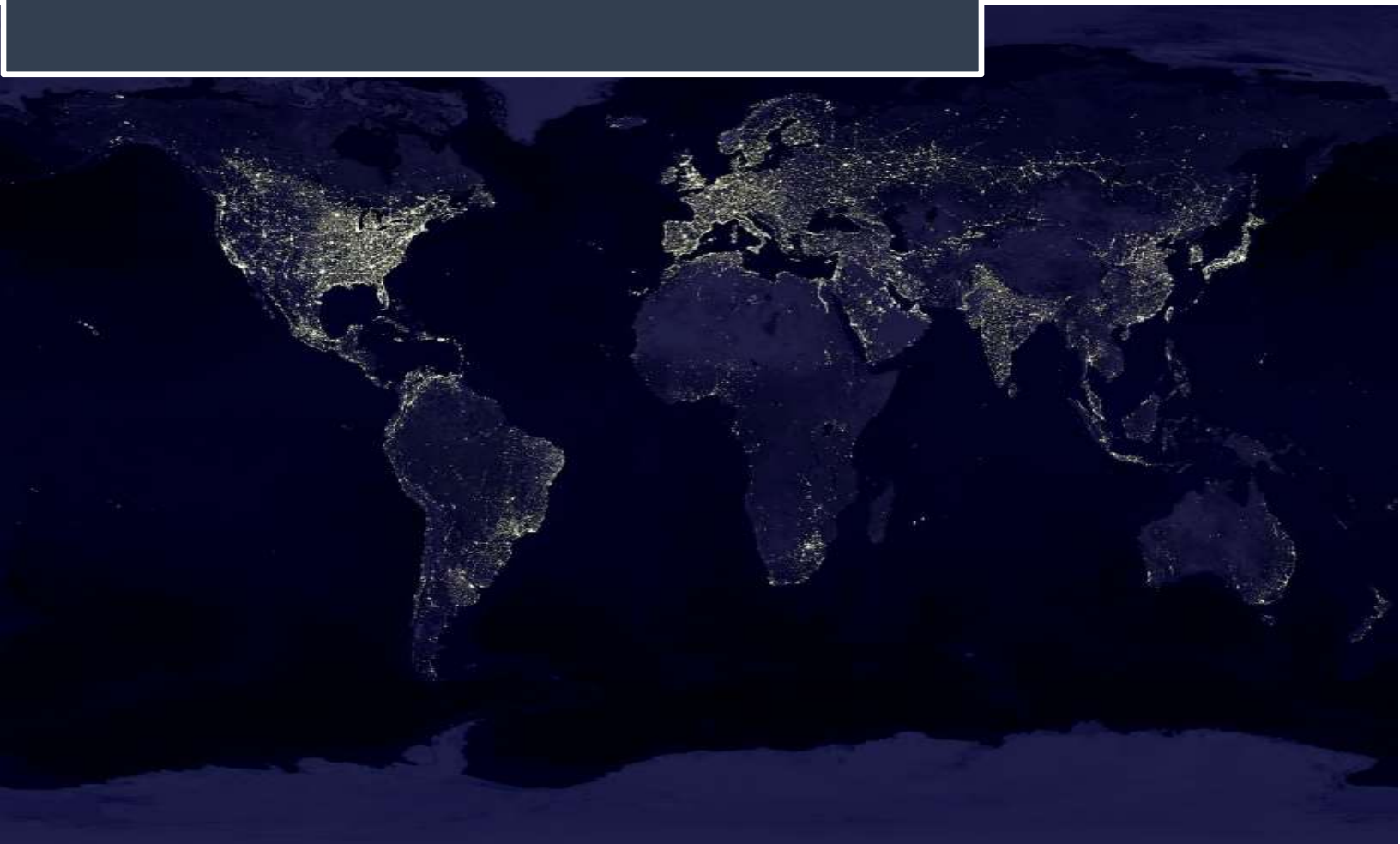


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Financial Action Task Force and the Fight against Money Laundering and the Financing of Terrorism: Quo Vadimus?

