major financial entities, the International Monetary Fund (I.M.F.) and the World Bank.¹⁴³

Considered as having a modern financial system and an environment easily accessed by traffickers and other international criminals, Brazil is undoubtedly a target for money laundering.¹⁴⁴ In this sense, the second plenary meeting held in Paris in June 2000 was a major achievement for Brazil, because it was officially introduced as an effective member.¹⁴⁵ Brazil was solely an observer until September 1999, when it was invited to be a full member. The Brazilian government undertook the primary assignment of ratifying the Forty Recommendations established by the F.A.T.F. to combat money laundering.¹⁴⁶ In fact, in order to be selected

139. UNODC Regional Office Brazil, *supra* note 131.

140. Press Release, UNODC, Brazilian Branch, Crime Organizado Movimenta US\$2 Trilhões No Mundo (Oct. 3, 2004), http://www.unodc.org/brazil/pt/press_release_2004-10-03.html [hereinafter UNODC press release]. At the time of the press release, President Lula stated that the law still had some gaps, which should be rectified as soon and as quickly as possible, in order to allocate the stolen assets back to the owners.

141. See F.A.T.F., *supra* note 5.

142. The terrorist attacks on September 11, 2001, changed the entire scenario of the international financial system. Accordingly, many issues remain unresolved regarding the link between money laundering and terrorism. See Walters, *supra* note 101; see also Lisa A. Barbot, *Money Laundering: An International Challenge*, 3 TUL. J. INT'L & COMP. L. 161, 174 (1995).

143. Financial Action Task Force on Money Laundering, *The Forty Recommendations* (June 20, 2003), available at <http://www.fatf-gafi.org/dataoecd/38/47/34030579.pdf> [hereinafter Forty Recommendations].

144. Financial Action Task Force on Money Laundering, *Annual Report 1999-2000* (June 20, 2000), available at <http://www.fatf-gafi.org/dataoecd/13/42/34328015.pdf> [hereinafter FATF Annual Report].

145. *Id.* The other two Latin American countries that joined at the same time as Brazil were Argentina and Mexico.

146. *Id.* at 8. The "minimum criteria" are:

- To be fully committed at the political level: (i) to implement the 1996 Recommendations within a reasonable timeframe (three years), and (ii) to undergo annual self-assessment exercises and two rounds of mutual evaluations;

as a full member, the F.A.T.F. imposes a “minimum and *sine qua non* criteria for admission.”¹⁴⁷ Regarding the F.A.T.F. Forty Recommendations,¹⁴⁸ Brazil successfully fulfilled thirty-eight completely and two partially.¹⁴⁹ Such a performance made Brazil very pleased as well as recognized by international institutions as an important part of the plenary meeting.¹⁵⁰

Due to the impact that the September 11 terrorist attacks made not only on the U.S. economy but also to the entire hemisphere, the F.A.T.F. was forced to improve its standards to combat money laundering. Henceforth, F.A.T.F. established eight Special Recommendations.¹⁵¹ However, compliance with the newer eight recommendations on terrorist financing¹⁵² remains weak in many countries as they lack both specified training and sufficient resources.¹⁵³ Because globalization offers new perspectives for both the integration of developing countries and openness of market opportunity for the exports, F.A.T.F. has a very important role as a “Task Force” responsible for the triage of the trajectory of the money.¹⁵⁴

-
- To be a full and active member of the relevant FATF-style regional body (where one exists), or be prepared to work with the FATF or even to take the lead, to establish such a body (where none exists);
 - To be a strategically important country;
 - To have already made the laundering of the proceeds of drug trafficking and other serious crimes a criminal offence; and
 - To have already made it mandatory for financial institutions to identify their customers and to report unusual or suspicious transactions.

147. *Id.*

148. See Forty Recommendations, *supra* note 143.

149. See Activities Report 2000, *supra* note 79.

150. *Id.*

151. See Financial Action Task Force on Money Laundering, *Methodology for Assessing Compliance with the FAFT 40 Recommendations and the FAFT 8 Special Recommendations* (Feb. 2004), available at <http://www.fatf-gafi.org/dataoecd/46/48/34274813.pdf>.

152. See Walters, *supra* note 101, at 179.

153. U.N. Dep't of Econ. & Soc. Affairs, *World Economy and Social Survey 2004: Trends and Policies in the World Economy*, U.N. Doc. E/2004/75/Rev.1/ST/ESA/291 (2004), available at <http://www.un.org/esa/policy/wess/wess2004files/part1web.pdf> (last visited Nov. 10, 2004).

154. According to the F.A.T.F., “Brazilian [anti-money laundering legislation] lays the groundwork for formal and informal international co-operation. This co-operation is based on a growing network of international treaties and on the concept of reciprocal treatment of requests for legal assistance.” Press Release, UNIBANCO, UNIBANCO’s Anti-Money Laundering / Combating Terrorist Financing Program: Brazilian Legal Anti-Money Laundering Framework Background (July 2005), http://www.ri.unibanco.com/br/arg/compliance/UNIBANCO_S_AML_Program.pdf. See Financial Ask Task Force (F.A.T.F.), *FATF Members and Observers: Brazil*, available at http://www.fatf-gafi.org/document/52/0,2340,en_32250379_32237295_34027188_1_1_1_1,00.html.

