The FATF and Evolution of Counterterrorism Asset Freeze Laws in the Nordic Countries: We Fought the Soft Law and the Soft Law Won

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Abstract The Financial Action Task Force (FATF) is an inter-govermental body devoted to developing international standards for combatting money laundering as well as terrorist and proliferation financing. It is particularly known for its profoundly influential "40 Recommendations" and the grueling mutual evaluations to which member governments periodically subject each other. Despite the non-binding "soft law" nature of its Recommendations, the FATF has had an immense impact on the development of domestic laws in jurisdictions around the world. Some have sought to explain the FATF's powers through its ability to penalize non-compliant jurisdictions through a "blacklisting" mechanism, while others have emphasized the softer, persuasive powers a co-operative expert organization can have on its members. This chapter explores the historical development of a particularly contentious FATF Recommendation on counterterrorism asset freezes and its implementation in the Nordic countries to provide a detailed example of how the FATF influences individual states—and how individual states, in turn, may influence the FATF.

1 Introduction

This chapter revisits an ongoing discussion on the nature and causes of the global influence of the Financial Action Task Force (FATF), an inter-governmental standard-setter in the fields of anti-money laundering (AML) and counterterrorism

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financing (CTF). Specifically, the chapter will recap the two main competing strands of approaches seeking to explain the mechanisms through which this influence is exerted and then assess their ability to explain the history of the implementation of a particular FATF standard—concerning counterterrorism asset freezing mechanisms—in the Nordic countries.

The chapter is divided into five sections. Section 2 introduces the FATF as an organization. It will then briefly summarize the competing "coercive" and "voluntarist" attempts to explain why the FATF, despite the "soft law" nature of its standards, is able to induce compliance in jurisdictions across the world.[1] The first set of explanations argue that the FATF is essentially a tool harnessed by a few powerful states to promote their self-interests and, more importantly for this chapter, that the primary motivation behind compliance with FATF standards is the fear of being blacklisted by it. The second set of explanations argues that the FATF is, quite the contrary, an intricate network of states and other international actors engaged in expert-driven development of mutually agreed standards, with the primary motivation behind compliance being a shared perception of the legitimacy of the resulting norms.

Section 3 begins with an outline of United Nations Security Council Resolution 1373 (2001) ("UNSCR 1373 (2001)"), a binding UN Security Council Resolution, which established an obligation on states to freeze assets to counter international terrorism in the wake of the September 11 attacks on the United States. The section then describes the development of FATF's standards related to such asset freezes and explains how these two instruments conspired to create an international norm requiring states to establish an *administrative procedure for the freezing of terrorists' assets* exhibiting particular mandatory characteristics. Building on this description of the relevant legal standards, Sect. 4 then retraces the evolution of efforts to implement UNSCR 1373 (2001) and the related FATF standards in the Nordic countries. The section shows how these countries held out for more than a decade without implementing key requirements under the newly established norm and how their resistance now seems to have been finally exhausted. Finally, Sect. 5 offers an explanation as to the causes for this prolonged resistance in the Nordic countries, despite their usual acquiescence to international law and multilateral institutions, and the reasons that ultimately broke down that resistance. The chapter concludes with some reflections on the relative merits of the coercive and voluntarist explanations of the FATF's influence.

[1] For explanations making what can be described as "coercive" arguments on the FATF's influence *see,* e.g., Simmons (2001), pp. 589–620; Jojarth (2009), Chapter 5; Goldbarhst (2020), esp. 174–182; Beekarry (2011) esp. 179–188. For contributions emphasizing "voluntarist" views, *see*, e.g., Heng and McDonagh (2008), pp. 553–573, Kerwer and Hülsse (2011), pp. 50–67, Nance (2018a), pp. 131–152, and FATF, *see* e.g. Pavlidis (2021), esp. 767.

2 The Financial Action Task Force

2.1 The FATF as an Organization

The Financial Action Task Force (FATF) was launched in 1989 by the G7 Summit held in Paris.[2] It was originally established as a temporary task force consisting of 11 individual members to focus on money laundering related to international trade in narcotics and, in particular, on determining the aggregate value of related flows of funds.[3] Today, it is an organization with 39 members (37 Member States, plus the European Commission and the Gulf Co-operation Council)[4] and is widely recognized as the most important international standard-setter in anti-money laundering (AML) and counterterrorist financing (CTF).[5] In addition to its members, it has nine "Associate Members", each essentially a regional organization styled after the FATF itself. These regional organizations are partly responsible for ensuring the global reach of the standards set by the FATF—by far the majority of countries of the world are members of one of these organizations.[6] Finally, the FATF is joined by numerous "Observer Organizations", such as the European Central Bank, the International Monetary Fund (IMF), the Organisation for Economic Co-operation and Development (OECD) and the World Bank. As a bureaucracy, however, the FATF is staggeringly small in comparison to its global influence: the FATF budget for 2018 was just over six million euros.[7]

The constitutive document of the FATF is the "Mandate of the Financial Action Task Force", a declaration that is being (re-)issued by the ministers of its members periodically since 1989, with the latest mandate having been approved "open-endedly" in 2019.[8] The Mandate assigns ten different tasks and functions to the FATF, of which three are of particular importance:

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[2] Financial Actions Task Force, *History of the FATF*, https://www.fatf-gafi.org/about/historyofthefatf/.

[3] Nance (2018b), pp. 109–129.

[4] Financial Action Task Force, *Members and Observers, https://www.fatf-gafi.org/about/membersandobservers/* (accessed on July 15th, 2020).

