Crime Law Soc Change (2010) 53:437–455
DOI 10.1007/s10611-010-9235-8

Asset and money laundering in Bolivia, Colombia and Peru: a legal transplant in vulnerable environments?

Francisco E. Thoumi · Marcela Anzola

Published online: 30 March 2010

Introduction

The deepening of the globalization process and the growing interrelations among countries have reinforced the need for homogeneous norms and common systems not only to regulate international capital flows and international trade but also to control and combat illegal capital flows and money laundering. In this context the normalization and standardization of criminal offenses and regulatory measures seeks to facilitate the prosecution and penalization of criminal activities.

Illegal capital flows and money laundering were recognized as an international policy issue in the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances that was followed by substantial international developments. In 1989 the G7 countries established the FATF to attack money laundering. In 1990 it issued Forty Recommendations to fight money laundering which were revised and tightened in 1996 and 2003. In October 2001 it issued 8 recommendations on Terrorism Financing that were updated in October 2004 when a ninth was added. These revisions took into account the new United Nations Conventions against Transnational Organized Crime, 2000 (the Palermo Convention) and the 1999 International Convention for the Suppression of the Financing of Terrorism. After the UN General Assembly Special Session of 1998 (UNGASS-1998) the UN established the Global Program Against Money Laundering (GPML) within the UN Office of Drug Control and Crime Prevention (UNDCCP) that in 2003 became the UN Office on Drugs and Crime (UNODC). The GPML launched a technical assistance program to help countries enact anti money laundering legislation and to develop anti money laundering agencies and systems. This set of international arrangements and guidelines constitutes an anti-money laundering -AML- system

F. E. Thoumi (✉)
Latin American Studies, University of Texas, Austin, TX, USA
e-mail: fthoumi@hotmail.com

M. Anzola
Law School, University of Texas, Austin, TX, USA

that serves as a model to the domestic legislations and initiatives to combat money laundering.

This system is focused on the financial sector and is based on the following assumptions:

- First, asset and money laundering is defined as a process by which illegally obtained assets and money is made to appear legal in order to minimize or eliminate the risk of seizure and forfeiture. This definition implicitly divides economic activities into legal and illegal. Asset and money laundering aims to lower the risks associated to illegal activities and obtain the benefits of legality.
- Second, money laundering is defined as a three stage process focused on the financial sector. Illegally obtained cash or financial assets are first *placed* in a financial institution. Then the money is sent through various transactions involving wire transfers and many accounts. This *layering* is done to hide the origin of the funds. After the illegal origin is disguised, the assets should be *integrated* into the legal economy, that is, they are invested or spent without generating suspicion. In this laundering process the financial sector plays a key role.[1]
- Third, it assumes that individuals have a preference for legal over illegal assets; that a legally obtained dollar is worth more than an illegally obtained one because it can be used in many more ways than the illegal one and because in the illegal sector there is a risk of seizures and forfeitures that does not exist in the legal one.
- Fourth, it is also assumed that the benefits of "cleansing" assets outweigh the costs of the laundering process.

In this context, as a result of an initiative of legal unification and in order to accomplish with the acquired compromises by signing international agreements to combat money laundering, Bolivia, Colombia and Peru, the three countries that are the source of illegal cocaine, have adopted national legislations that follow the above mentioned international guidelines.

Notwithstanding the existing institutional arrangements and legal developments in these countries, actual results in terms of prevention, detection, and suppression on money laundering have been very modest. The implementation process has not been successful and in the three countries the results are unsatisfactory. These three countries have concentrated the coca-cocaine industry and the AML policies are an important part of their anti drug policies. Their AML experiences however, are not exceptional and similar failures are found across the developing world.

[1] The FATF 40+9 recommendations are designed to attack money laundering in each of its three steps and increase the costs and risks of laundering. The references to the real economic sector in the FATF 40+9 are marginal. Only recommendation 12 refers to "non-financial businesses and professions in the following situations: casinos, real estate agents, dealers in precious metals and in precious stones, trust and company service providers and "lawyers, notaries, other independent legal professionals and accountants when they prepare for or carry out transactions for their client concerning the following activities: buying and selling of real estate; managing of client money, securities or other assets; management of bank, savings or securities accounts; organization of contributions for the creation, operation or management of companies; creation, operation or management of legal persons or arrangements, and buying and selling of business entities." These activities are almost always related to the financial sector.

The root of the problem in this context is that the domestic legislation is more the result of an international initiative of legal unification in response to a global problem than the product of a domestic initiative. This constitutes a typical case of what in comparative law has been called "a legal transplant" [14]. National legislation based upon international guidelines and foreign principles acts as an organ that it is transplanted in a strange body and, as occurs in the case of a biological organism, the transplant of such a regime into the domestic legislation requires an adequate environment to be successful. However, as seen below, the environment of these countries has been less than welcoming to this transplant.

Money laundering in the Andean countries, as in other developing countries, transcends the financial sector; it is complex and involves the real sector to a greater extent than what is implied in the literature and in the legal transplants. All these countries have very large informal economies, a large share of which does not comply with many laws and regulations. Many economic activities that take place outside the law are considered normal and acceptable by a large share of the population. In these economies operating in either the formal and informal sectors has benefits and costs. The incentives to be simultaneously in both are high and it is common for firms to operate in both sectors in an attempt to capture the benefits of each one and to minimize their costs. This is why many formal firms simultaneously sale legally imported and contraband goods[2], have several accounting systems and balance sheets, sublease some activities to firms in the informal sector, etc.

Since AML legislation focuses almost exclusively on financial transactions, the weakness of the formal economy and property rights in the three countries are great obstacles to the successful implementation of AML policies. This poses a very difficult problem: how to make compatible the need for a harmonized transnational legislation with the institutional particularities and weaknesses of the Andean countries?

This study focuses on the AML system in the Andean countries, evaluates its advances and explains its limitations. Section II shows how the development of the AML system as the result of an international initiative of legal unification and not the product of a domestic initiative. Section III discusses some institutional problems of the AML legislation implementation. Section IV surveys the AML international and the domestic legislations in the three countries and looks at the scant evidence about the enforcement of that legislation. Finally, some conclusions are presented. It is important to mention that the data and other available information are very different in the three countries. Colombia has greater experience and a more advance AML which allows for a more detailed analysis.