Abstract

Thirty years after its creation, the Financial Action Task Force (FATF) has become a prime example of a norm-building process that transcends the traditional avenues of public international law, while compelling a high level of compliance and assuring quick adaptation to norms and practices that better address money laundering and the financing of terrorism in their evolving form. On the occasion of FATF's 30th anniversary, this paper revisits the unique characteristics of FATF and the factors behind FATF's success as standard-setter and as implementation-reviewer in the AML/CFT context. Even though the FATF standards do not have any explicit and formal authority under international law, the FATF's means of action, especially the mutual evaluation process and the blacklisting process, have proved persuasive and effective in ensuring compliance in the AML/CFT context. Nevertheless, the effectiveness of FATF tools is not only a result of coercive policies ('naming and shaming'), but can also be attributed to the increased efforts of the FATF to enhance its legitimacy, improve transparency and increase stakeholders' participation. These objectives need to be pursued even more vigorously by the FATF, in order to ensure the delivery of quality standards that enjoy international acceptance and implementation.

Keywords

FATF, money laundering, financing of terrorism, soft law, mutual evaluations

1. Introduction

The Financial Action Task Force (FATF) has established itself as the leading global forum for the development and the monitoring of international standards against money laundering and terrorism financing (AML/CFT). The success of the FATF as standard-setter and as implementation-reviewer is evidenced by the impact of the FATF 40 Recommendations and their interpretive notes and guidance on national law, European Union (EU) law and traditional international law. Given the high level of compliance with FATF standards, it may be argued that they have assumed a quasi-hard-law status, blurring the dichotomy between soft law and hard law in the AML/CFT context.

In this sense, the FATF constitutes a prime example of a norm-building process that transcends the traditional sources and enforcement mechanisms of public international law, while compelling a high level of compliance and assuring quick adaptation to better address money laundering and terrorism financing. On the occasion of the FATF's 30th anniversary, it is worth revisiting the FATF's norm-building process, with emphasis on its legal nature, expansiveness and flexibility, as well as on the significant challenges that lay ahead due to the evolving nature of money laundering and the terrorism financing.

2. New Open-Ended Mandate and Enhanced Legitimacy

The FATF is an intergovernmental body that was set up in 1989, at the 15th Group of Seven (G7) Economic Summit held in Paris. The initial mandate of the FATF, which was later gradually expanded, was to study the phenomenon of money laundering, its trends and techniques, in order to propose measures to combat it. Under its initial mandate, the FATF would have completed its work in 1990; however, FATF members extended the mandate on several occasions and, on the occasion of the FATF's 30th anniversary in April 2019, they agreed on an open-ended mandate, recognising that “the FATF has evolved from a temporary forum to a sustained public and political commitment to fight money laundering, terrorist financing, and proliferation financing”. [1]

The adoption of an open-ended mandate for the FATF was not accompanied by the adoption of an international treaty acting as a charter to upgrade the FATF's legal status. The existing institutional model was considered a success that did not require an overhaul. The new mandate introduced only minor adjustments to the FATF's governance: FATF Ministers will meet every two years and the term of the FATF's Presidency was also extended to a two-year period. In addition to this, “a stronger funding model” has been agreed to in order to allow the FATF to deal effectively with an expanding workload (FATF, 2019b).

The legitimacy of the FATF as a standard-setter is a recurring issue. The FATF is an inter-governmental body that designs and supervises the international AML/CFT regime, but it is not immediately visible who governs the FATF and who sets its agenda. The FATF is sometimes seen as a proxy used to promote the agenda of those few

developed countries that had been involved in the development of the original Recommendations. Without rejecting the criticism regarding the democratic deficit and the lack of transparency, we find that the argument of “agency capture” and “hegemonic subservience” does not do justice to the FATF norm-building process (Belay, 2019; Ghoshray, 2015), because an increasing number of countries and stakeholders have joined the FATF, including important international players such as the Russian Federation (since 2003), the People’s Republic of China (since 2007), India (since 2010), etc. In addition to this, the FATF often incorporates feedback and positions from private stakeholders, in particular financial market participants; thus, states are not “the sole institutional source of political authority and innovation” in the FATF process, which comprises “broader interaction of processes and practices of governance” (Heng and McDonagh, 2008). These elements render the FATF governance more balanced and autonomous, watering down links to the U.S. policy agenda, which were stronger in the early 1990s.