E. MERCOSUR AND THE ANTI-MONEY
LAUNDERING FRAMEWORK¹⁵⁵

The Common Market of the Southern Cone (MERCOSUR)¹⁵⁶ is becoming increasingly important, and therefore plays a significant role in establishing a legal framework to combat money laundering in its member countries.¹⁵⁷ In order to establish a regulatory framework, the Common Market Group (G.M.C.) issued Resolution No. 82 in 1999, which created the Task Force (Fuerza de Tareas). The Task Force was adopted by the Council through Recommendation No. 02 in 1999 in order to prevent and repress the money laundering practice among the MERCOSUR's Member States.¹⁵⁸

Notwithstanding the fact that integration of the Central Banks in MERCOSUR remains under strong negotiations,¹⁵⁹ the G.M.C. implemented another principal regulatory provision in order to establish a legal framework to regulate the anti-money laundering efforts in the region. The Central Banks adopted Recommendation No. 01/00,¹⁶⁰ integrated by the G.M.C. as Resolution No. 53 in 2000 regarding minimum regulation standards, as prevention against the money laundering scheme.¹⁶¹

V. RECOMMENDATIONS FOR BRAZILIAN
ANTI-MONEY LAUNDERING LAW

As far as the money laundering crime, scheme or even practice is concerned, developing countries will continue to be terribly targeted by

155. Common Market of the Southern Cone (MERCOSUR) was created in force of the Treaty of Asuncion of 1991 on December 31, 1994. The Member States are the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay. MERCOSUR, <http://www.mercosur.org.uy>.

156. For a comprehensive report on integration in the MERCOSUR Member States, see Eva Holz, *Legislative Asymmetry and the Integration of Banking in Mercosur: A preliminary Approach*, in REFORM OF LATIN AMERICAN BANKING SYSTEMS: NATIONAL AND INTERNATIONAL PERSPECTIVES 107, (107-125) (Ernesto Aguirre & Joseph Norton eds., 2000).

157. *Id.*

158. MERCOSUR, GMC Res. No. 82 (Nov. 18, 1999), available at <http://www.mercosul.gov.br/normativas/default.asp?key=1247>; see Eva Holz, *MERCOSUR: Lessons from the Recent Past—The Case of the Financial Services*, 10 NAFTA L. & BUS. REV. AM. 299, 306 (2004).

159. See generally Enrique Mario Goberna, *The Integration Process in Mercosur*, in REFORM OF LATIN AMERICAN BANKING SYSTEMS: NATIONAL AND INTERNATIONAL PERSPECTIVES 93 (Ernesto Aguirre & Joseph Norton eds., 2000).

160. See Holz, *supra* note 158, at 306.

161. See MERCOSUR, GMC Resolution No. 53 (Nov. 29, 2000), available at <http://www.mercosul.gov.br/normativas/default.asp?key=1175>. Moreover, Brazil, represented by its International Financial Unit (COAF), participated in the meeting of Subgroup 4 of the MERCOSUR (SGT-4) in Buenos Aires in May 2000. According to Professor Holz, the "GMC Resolution 20/01 stipulated that the Party States should adopt the information transparency rules recommended by the Basle Committee before December 31, 2005." Holz, *supra* note 158, at 311 n.57.

criminals.¹⁶² However, as previously mentioned in this paper, Brazil has been fighting insistently to curb money laundering as quickly and precisely as possible by honoring the commitment agreed upon by the international entities.

In addition, the Brazilian government has far more to do. For instance, though the anti-money laundering provision set by Law No. 9.631 in 1998 has been quite efficient (especially with the creation of the COAF), it still has some gaps upon which criminals rely. As such, pursuant to the judicial proceedings and sentencing of the crimes referred to in Law No. 9.631, criminals will be considered launderers solely if there was a preceding crime.¹⁶³ The National Secretary of Justice, Cláudia Chagas, affirmed the law "should be broader as to apply the money laundering crimes into the criminals."¹⁶⁴

Therefore, despite practical difficulties, it seems that Brazil is doing its best to meet international standards to fight money laundering. Also, Brazil should rely on international banking organization standards, which, with regards to the matter of harmonization, for instance, is a fundamental issue involving the exchange of information.

VI. CONCLUSION

Great power requires great responsibilities. Banks and financial institutions, which have great power, undoubtedly bear great responsibility in combating the money laundering scheme. The best tool against such a crime relies not only on the domestic laws adopted by the countries, but also on joint work with the international community. Hence, the exchange of information among countries is crucial, and compliance with the international standards becomes a paramount mechanism to curb such a crime.

162. There are contradictory issues regarding money laundering and development that must be resolved. Opening the banking system to facilitate banking transactions related to international operations is crucial to improve trade and developments. However, it may create a "Swiss Cheese" structure allowing criminals to use the banking system as a "washing machine" for money laundering activities.

163. See Lei No. 9.613, art. 2.

164. See UNODC Press Release, *supra* note 141.