AML system in the Andean countries: a typical case of "legal transplant"

In Bolivia, Colombia and Peru, multilateral agencies and international agreements have played an important role in AML activities and as a result their national

[2] A significant part of incoming money laundering flows is though contraband imports sold in the domestic market. Contraband markets have been institutionalized in the Andean countries for a long time. In each of the main cities there are large commercial areas where contraband is sold openly mixed with legally imported goods.

legislations reflect international principles and guidelines. Indeed, the three countries have advanced substantially in the adoption of the FATF 40+9 recommendations (see Table 1). All of them are signatory of most conventions and international arrangements that seek to combat drug trafficking, terrorism and money and assets laundering. Bolivia is a party of the U.N. Convention against Illicit Traffic in Narcotics and Psychotropic Substances of 1988 (the 1988 Vienna Convention). In January 2002, Bolivia ratified the UN International Convention for the Suppression of the Financing of Terrorism. Colombia is a party to the 1988 Vienna Convention, the UN International Convention for the Suppression of the Financing of Terrorism and the UN Convention against Transnational Organized Crime. In October 2006 Colombia ratified the UN Convention against Corruption and in June 2008 Inter-American Convention against Terrorism. Peru is a party to the UN International Convention for the Suppression of the Financing of Terrorism and the Inter-American Convention on Terrorism, the 1988 Vienna Convention, the UN Convention against Transnational Organized Crime, and the UN Convention against Corruption.

These efforts have been complemented by regional initiatives—GAFISUD, FELABAN, and the Andean Community—that have incorporated the international principles and guidelines and have contributed to the implementation of national laws and policies.

GAFISUD[3] is a regional inter-governmental organization established in December 2000 in Cartagena, Colombia, by Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, México, Paraguay, Peru and Uruguay.[4] It follows the FATF model and adopted its Forty Recommendations and encourages the signatory countries to implement them.

The Latin American Banking Federation[5] (FELABAN) which groups bank associations from Latin American countries is also a player in AML. It approved a *Declaration of Principles* for the prevention of undue use of the financial system in laundering assets originating from drug dealings and other illegal activities.[6] It defines cooperation principles for each country's authorities regarding general information exchange, prevention methods and technical aspects between associations and entities members of FELABAN, and proposes that its members adopt prevention policies—codes of conduct—for their affiliates.

The Andean Community approved the "Andean Cooperation Plan for the Control of Illegal Drugs and Related Offenses" on June 22, 2001—Decision 505—. The Plan addresses drug production, trafficking, and consumption and related offenses. Concerning asset laundering the plan contains a set of actions and guidelines to be implemented by the Andean Countries.

[3] http://www.gafisud.org/home.htm

[4] The following participate as observers: World Bank, Inter-American Development Bank, Egmont Group, Germany, Spain, United States of America, IMF, France, INTERPOL, INTOSAI, Portugal and United Nations. The following fellow organizations also attend the sessions: FATF, Financial Action Task Force of the Caribbean (CFATF) and the Organization of American States, through the Inter-American Commission against Drug Abuse (CICAD).

[5] http://www.felaban.com/index.php

[6] http://www.felaban.com/lavado/boletin_comite_latinoamericano.php

Table 1 Compliance with FATF-GAFI recommendations

FATF recommendations		Bolivia	Colombia	Peru
Legal System	Scope of the criminal offence of money laundering (Recommendations: 1, 2)	Law 1768/1997	Law 30 of 1986 Law 599/00, Article 345 Law 1121 of 2006	Law 27765 of 2002
	Provisional measures and confiscation (Recommendation 3)	Law 1786/97, article 71 bis	Law 333 of 1996 Law 785 of 2002 Law 793 of 2002	Legislative Decree No. 992/07
Measures to be taken by Financial Institutions and Non-Financial Businesses and Professions to prevent Money Laundering and Terrorist Financing	Customer due diligence and record-keeping (Recommendations: 4, 5, 6, 7, 8, 9, 10, 11, 12)	Administrative Resolution FIU 016/99	Decree 1872 of 1992	Supreme Decree 018-2006-JUS
	Reporting of suspicious transactions and compliance (Recommendations: 13, 14, 15, 16)		Decree 663 of 1993 -Organic Statute of the Financial System, Article 102, no. 2	
	Other measures to deter money laundering and terrorist financing (Recommendations: 17, 18, 19, 20)			
	Measures to be taken with respect to countries that do not or insufficiently comply with the FATF Recommendations (Recommendations: 21, 22)			
	Regulation and supervision (Recommendations: 23, 24, 25)			
Institutional and other measures necessary in systems for combating Money Laundering and Terrorist Financing	Competent authorities, their powers and resources (Recommendations: 26, 27, 28, 29, 30, 31, 32)	Supreme Decree 24771 de 1997, *Artículo 2*	Law 526 of 1999	Supreme Decree 018-2006-JUS
	Transparency of legal persons and arrangements (Recommendations: 33, 34)			
	International Co-operation (Recommendation 35)			
	Mutual legal assistance and extradition (Recommendations: 36, 37, 38, 39)			
	Other forms of co-operation (Recommendation 40)			

Inadequate environment: informal economy, bancarization and property rights problems

The three countries have a very large informal economy, the access to credit and financial services (bancarization) is very low and property rights in many areas are ill defined and questionable.

Informality

There is no consensus on the definition of the informal economy as "shown by the wide variety of terms: non-observed, unofficial, second, hidden, shadow, parallel, subterranean, informal, cash economy, black market, unmeasured, unrecorded, untaxed, non-structured, petty production and unorganized" [10]. Despite the definitional and measurement problems, there have been several efforts to measure the size of the informal economy in the three countries. The concepts used vary but the estimates are illustrative and their trends provide reasonable indications of how informal activities change through time. Schneider and Klinglmair [11:10] using a combination of statistical procedures estimate that the informal economy in 1999/2000 accounted for 67.1% of GNP in Bolivia, 39.1% in Colombia and 59.5% in Peru. This study covers 110 countries and obtains estimates of 41% for developing countries, 38% for transition countries and 18% for OECD members. A World Bank study [8] measuring informality using employment classifications found that between 1992 and 2005 Colombian independent workers increased their share in total employment by 17.3%, the Bolivian share increased 6.9% between 1990 and 2000 but Peru's declined 6.9% between 1991 and 2005. They also estimate that the share of informal independent workers plus informal wage earners in Bolivia (2005) at 81.5%, in Peru (2002) at 81.9% and in Colombia (2006) at 66.8%. These are workers that do not comply with many legal requirements, contribute little if any to social security and do not have many social security benefits.