Another source of legitimacy is the FATF’s successful marketing of its standards as an expert and impartial solution endorsed by a specialised body (Hülse and Kerwer, 2007). Being a multidisciplinary body that brings together experts in the fields of finance and law (Spreutels, 1996), FATF Standards incorporate expertise and experience from participating jurisdictions. Widening the base of participation in FATF decision-making would enhance the legitimacy of the process, as it would allow for “formerly technocratic and closed processes”, such as FATF rule-making, to benefit from more feedback, information and argument (Nance 2018). Following this logic, the old 2012-2020 FATF mandate had recognised the importance of enhancing transparency and predictability in decision-making and governance (FATF, 2012b). Since then, the FATF has achieved significant progress in this respect by supporting a constructive dialogue with the private sector, as in the case of the FATF’s engagement with the Financial and Regulatory Technology sector (FinTech & RegTech) [2]. The FATF’s increased legitimisation is further evidenced by the acceptance of its Standards by an increasing number of jurisdictions in the last 30 years, as the FATF currently counts 39 members (37 member countries and two international organisations) and several observers, more than double the FATF’s initial 16 members.

3. Blurring the Dichotomy between Soft Law and Hard Law

The FATF's 40 Recommendations are a document of reference in the FATF norm-building process. Updated several times and accompanied by their respective Interpretative Notes, Guidances and Best Practices, [3] they cover aspects such as the criminalisation of money laundering, the regulation of the financial system, the confiscation of money laundering proceeds, international cooperation and so on. They constitute soft law standards and do not create legally sanctioned obligations (Guymon, 2000; Zagaris and Castilla, 1993); therefore, they have no obligatory value *stricto sensu* under international law (Turner, 2015).

However, this statement does not logically accord with the FATF members’ high level of compliance (Cassani, 2008), as they have made strong political commitments to transpose the Recommendations into their domestic laws and have put this into

action with remarkable consistency. International obligations imposed by a convention do remain superior to FATF Recommendations in the event of a conflict of norms and they promise a more consistent and homogenous application. Nevertheless, FATF soft law standards offer the advantages of flexibility and easier and faster modification; they have also been proved capable of ensuring consistent compliance, though there is still room for improvement (Mekpor, 2019; Mekpor, Aboagye and Welbeck, 2018). Indeed, FATF members participate in the mutual evaluation process and its follow-up and accept the FATF's assessment of their AML/CFT framework. They then act upon this assessment by "report[ing] back on the steps they have taken to address the deficiencies identified" (FATF, 2018). At the same time, international organisations and international fora regularly reference FATF's work and call for a "swift and effective implementation of the FATF Standards" [4]. Therefore, FATF Standards have assumed a quasi-hard-law status as de facto binding obligations in the AML/CFT context, blurring the dichotomy between soft law and hard law (Lichtenstein, 2001). As Deng Xiaoping, former leader of the People's Republic of China, had famously put it: "It doesn't matter whether a cat is black or white, as long as it catches mice", which in the case of the FATF translates into increasing the efficiency of AML/CFT worldwide.