Bancarization

The financial sector is undeveloped in the three countries. As in most developing countries, the low level of bancarization presents a problem for AML policies designed for situation in which it is expected that most people use banks, savings institutions, obtain mortgages, etc. Data on bancarization are very general and are not available in many countries. A survey of Latin American experiences [9] obtained data for only six countries: Brazil, Chile, Colombia, El Salvador, Mexico and Peru. It shows that financial system deposits and credit relative to GNP are very low, particularly in Colombia and Peru although their trend is positive. Data for 1990–1999 and 2000–2005 show that in Colombia deposits were 14% of GNP in the first period and increased to 22% in the second. In Peru they increased from 16% to 24%. Credit in Colombia rose from 15% to 19% and in Peru from 14% to 22%. These figures are about one third of those for the developed countries included in the survey and about one half of those for Chile. Similarly, the number of bank offices and ATM machines per 100,000 inhabitants are very low; in Colombia about one half and in Peru about one third of those in Brazil, Chile and Mexico. These figures are about 10% and less of what is found in the developed world.

A more detailed study [6] shows that 26.5% of the Colombian population resides in municipalities that do not have banking services. These cover large areas of the country with strong guerrilla and paramilitary presence. Data from the large urban areas show that only 26.4% of the adult population has either deposits in or credit from the financial system. These people are mostly upper income. Colombia experienced a financial crisis in 1999 caused by a significant change in the way mortgages' balances were estimated. In response to persistent high inflation rates, in the early 1970s a "constant value unit" system was established. In essence, if set a fix interest rate on mortgages but the principal was adjusted by the inflation rate. In the 1990s the adjustment was changed to reflect high interest rates and the value of the principal ballooned. Many borrowers found themselves with mortgages that exceeded substantially the value of their properties and the real estate market collapsed. In 1999 Colombia for the first and only time during the postwar had negative GDP growth of −4.2%. After the financial and real estate crisis the financial institutions had to clean their portfolios and their total credits declined. Tafur-Saiden [13: 23] using annual data shows that during the 1990s the ratio of credit to PIB increased reaching 37.9% in 1998. Then it dropped sharply to the 24 to 25% range in 2002–2005.[7]

A tax on financial transactions of 0.002% that was raised on two occasions to 0.003% and to 0.004% was earmarked to support the troubled financial sector. The government however, found it a very expedient source of funds and maintained after the crisis was over. Today it collects about 1% of GDP [6: 58]. Increases in service costs including many difficult to see fees was another response of the financial sector to the crisis. Banks charges include account management fees, fees to use ATM machines and even to consult balances on ATM machines and the internet among many others. Besides, their intermediation interest gap is probably the largest one in Latin America.[8] Bancarization in Colombia has other obstacles like the fear of assaults after withdrawing deposits or cashing checks. This type of crime is so common that the police offers protection on demand.

Peru had a very good growth record in the 2000's and the financial sector assets grew 20% between 2001 and 2005 reaching $45.6 billion in 2005 [7: 133]. The financial sector is highly concentrated and 12 banks accounted for 54.8% of all assets in 2005 while micro-financial establishments had 3.6%. Banks supplied about 88.7% of all credits in 2001 and 87.2% in 2005. Bank lending is highly concentrated: 2% of the possible borrowers receive 62% of the loans. The government's drive to increase microcredit led to an increase in micro-financial credit from 2.9% to 5.8% of the total. In the same period the banks' share of deposits fell from 97% to 94% while micro-finance organizations increased their share from 2% to 5%. Despite these encouraging signs, the above mentioned comparison between 1990–1999 and 2000–2005 hides a declining trend in intermediation in the latter period as the ratio of credit to GNP declined from 22.4% in 2001 to 19.8% in 2005 while the ratio of deposits to GNP fell from 24.7% to 22.9% [7: 134]. Among the countries surveyed by Rojas-Suárez [9], Peru had the lowest number of bank offices for 100,000 inhabitants (4.8).

[7] These data are consistent with a graph in Marulanda [6: 50] that unfortunately does not provide figures. In this graph the ratio of deposits to PIB follows a similar path.

[8] One of the authors of this essay, for example, in 2008 closed a savings account that keep a balance of about $7,000 because the interest received was less than the monthly account costs.

Aggregate data on Bolivia suggest a higher degree of bancarization than in Colombia and Peru. In 2008 the ratios of loans to GNP and deposits to GNP were 0.36 and 0.49 [1]. It has a relatively low number of ATM machines per 100,000 inhabitants (9), but it has 10.3 finance offices per 100,000 inhabitants, the third highest number in Latin America. There are no studies that explain these figures but one may suggest that the strong community organizations among the countries' Indians and poor and the government led by a Bolivian Indian may be a reason for it.

The structure of the finance sector also reflects the influence of community organizations. The country has 12 banks, 8 *mutuales*, 6 private financial funds, 23 open savings and loans cooperatives, 94 closed savings and loans cooperatives and 14 financing NGO organizations.

Property rights

Property Rights in the three countries are weak and ill defined in many areas. Land property is particularly problematic. The root of this problem lays in history. The Spanish conquistadores arrived with a goal to live off the rest of the population. Indeed, they considered manual labor dishonorable not fit for any respected hidalgo. On arrival they faced a big problem: fertile land was abundant relative to the stock of labor that was decimated by the illnesses brought by the Spaniards, and the natives were used to communal property. They distributed the land among themselves but faced the problem of attaching the labor to the land and devised several systems to achieve this goal such as the *encomienda*. Indeed, if there had been a neoliberal market solution, they would have had to work by themselves to be able to survive. Since the Conquest the problem of land tenancy has been a constant in the Andean countries political economy.