Compared to hard law mechanisms, the FATF paradigm is an example of 'new' or 'experimental' governance (Nance and Cottrell, 2014) that promises more flexibility, i.e. faster adaptation to new realities and faster transposition of successful AML/CFT rules and countermeasures. Soft law mechanisms are better suited to accommodate national diversity than international conventions, promoting convergence of norms in a more flexible manner (Abbott & Snidal, 2000). For this reason, the FATF encourages its members to "make use of the FATF Recommendations' flexibility", as the FATF's operational plans, such as the 2018 Counter-Terrorist Financing Operational Plan, are designed to "remain flexible and adaptable in order to address vulnerabilities as they are observed, and tackle emerging threats as they arise" (FATF, 2018). Another example of the FATF's flexibility is the adoption of the so-called "risk-based approach". In this sub-process, each jurisdiction has to identify and understand the ML/TF risks to which it is exposed, in order to adapt the AML/CFT rules to its specific jurisdictional characteristics and apply measures in a manner that ensures the mitigation of these risks. Soft law is therefore further softened and becomes an almost invisible agent that keeps domestic law "in check", further increasing the convergence of standards. In this regard, the FATF could also be viewed as a "global common knowledge creating organization" (Yasaka, 2017); following a knowledge creation and sharing model, knowledge related to AML/CFT is regularly passed on by the FATF to international organisations, FATF members and, ultimately, to Financial Intelligence Units, law enforcement agencies and supervisory agencies in each FATF member state.

4. Ensuring the Universal Implementation of FATF Standards

To ensure the transposition of its Standards at the national level, the FATF examines the laws and practices of member countries on a regular basis. The mutual evaluation system [5] developed by the FATF has become a process of reference for monitoring the implementation of international instruments. The monitoring system

is based on peer reviews conducted on an ongoing basis for each FATF member. FATF experts review the implementation of the FATF standards and they provide an exhaustive analysis of domestic laws and practices in the AML/CFT area, ultimately assessing the effectiveness of the domestic AML/CFT system (technical compliance and effectiveness assessment).

In addition to the FATF, nine FATF-style regional bodies (FSRBs) endorse the FATF standards and assess the compliance of their members by conducting mutual evaluations according to a commonly agreed methodology. [6] FATF and FSRBs are “free-standing organizations” with no organisational hierarchy between them, though the 2012 High-Level Principles for their relationship clarify that “FATF is the only standard-setting body and the guardian and arbiter of the application of its standards” (FATF, 2012a). Together, FATF and the Global Network of FSRBs cover 205 countries (FATF, 2018), which effectively renders standards adopted by the FATF as truly global in the AML/CFT context.

In addition to the mutual evaluations process, the FATF has resorted to the practice of blacklisting jurisdictions that fail to combat money laundering and terrorism financing (Morse, 2019; Stessens, 2001). Publicly listing these jurisdictions has been a means to put pressure on and compel them to make the necessary reforms and address their AML/CFT weaknesses. Indeed, of the 68 jurisdictions with weak AML/CFT systems that the FATF has identified, 55 have adopted reforms, resulting in their eventual removal from the blacklist. Interestingly, on some occasions, non-FATF members have adopted FATF rules and complied with them even before the FATF resorted to blacklisting, which further proves the efficiency of this method.

In addition to the coercive approach, FATF has put efforts into enhancing the legitimation of its processes to better ensure compliance by putting emphasis on expertise and participation (Kerwer and Hülse, 2011). In the framework of the ongoing fourth round of mutual evaluations, the consolidated assessment ratings show that compliance for the majority of jurisdictions is very satisfactory, with progress made in several countries since the third round of mutual evaluations (FATF, 2019a). Furthermore, some cases of compliance deficiencies can be explained by the fact that the AML/CFT Standards that are assessed in the fourth round have been updated and have become stricter compared to those examined in the third round. The major challenge that remains for future evaluation rounds is to shift the FATF’s focus on effectiveness from a “tick-the-box” technical compliance to an outcome-oriented model (Pol, 2018).