For several centuries the Andean economy was characterized by a seigniorial structure, having abundant natural resources, very little capital, primitive technology and unskilled labor. This system was based on the hacienda and in some areas of Bolivia and Peru also on mining. Land tenancy was very concentrated across the region. Bolivia and Peru had important land reforms that distributed land in 1953 and 1969 respectively. In Colombia, where native communities were less organized and *mestizaje* more widespread, there was a failed attempt at land reform in the 1960s.

In the three countries rural-urban migration and the population explosion of the 1950s through the 1970s produced a sharp increase in urbanization that led to large informal and illegal urban settlements where property rights were questionable.[9]

In the last few decades in the three countries there has been a process of expansion of the rural frontier as new areas have been settled. In many cases this has been carried on without government control or support and has been related to the expansion of illegal coca crops.

Traditional economic policies in the three countries were not conducive to socially validating property rights. Government interventionism prevalent throughout history

[9] De Soto´s acclaimed works [2, 3] stress the need to clarify and define urban and rural property rights and argue that the deficiencies in property rights are a main obstacle to development. Smolka and Mullahy [12] survey urban development in Latin America and present various typologies that show the weakness and importance of property rights.

placed the State in a position to distribute benefits. Despite the opening of the Andean economies in the last 20 years the link between privilege and wealth has persisted in the imaginary of many. For a large sector of the population individual wealth is not created but captured. The link between the social welfare and individual capital accumulation is weak at best, particularly in Colombia. In this country, extortive kidnappings may be perceived by a segment of the population as a rent transfer mechanism: if one does not have access to privilege to accumulate wealth, a seconded best strategy is to kidnap someone who has and transfer rents. One of the paradoxes of this society is that people fight to accumulate wealth but once this goal is achieved, the main problem is how to protect it. This has led to a privatization of police security services (Bogotá, for instance, has at least three times more private guards than policemen), the incorporation of heavy security systems in new construction, and the strange situation in which single family homes are substantially cheaper than apartments in similar locations simply because the latter are safer.

Consequences

Informality implies the existence of a large grey area in the economy in which some laws are respected and others don't and money laundering takes place. But money dirtying also occurs, that is, legally generated income and assets are hidden and invested in ways that violate laws. When there is little or no real risk of seizures and expropriations, these activities are frequent and accepted as normal and socially legitimate ways of "doing business". In these countries economic activities can be typified in four broad categories: legal and legitimate, legal and illegitimate, illegal but legitimate and illegal and illegitimate. A normal transaction in the modern economy is both legal and socially legitimate but illegal transactions such as buying contraband appliances are also socially legitimate; a legal abortion may be illegitimate for certain groups in the society but not for others; hiring an assassin (sicario) may be illegal and illegitimate for most people and illegal but legitimate for others. In these economies there are financial flows across these four categories.

AML policies in the Andean countries have to be implemented in an environment that is not conducive to success. To begin, the part of the economy that uses the financial system is small and the informal economy is very large. Economic activities that break laws are very common and socially accepted. To compound the problem, property rights in large sections of the economy are ill defined, difficult to enforce and lack social legitimacy. These factors have contributed to the development of a market system in which rent seeking is a very profitable activity.

Furthermore, the implementation of AML policies is done by people who have grown, have been educated and socialized in this environment and may not be committed to their success. Not surprisingly, as seen below, policy implementation is very ineffective.

AML legislation: international standards but meager results

As mentioned in section II, the three countries have developed institutional arrangements to comply with the 40+9 AML recommendations and meet

international standards. They also have created, at least formally, financial intelligence units (FIU), which in most of the cases can request information and submit it to the competent authorities in order to initiate, when relevant, the respective criminal investigation and prosecution. The regulatory framework has focused on three dimensions: the administrative control of financial transactions; penalization of money laundering and illicit enrichment as autonomous offenses; and the development of comprehensive asset forfeiture legislation. However, the results are meager. In some cases the existing norms and organisms (political, budgetary and administrative) impede the adequate enforcement of the laws; in other cases, perhaps most dramatic, the lack of adequate regulations is an obstacle to prosecute illegal activities that are not closely related with the financial sector.

Bolivia

Bolivia's money laundering supervision strategy has been based on the system of mandatory external audits of financial institutions. The FIU is not responsible for supervising compliance with anti-money laundering standards, but for requesting *"that external audits be carried out by the respective superintendencies to verify the compliance with the requirements imposed on the regulated entities."* (Supreme Decree 24771/1997 article 8.) The FIU was created in 1997 by Law 1768 (Article 2 no. 40) but the history of its regulation has been quite complex and it has been an obstacle to its adequate functioning.[10] Additionally, although the law grants the FIU the powers of a typical "*decentralized agency with functional, administrative, and operational autonomy*", it does not have an independent structure. According to the law it is an organic part of the Superintendency of Banks and Financial Entities. Currently the FIU can request cooperation, obtain confidential information, and have access to any database or file of any government agency without the need to share the information obtained, but it must, however, submit to the competent authorities such duly substantiated information as may be needed for the relevant criminal investigation and prosecution.

Money laundering was criminalized by Law 1768/1997 with a penalty of 1–6 years' imprisonment (article 185 of the Penal Code). It will apply even if the offenses giving rise to the illicit gains have been committed wholly or partly in another country, provided that the offenses are considered as such in both countries. This law establishes also the principle of seizure (Article 71 bis of the Penal Code). The instruments confiscated can be sold at public auction, if they are legally tradable, to cover civil liability in cases of insolvency; otherwise, they are destroyed or rendered useless. The *Dirección de Registro, Control y Administración de Bienes Incautados* (Directorate of Registration, Control, and Administration of Confiscated Goods)—**DIRCABI-** administers the seized goods (Article 253 of the Penal Code).

[10] Supreme Decree 28695 of 2006 repealed Supreme Decree 24771 and created the *Organizational Structure in the Fight against Corruption and Illicit Enrichment* and provided for the creation of a Financial and Property Intelligence Unit, to replace the FIU. Because the FIU was eliminated before its replacement was operational, the government then passed Supreme Decree 28713 on May 13, 2006, reinstating the FIU's functions and duties until January 2007 and placing the FIU under the Ministry of Finance. On November 29, 2006, the government passed Decree 28956, eliminating the portion of Decree 28695 that had repealed Decree 24771 and allowing the FIU to continue to operate.