5. Expansiveness of FATF Standards: Has it Reached its Limits?

Within the last 30 years, the scope and coverage of FATF soft law has expanded considerably. The 40 Recommendations, formulated in 1990, were revised for the first time in 1996 to adapt to the evolving money laundering phenomenon. Among the changes introduced in 1996 is the extension of the scope of money laundering to include serious offenses, far beyond drug-related crimes. A more thorough revision took place in 2003, as the 40 revised Recommendations, combined with 9 special Recommendations on the financing of terrorism, aimed at strengthening AML/CFT

measures. The development of standards against the financing of the proliferation of weapons of mass destruction has also become part of the FATF agenda under the old 2012-2020 FATF mandate; these standards relate to the implementation of United Nations Security Council (UNSC) resolutions on non-proliferation, such as UNSCR 1540(2004) and counter proliferation resolutions related to specific countries, such as UNSCR 1874(2009) on North Korea and 1803(2008) on Iran. In several aspects, the FATF has acted on the territory of public international law by partly duplicating the work of the UN, such as in the case of the aforementioned resolutions, the UNSC Resolutions against the financing of terrorism and the UN Convention against the financing of terrorism.

We argue that this expansiveness has not yet reached its limits, due to the evolution of threats and vulnerabilities associated with money laundering, terrorism financing and proliferation financing (FATF, 2019b), which necessitate swift responses and the development of new standards and principles. For example, the FATF has recognised the new regulatory and supervisory challenges in the field of FinTech and RegTech and has organised a dialogue with the private sector as part of the FATF Private Sector Consultative Forum [7] – the 2017 San Jose Guiding Principles being the first product of this dialogue.[8] The FATF's recent work on the regulation and supervision of virtual assets and virtual asset service providers, in particular the amendment of FATF Recommendation 15 and the adoption of an Interpretative Note, constitute another example of the expansiveness of FATF's standards, which have to keep pace with rapid developments in the field of finance and technology. FATF standard-setting is a work in progress and the FATF has to study and address “the vulnerabilities and evolving methods used by criminals around the world”. Therefore, the expansiveness of FATF's standards is inevitable, as new threats and challenges constantly emerge in the AML/CFT context (FATF, 2019b).

7. Consolidating Synergies between National Law, International Law and FATF Standards

The first version of the FATF Recommendations has been strongly influenced by national AML legislations, such as the legislation in the United States. Nevertheless, it is not doing justice to FATF to view its evolution as shaped solely by a hegemonic agenda; FATF standards should instead be viewed as a continuous comparative law exercise, whereby successful national norms may become global standards through their acceptance by FATF members and their incorporation into the FATF soft law. FATF member jurisdictions have committed to actively participate in the work of the FATF (in the form of meetings, reports, initiatives with the private sector, best practices, etc.), thereby contributing to the shaping of the standards (FATF, 2019b). Furthermore, FATF's evolution has also been shaped by international law, since FATF texts often refer to international law instruments (such as the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the 2000 UN Convention against Transnational Organized Crime, the 2003 UN Convention against Corruption and the 1999 UN Convention against the Financing of Terrorism) and recommend their unreserved ratification, such as in the case of FATF Recommendation 36.

Another important sub-process that has to be examined is the impact of FATF standards on hard law, i.e. the hardening of the soft regulatory framework. FATF standards become hard law when they are integrated into domestic legislation, EU law or public international law. The 40 Recommendations have become the reference text for anti-money laundering strategies around the world and have influenced the work of other international bodies, such as the Council of Europe, especially Convention No. 198, as demonstrated by Article 13. The FATF Recommendations have also influenced the work of the European Union (Spreutels/Scohier, 1998; Gilmore, 2005), from the drafting of the First Money Laundering Directive 91/308 to the recent Fifth Money Laundering Directive 2018/843 and numerous other instruments, such as Directive 2014/42 on confiscation, Regulation 2018/1805 on mutual recognition of confiscation orders and so on (Pavlidis, 2019; House of Lords, 2009; Mitsilegas and Gilmore, 2007). At the UN level, there are several examples of the instruments explicitly “stressing the essential role of the FATF in setting global standards for preventing and combating money laundering, terrorist financing and proliferation financing and its Global Network of FATF-style regional bodies” and “encouraging [UN] Member States to actively cooperate with FATF”.^[9] Therefore, FATF soft law standards can ultimately be incorporated into hard law and re-emerge as binding obligations in national, EU and international law. We argue that these synergies are constructive and positive, as long as the FATF, international organisations and national jurisdictions aim for consistency of norms and avoid unnecessary and wasteful duplication of work.

8. FATF Norm-Building or a New International Convention?

International law and soft law instruments to combat money laundering, corruption and transnational organised crime overlap to some degree (Pavlidis, 2012). Indeed, provisions on laundering and confiscation of criminal proceeds can be found in the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the 2000 UN Convention against Transnational Organized Crime, the 2003 UN Convention against Corruption, regional conventions such as the Council of Europe Conventions No. 141 and No. 198, the five EU Anti-Money Laundering Directives and so on. Each initiative is the product of a long process of negotiation and compromise, and is part of a legal evolution reflecting the political momentum of the time. A lack of standardisation is therefore to some degree inevitable.

Would a global instrument on money laundering and confiscation constitute a more coherent solution than a series of fragmented instruments dealing with specific aspects of the same problem? The idea of creating a global convention on money laundering and confiscation seems too ambitious to achieve, as its adoption is likely to face considerable difficulties and delays, as was often the case with existing international instruments (Pavlidis, 2012). For this reason, the FATF approach, based on soft law, seems to have better chances of success. This statement is reinforced by the fact that FATF’s visibility with global governance bodies has gradually increased through the FATF’s participation in several international fora, “including at the G7/G20, United Nations bodies and FATF-Style Regional Bodies” (FATF, 2019b). Finally, the level of compliance with FATF Standards at the global level is very satisfactory, as evidenced in FATF’s consolidated assessment ratings (FATF, 2019a). Therefore, the FATF

approach is not at a disadvantage compared to hard international law obligations, compliance with which is not always a given and “the system's ability to self-correct and self-enforce is [...] limited, creating gaps between aspiration and authority, procedures and policy” (Cogan, 2006).

9. Conclusions

A proliferation of international initiatives in the AML/CFT context can be evidenced after 1988. Clearly, such mobilisation of the international community for the introduction of AML/CFT controls was necessary to prevent the exploitation of financial globalisation by criminals and criminal organisations. The proliferation of initiatives has been accompanied by a "multiplication of actors in the standard-setting process" (Cassani, 2008), a trend that is increasingly characteristic of economic criminal law and relativises, to a certain degree, the normative power of the State. The national legislator must therefore take into account the work carried out and the proposals put forward by international organisations, legislators from other states, NGOs and civil society, financial sector "stakeholders", etc. In this process of standard-setting, soft law instruments are increasingly influencing the criminal policies of states; the work of FATF in the fight against money laundering stands out as an example.

Even though the FATF standards do not have any explicit and formal authority under international law, the FATF's means of action, especially the mutual evaluation process and the blacklisting process, have proved persuasive and effective in ensuring compliance in the AML/CFT context. Nevertheless, the effectiveness of FATF tools is not only a result of coercive policies (‘naming and shaming’), but can also be attributed to the increased efforts of the FATF to enhance its legitimacy, improve transparency and increase stakeholders’ participation. These objectives need to be pursued even more vigorously by the FATF, in order to ensure the delivery of quality standards that enjoy international acceptance and implementation.

Notes

1. FATF, Mandate approved by the Ministers and Representatives of the Financial Action Task Force, Washington, DC, 12 April 2019.
2. For the summaries of the numerous roundtables, meetings and *fora* organised by the FATF and involving representatives from the FinTech & RegTech community, see: [http://www.fatf-gafi.org/fintech-regtech/fatfonfintechregtech/?hf=10&b=0&s=desc\(fatf_releasedate\)](http://www.fatf-gafi.org/fintech-regtech/fatfonfintechregtech/?hf=10&b=0&s=desc(fatf_releasedate))
3. For the full text of these documents and information on updates made to them, see <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html>
4. See for example: Hamburg G20 Summit (July 2017), G20 Leaders' Statement on Countering Terrorism.
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