However, the administration of these goods is commonly criticized by the media. Scandals of corruption and bad administration have been reported periodically in newspapers without legal consequences. On July 31, 2007, the Egmont Group announced the expulsion of Bolivia because of continued lack of adequate terrorist financing legislation (United States Department of State 2009).

Colombia[11]

In Colombia, Decree 1872 of 1992 set forth the principles and procedures to combat money laundering in the financial sector. It made financial entities responsible for adopting adequate and sufficient control measures to avoid being used as instruments for concealing, handling, investing and in any way using funds or other assets originating from criminal activities, or to give an appearance of legitimacy to criminal activities or transactions and funds related to such activities.

Law 526 of 1999 created the Financial Information and Analysis Unit (UIAF), a special Administrative Unit ascribed to the Ministry of Treasury and Public Credit, charged with preventing and detecting Money Laundering in the different sectors of the economy. There is a consensus among experts that this is one of the most sophisticated intelligence units in the developing world.[12] On one hand, Colombia has made a good effort to comply with the FATF 40+9 and, on the other hand, the close oligopolistic structure of the Colombian financial sector and, paradoxically, the low level of bancarization have helped a lot. Banks have also taken strong measures. The Banco de Bogotá, for example, has a team of 50 professionals each of which visits 50 clients a month to look at how their businesses' operate. They realize that contraband is a main laundering venue and want to make sure that they know their clients well enough to prevent money laundering. The UIAF has recently turned its attention to the real sector. It is working with the Colombian Retailers Association (FENALCO) and with the Chamber of Commerce of Bogotá. It helps and encourages investigative journalism and in its efforts to expand the control illicit flows and money laundering, it now monitors the financial sector, insurance companies, the solidarity sector, the stock exchange, gambling systems, lotteries and casinos, foreign trade and customs agents, money exchange houses, businesses that transport valuables, vehicle sales and purchases, gold imports and exports, soccer teams, and arts and antique dealers.

The Colombian UIAF collects data from several sources, analyzes and cross checks it. After it finds basis for prosecution it gives the information to the Fiscalía. The UIAF believes that their actions have led to a decline in incoming flows of dirty money. They have detected a significant increase in the number of businesses that are open to provide specialized laundering services. The Fiscalía finds a similar evolution. "Ten years ago trafficking organizations were 'pyramidal'. Today they are fragmented and more collegiate." Money laundering has advanced technologically and money laundering firms have become increasingly specialized and offer their

[11] This section benefitted from in dept interviews with staff of UNODD, DNE, the UIAF and the office of the General Prosecutor (Fiscalía).

[12] Interviews with staff of UNODC, the National Drugs Directorate (DNE), the UIAF and the office of the General Prosecutor (Fiscalía).

services to many that need their services. In the past they were part of the main drug trafficking structures, today they are independent. Many of these firms have licit facades and provide diverse services. In one case, for example, the Fiscalía found that a firm had 1,500 "cédulas", the Colombian national identity cards. They were used to make financial transactions (smurfing) for various clients.

Colombia has also broadly criminalized money laundering. In 1997, it criminalized the laundering of the proceeds of extortion, illicit enrichment, rebellion, narcotics trafficking, arms trafficking, crimes against the financial system or public administration, and criminal conspiracy (Law 365/1997, article 9; Title VII, Volume II, Chapter III of the Penal Code).

However, the illegal drugs industry is continuously evolving and adapting to the government policies and today it is difficult to identify new drug traffickers. The Fiscalía thinks that they are chasing old traffickers and having little effect on today's drug industry. They think that new traffickers have a low profile, many are educated, some bilingual and have experience abroad. They invest in legal business and are camouflaged within the business community. The Fiscalía has a large backlog of cases. They have few prosecutors (fiscales) and the Judicial Police has only 40 officers assigned to fight money laundering. The prosecution processes are very time and labor consuming. Because of the prevalence of *testaferrato*, in order to prosecute they have to investigate the traffickers and all their family members.

A few years ago Colombia with the encouragement and support of the U. S. changed its traditional justice system to an accusatory one. The switch to the new system has not been easy and many lawyers, judges and prosecutors do not really understand the new one. Many young judges are not well qualified and do not understand money laundering issues and should be trained. A further problem is presented by high personnel turn over that requires continuous training. These have been main reasons for the large backlog of cases.

The Fiscalía also finds that there are many obstacles to its activities in small towns. Many of these are controlled by either armed groups or just local traditional landlords. The cadastre in the country is incomplete and real estate assessments grossly underestimated in many places. Municipal registries that should provide information on ownership are also woefully inadequate and frequently simply refuse to cooperate as they are controlled by those whose property rights may be challenged.

UNODC officials believe that there is a pressing need to improve the quality of the justice system personnel in all Andean countries. They think that personnel problems are behind a decline in AML sentences. UNODC personnel also think that the quality of the data available on the judicial processes is poor. The government agencies involved in money laundering supply data on processes that enter and exit the system but there is no information about the quality of what goes on during the processes themselves.

By 2008 new complex money laundering system had been developed. During the last several years pyramidal Ponzi systems attracted many Colombians. The largest and more complex was DMG, founded by David Murcia-Guzmán, a young man from La Hormiga, Putumayo, a small town near Ecuador's border that had been a main producer of coca and cocaine. DMG became wildly successful and developed a complex combination of financial pyramid, commercial enterprise and money

laundering scheme. The government attempted to close DMG but it hired some of the top lawyers of the country and changed its structure to evade financial sector controls and usury laws. Depositors were not defined as savers but as associates who received a voucher that they could use in DMG's stores to buy many goods and services at about 20% to 30% above regular store prices. After some time they were paid back what they gave DMG or a higher amount. This was not interest considered as or principal but as a payment for doing word of mouth publicity. This payment could also be converted in a voucher and a new round started.

No definitive study of DMG has been possible yet. However, it grew from a very small town and it took time for it to cover large areas of the country. This allowed it to be sustained for about three years. Goods sold in the DMG warehouses were a mix of legally imported and produced and contraband used to launder money. As it expanded, it opened offices in Panama and Ecuador where it had large accounts in the financial sector of those countries whose currency is the U.S. dollar. This apparently allowed drug traffickers to make deposits in DMG accounts and receive equivalent amounts in Colombia. The government finally closed DMG when it was close to have collapsed. The amounts recovered were about $100 per depositor. The closing of DMG generated widespread civil reactions. People demanded their right to continue DMG as many did not accept that this was a Ponzi scheme. Other argued that returns of 100% and 200% were normal in today's capitalist system; that formal banks obtained those returns and the Colombian oligarchy simply did not want others to become rich. Many people became blinded by DMG and deposited their life savings. Others mortgaged their houses. Interestingly, some attribute the sharp decline in the coca acreage in Putumayo during these years to the growth of DMG as many people became dependent on it and just stopped working. In many of the pro DMG marches a common poster was "let us work", meaning let us deposit our money in DMG so that we do not have to work. Mr. Murcia-Guzmán was extradited from Panama and while awaiting trial one of the parties of Mr. Uribe's coalition attempted to nominate him as a candidate for Congress. There is no question that if he could have run in the 2010 election he would have become a very popular congressman. Such is life in the tropics.

In May 2009 Mr. Murcia-Guzmán was requested on extradition by the United States government on drug money laundering charges. He confidently expressed its trust in the American justice system and asserted that he was not afraid of extradition. In January 2010 he was extradited.

The growth in contraband trade to launder illicit drug proceeds requires greater interagency cooperation within the government, including coordination between the UIAF and DIAN. Congestion in the court system, procedural impediments and corruption are other challenges. Limited resources for prosecutors, investigators, and the judiciary hamper their ability to close cases and dispose of seized assets. Streamlined procedures for the liquidation and sale of seized assets under state management could help provide funds available for Colombia's anti-money laundering and counterterrorist financing regime. Notwithstanding the progress in combating money laundering this illegal activity still creates difficulties for legitimate businesses. The sale within Colombia of cheap, illegally imported goods continues to represent unfair competition on a major scale for local producers, importers and retailers, as well as helping the drug trade. The operation of "front"

companies and other illegal businesses in construction and other sectors also undercuts legal competitors.

Concerning forfeiture, Colombian law provides also for both conviction-based and non conviction based in rem forfeiture. A general criminal forfeiture provision for intentional crimes has existed in Colombian Penal Law since the 1930s. Since then, Colombia has adopted more specific criminal forfeiture provisions in other statutes, including Law 30 of 1986 (National Drug Statute) and Law 333 of 1996. In 2002, the Colombian government enacted Law 785 and Law 793.[13]

Dirección Nacional de Estupefacientes (DNE) is charged with administering, managing and disposing seized goods. Its record has been quite questionable despite the efforts of most of its staff. As with the case of the Fiscalía, it continuously faces problems with many deeds of the seized properties. The cadastre and local registries are not well managed and there is a lot of corruption at the local level. Powerful local interests make sure that these offices are not modernized. Most keep all files manually. It is not convenient to the local powers to have these offices well organized because that prevents frauds and corruption. Disorganization is a good obstacle to prosecution. In many cases of seized properties, the records disappear. DNE opted to take assets to manage only after formalizing precautionary measures.

DNE currently manages assets in 7 specialized divisions: Chemical substances, urban real estate; rural real estate; land vehicles; airplanes; boats; cash, art and other goods; and businesses. The latter located mostly in the areas around Bogotá, Cali and Medellín.

DNE decides how to dispose of the forfeited assets. Both, DNE and the Fiscalía have had great difficulty separating *testaferros* from good faith asset holders. They know that a large share of seized assets is in the hands of *testaferros* but their condition is difficult to prove. A further problem is caused by the fact that many assets are not productive but should be maintained and generate substantial costs. Others require special skills to be managed properly.

When the asset seized is a business DNE confronts particular problems. The financial sector blacklists the business, cuts its credit lines and leaves it in dire straits. This is done even if the business is in the hands of the State. DNE does not have funds or the capacity to borrow from the financial system to provide working capital for those business and many just fail.

Table 2 summarizes the results the AML efforts in seized and forfeited drug traffickers' assets. Official data are aggregate and do not provide some important information. For example, there are no estimates about the value of the assets seized and forfeited. Besides, as shown below, the definition of an "asset" is not clear. Despite the deficient data, it is clear that the results are not encouraging.

[13] Law 785/02 strengthened the Colombian government ability to administer seized and forfeited assets. This statute provides clear authority for the DNE to conduct interlocutory sales of seized assets and contract with entities for the management of assets. Notably, Law 785 also permits provisional use of seized assets prior to a final forfeiture order, including assets seized prior to the enactment of the new law (Article 2). Law 793/02 repealed Law 333/96 and imposed strict time limits on proceedings, placed obligations on claimants to demonstrate their legitimate interest in property, required expedited consideration of forfeiture actions by judicial authorities, and established a fund for the administration of seized and forfeited assets. The amount of time for challenges was shortened and the focus was moved from the accused to the seized item (cash, jewelry, boats, etc.), placing more burdens on the accused to prove the item was acquired with legitimately obtained resources.

Table 2 AML results: number of seized and forfeited assets

Asset type	Returned by judicial decision	In judicial process	Forfeited	Total
Urban Real Estate	2,571	11,790	2,965	17,326
Rural Real Estate	1,282	3,659	695	5,636
Businesses	62	2,541	287	2,890
Cash	410	5,420	327	6,157
Controlled substances	525	9,439	653	10,617
Land vehicles	3,823	9,198	585	13,606
Airplanes and helicopters	361	660	44	1,065
Boats	179	571	99	849
Other	3,184	17,451	2,079	22,714
Total	12,397	60,729	7,734	80,860

UIAF. Data through November 30, 2008

At the end of November 2008 DNE had received 80,860 assets to manage while the forfeiture processes were advancing. Of those, 12,397 (15.3%) had been returned to their owners who had obtained favorable judicial sentences. Only 7,734 (9.6%) had been forfeited and the rest 60,729 (75.1%) were in judicial process. The forfeiture process is very slow. Indeed, in early May 2008 DNE auctioned property seized from Pablo Escobar, killed on December 2, 1993. The fact that a larger number of assets have been returned to their owners than those forfeited also indicates significant problems in the process. DNE officials suggest that the data are misleading because the definition of an "asset" used does not refer to a single piece of property but to a set of properties believed to belong a person that are seized at one time. They claim that some of the forfeited assets include several properties. They however, do not have data to corroborate this.

DNE has substantial management problems. It has very few people relative to the size of its task. High management has frequently been appointed for political reasons and has not had the necessary skills. The Uribe administration has appointed four General Managers. The first one is currently requested for extradition by Panama where he has to face money laundering charges. The second is a very well known general who led the army's attack that destroyed the Justice Palace that had been taken over by M-19 guerrillas in 1985. He is currently facing several human rights charges on account of the disappearance of a number of magistrates and other personnel that were seen leaving the Palace alive but disappeared or later on appeared dead in the Palace's ruble. The third manager tried to modernize the operation but the results have been mixed at best. He however, had to resign over a conflict of interest scandal about his father's bids to rent DNE seized properties. Hopefully the fourth one would do better.

Some examples explain the problems faced. First, it has been very difficult to rent properties seized or to find management companies willing to run some of the businesses. DNE personnel suspect that some of those that have been hired to manage or who have rented seized properties are probably part of the criminal groups that owned those properties. The problem is that most managers and managing firms shy away from running businesses previously owned by drug

traffickers. Second, the inventory of seized assets is incomplete and inaccurate. For instance, some airplanes seized have disappeared. Obviously, they have flown away. Third, they do not have control over the use of the rented property. The case of a boat seized in San Andrés Island with a cocaine cargo is perhaps extreme but points out some of the problems. The boat was rented out after the seizure and it was seized again with another cocaine load. The Fiscalía has today two separate forfeiture processes on the same asset.

DNE is making managerial advances and is in the process to hire the asset management functions to a Central de Inversiones (CISA) a mixed capital company attached to the Finance Ministry subject to the Private Law Regime. It was established mainly to manage and dispose of the homes foreclosed during the 1998–2000 real estate crises. There are questions among both government officials and analysts about CISA's ability to handle the varied assets currently in the hands of DNE. In particular, a possible problem may arise because CISA has an extensive urban management experience but a large share of the properties under DNE's supervision is made up rural properties.

Several public officials suggest other possible changes that could allow the government to sell seized properties and return the proceeds to the owners in case they win their suits. This would eliminate the problem of managing seized property. This however raises the issue of how to set sale prices in highly imperfect market environments.

Peru

Peru's AML legislation lagged several years from Bolivia's and Colombia's. During the 1990 the Fujimori government projected a strong law and order image but its main adviser, Vladimiro Montesinos, the power behind the throne, "collected bribes, dealt in drugs, weapons and other illicit markets. Montesinos directed the political life in the country using public funds to bribe judges, opposition politicians and the media and keep their loyalty" [5: 231]. Not surprisingly, the FIU was created only through law 27693 of 2002 after the Fujimori regime was forced out.[14] The FIU is the government entity responsible for receiving, analyzing and disseminating suspicious transaction reports (STRs) filed by obligated entities. This law serves as a framework for the implementation of the all AML policies.

Concerning criminalization measures, since June 2002, Peru has adopted substantial changes to its existing anti-money laundering regime, significantly broadening the definition of money laundering beyond a crime associated with narcotics trafficking. Prior to these changes, money laundering was only a crime when directly linked to narcotics trafficking and "narcoterrorism."

Legislative Decree No. 992/07, established the procedure for loss of dominion, which refers to the extinction of the rights and/or titles of assets derived from illicit sources, in favor of the government, without any compensation of any nature. This Decree has also created the Loss of Dominion Fund (FONPED) in the Justice Ministry to manage and dispose of all assets seized for forfeiture.

[14] It was amended partially by law 28009 of 2003.

In Peru the Government has made advances in strengthening its AML regime in recent years. However, despite these significant efforts there are still a number of weaknesses in Peru's AML system: bank secrecy must be lifted in order for the FIU to have access to certain cash transaction reports, smaller financial institutions are not regulated, and the FIU is not able to work directly with law enforcement agencies; rather, the Public Ministry must coordinate any collaboration between the FIU and other agencies.

Peru however has had an interesting experience recuperating corruption moneys deposited abroad. The Fujimori-Montesinos regime centralized corruption in the hands of Montesinos who controlled the government's security apparatus. Montesinos had a curious practice to video tape all his corruption transactions. The collapse of the Fujimori administration started when a video of Montesinos bribing a congressman became public. The about 700 "vladivideos" that appeared implicated members of the judicial system, the country´s media, the legislative branch, the military and industry leaders. They also made clear the links between Montesinos, the State and the illicit drug industry.[15]

Under Fujimori, Montesinos and some very high ranking military received very large "commissions" on large military purchases particularly in Russia and Belarus.[16] This was not however the only source of illicit funds deposited in the corrupted officials' accounts abroad. Large sums were involved in a scheme to invest moneys from the armed forces retirement fund in overvalued assets. Those who managed the fund captured a large proportion of the overvaluation.

After Fujimori fell the government's efforts focused on the former government leaders' loot rather than on AML policies. The new government had to start strengthening the institutions that had been captured, co-opted and weakened by Fujimori-Montesinos. Some of the changes made were the creation of an anti corruption unit; a shift from an inquisitorial to an adversarial judicial system facilitated the use of plea bargaining that resulted in several lower level accused to provide valuable information leading to the discovery of very large bank accounts held by prominent military and Montesinos in Switzerland, the United States, Panama, the Cayman Islands, Mexico and Luxembourg; and the approval of restrictive precautionary measures that allowed the state to seize assets during the preliminary steps of an investigation [5: 233–234].

By 2008 Peru had recovered $175 million from accounts in Switzerland, the United States and the Cayman Islands and was negotiating with the other jurisdictions. The political prominence of the Fujimori-Montesinos case probably facilitated this positive result but the changes in the Peruvian legislation, the 2003 Anti Corruption Convention and the blacklisting of some jurisdictions by the FATF were also factors [5].

This case has provided positive lessons about how countries may be willing to cooperate with each other even when their own laws and regulations may not make cooperation automatic. In the United State, for instance, the General Attorney has

[15] Pablo Escobar's brother, for example, attests that Montesinos visited Pablo Escobar at the famous Hacienda Nápoles where they made an agreement to safely use some landing strips in Peru to move coca paste to Colombia [4: 7–11].

[16] Jorge [5] provides an excellent description and analysis of these events and the process in which Peru recovered large sums deposited in several off-shore centers.

discretionary power to decide whether to return the money to the country where corruption took place or to keep it for the U.S. government. In this case an agreement was achieved by which the returned moneys had to be used to fight drugs in Peru [5].

Conclusions

AML legislation is the result of an international initiative of legal unification and harmonization in response to a global problem and not the product of a domestic initiative. The AML international system is based on the implicit assumption that money and assets flow from the illegal to the legal economy and that the illegal economy is not very large.

In Bolivia, Colombia and Peru most money laundering is related to the illegal cocaine industry. The main problem for money launderers is to find safe ways to bring the profits obtained in international markets to the domestic economy. Concerning terrorism, the main issue in the Andean countries is the financing of domestic terrorist organizations.

However, although these countries have made substantial efforts to adopt the international AML legislation guidelines, the implementation process has not produced a successful regime and the results are unsatisfactory. Cases like the recovery of moneys hidden abroad by Fujimori-Montesinos might have been influenced by political prominence and it is not clear if it could be easily replicated.

Lack of congruence between the international AML system and the domestic environment explains in great part the meager results of the AML legislation in the Andean countries. The fact that international AML system is focused on the financial sector has played an important role. AML international principles do not take into account that in these countries money laundering transcends the financial sector. It is complex and involves the real sector to a greater extent and a significant part of incoming money laundering flows is contraband imports sold in the domestic market. In the three countries the part of the economy that uses the financial system is small and the informal economy is very large. The informal sector does not comply with many laws and regulations. Many economic activities that take place outside the law are considered normal and acceptable by a large share of the population.

In all Andean countries a very large share has a pre-modern relationship with the State. They are not citizens with rights and duties. They are more like serfs that depend on the on the benevolence of the Lord. Not surprisingly, despite some 20 years of a sequence of elected governments in the region (and a much longer one in Colombia) today through the Andes there is a strong trend toward governments run by strong caudillos. In these environments the caudillo is able to interpret and change the rules of the game and many norms become increasingly fuzzy. In a modern system one would expect rules to be certain and results uncertain. The Andes is drifting toward the opposite, systems in which rules are uncertain but results are certain.

It is important to highlight that the success of AML policies depends critically on the type of relationship that individuals have with the State. A key issue is whether

they are modern or pre-modern citizens. Legal harmonization initiatives in general must take it into account. It is true that the globalization process has reinforced the need for homogeneous norms and common systems in order to facilitate the relations among countries and as a result, guidelines and principles are directly transplanted into domestic legislations. However, it is also important to point out that in many cases a legal transplant into a hostile environment tends to be rejected. These have been the cases of AML initiatives in Bolivia, Colombia and Peru.

A key lesson learned from the experience of these three countries that may be applied to other countries and issues is that there is a big challenge making compatible the need for a harmonized legislation with the institutional particularities and weaknesses of the countries. Since legal transplants require an adequate environment, harmonization initiatives must focus more on institutional issues than on mere legislative changes. Policy and law makers, on the other hand, should not fall in the temptation of legal transplants without taking into account that in many cases international principles and guidelines are responses to the need for global harmonization that may conflict with the particular country´s environments and circumstances. In these cases, the blind adoption of international standards result in ineffective policies in which countries appear to go to the motions of complying with the international norms but are incapable to achieve significant results.

References

1. Asobancaria Bolivia. (2008). *Bancarización en Bolivia*. Available Online: http://www.asoban.bo/publicaciones/documentosPub/2008-11-BancarizacionEnBolivia.pdf.
2. De Soto, Hernando. (1986). *El Otro Sendero*. Lima: Editorial El Barranco.
3. De Soto, H. (2000). *The mystery of capital*. Basic Books.
4. Escobar, R. (2000). *Mi Hermano Pablo*. Quintero Editores.
5. Jorge, G. (2008). La experiencia de Perú: el caso "Fujimori-Montesinos". In G. Jorge (Ed.), *Recuperación de Activos de la Corrupción*. Buenos Aires: Editores del Puerto.
6. Marulanda, B. (2006). Una nueva política para un mayor acceso a los servicios financieros en Colombia. In Secretaría General Iberoamericana, *La Extensión del Crédito y Servicios Financieros. Obstáculos, propuestas y buenas prácticas,* Madrid, September.
7. Morón, E. (2006). Los retos del sistema bancario del Perú. In Secretaría General Iberoamericana, *La Extensión del Crédito y Servicios Financieros. Obstáculos, propuestas y buenas prácticas,* Madrid, September.
8. Perry, G., Arias, O. S., Fajnzylber, P., Maloney, W. F., Mason, A. D., & Saavedra-Chanduvi, J. (2007). *Informality: Exit and exclusion*. The World Bank.
9. Rojas-Suárez, L. (2006). El panorama regional. In Secretaría General Iberoamericana, *La Extensión del Crédito y Servicios Financieros. Obstáculos, propuestas y buenas prácticas*, Madrid, September.
10. Sindzingre, A. (2006). The relevance of the concepts of formality and informality: a theoretical appraisal. In: B. Guha-Khasnobis, R. Kanbur, E. Ostrom (Eds.), *Linking the formal and informal economy: Concepts and policies*. Oxford University Press.
11. Schneider, F., & Klinglmair, R. (2004). *Shadow economies around the world: What do we know?* Department of Economics, Johannes Kepler University of Linz, Working paper 0403.
12. Smolka, M., & Mullahy, L. (eds.) (2007). *Perspectivas Críticas Urbanas. Temas críticos en políticas de suelo en América Latina*. Cambridge: Lincoln Institute of Land Policy.
13. Tafur-Saiden, C. (2009). Bancarización: una Aproximación al caso Colombiano a la Luz de América Latina. *Estudios Gerenciales, 25*, 110. January–March, Cali: Universidad ICESI.
14. Watson, A. (1993). *Legal transplants: An approach to comparative law* (2nd ed.). Georgia: University of Georgia Press.