[5] Since 2012, the FATF's mandate has explicitly included also counter-proliferation.

[6] The Associate Members are the Asia/Pacific Group on Money Laundering (APG) based in Sydney, Australia; the Caribbean Financial Action Task Force (CFATF) based in Port of Spain, Trinidad and Tobago; the Eurasian Group (EAG) based in Moscow, Russia; the Eastern & Southern Africa Anti-Money Laundering Group (ESAAMLG) based in Dar es Salaam, Tanzania; the Central Africa Anti-Money Laundering Group (GABAC) based in Libreville, Gabon; the Latin America Anti-Money Laundering Group (GAFILAT) based in Buenos Aires, Argentina; the West Africa Money Laundering Group (GIABA) based in Dakar, Senegal; the Middle East and North Africa Financial Action Task Force (MENAFATF) based in Manama, Bahrain; and the Council of Europe Anti-Money Laundering Group (MONEYVAL) based in Strasbourg, France (Council of Europe).

[7] Financial Action Task Force, *Annual Report 2017–2018*, 66.

[8] Financial Action Task Force, *Mandate*¸ Approved by the Ministers and Representatives of the Financial Action Task Force (2019).

(i) Developing and refining international standards for combating money laundering and the financing of terrorism and its proliferation
(ii) Assessing and monitoring its members, through "peer reviews" ("mutual evaluations") and follow-up processes, to determine the degree of technical compliance, implementation and effectiveness of systems to combat money laundering and the financing of terrorism and its proliferation; and
(iii) Identifying and engaging with high-risk or non-co-operative jurisdictions and those with strategic deficiencies in their national regimes as well as co-ordinating actions to protect the integrity of the financial system against threats posed by them.[9]

The ultimate decision-maker in the FATF is its Plenary, which approves, *inter alia*, FATF's standards on AML and CTF, the results of the peer reviews of its members and decisions on identifying high-risk or non-co-operative jurisdictions. Plenary decisions are made by consensus.[10] In practice, all this means that (1) the members, associate members and observer organizations in the FATF develop and constantly refine a document called *FATF Recommendations*,[11] which describes FATF's understanding of how its members should go about countering threats falling within the ambit of the organization, and also numerous associated documents guiding their implementation and interpretation, feeding into their further development. (2) Each member is subjected to a periodic *Mutual Evaluation* process, where other members review its efforts to comply with the Recommendations and, in particular, highlight any shortcomings in its laws, the capabilities of its competent authorities and its resource allocation. The Plenary approves a Mutual Evaluation Report, which grades the member's compliance with each of the Recommendations. If the results are not satisfactory, the country will be expected to improve and be placed in a "follow-up process", where it must report back to the FATF on the progress it has made until it can demonstrate adequate improvement. The regional FATF-style organizations undertake similar reviews regionally among their own Member States. (3) The Plenary can, in the most severe cases of non-compliance with FATF standards, decide to identify a (member or non-member) jurisdiction as "high-risk", a designation other members (and states globally) are expected to take as a warning sign and as a call to take measures to protect themselves from threats to the integrity of the international financial system caused by that jurisdiction. A slightly less dire warning is a public announcement that a jurisdiction is under

[9] *Ibid.,* 4–5.

[10] *Ibid.,* 7–8. In the experience of the author, as a matter of procedural custom, a single dissenting vote is not considered enough to prevent a "consensus" from forming in the Plenary or its subsidiary working groups; therefore, an individual member cannot not block a decision that negatively affects it without support from at least one additional member.

[11] Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* (Updated June 2019), http://www.fatf-gafi.org/recommendations.html, hereinafter *FATF Recommendations* or *FATF Recommendations (2019)*.

"Increased Monitoring", with the implied threat of further action unless a significant improvement is made.[12]

The FATF Mandate not only lays down the substantive scope of the organization's work, its working methods and the structure of its bureaucracy, but it also specifically provides for its own legal effect: "Legal Effect of the Mandate: . . . *This Mandate is not intended to create any legal rights or obligations*."[13] The constituent document of the organization is, in other words, unambiguous: the FATF is not intended to wield any legally binding powers towards its Member States. Its mandate is to develop standards to fight financial crime and to support the Member States that choose to seek to meet those standards voluntarily rather than out of a sense of legal obligation. The FATF Recommendations, in other words, are a prime example of what is commonly known as *soft law*.[14]

2.2 Competing Explanations of the Influence of the FATF

Competing explanations on the FATF's influence can be divided into two rough categories: firstly, approaches that emphasize the FATF's blacklisting capabilities as the key to coercing compliance and, secondly, approaches that underline its nature as an intricate network where influence is born in largely voluntary processes of mutual co-operation and benchmarking, leading ultimately to the creation of norms that countries voluntarily comply with due to their perceived legitimacy.

The first set of explanations, which I shall call "coercive" approaches, emphasize the ability of dominant FATF Member States to pressure others into action and, even more importantly, the power of the FATF to order countermeasures on jurisdictions that consistently fail to co-operate with it or that are unable or unwilling to bring their domestic AML/CTF frameworks up to the standards held by the FATF. The toughest of these measures are reserved for "high-risk" jurisdictions, in relation to which the FATF publishes a "call of action", recommending that states undertake various protections and restrictions in their undertakings with the financial sectors of these jurisdictions. The other is the Grey List, which does not specifically mandate any action but indicates the judgement by the FATF that the country has strategic deficiencies and thereby may be a cause of AML/CFT risk to those that co-operate with it without taking extra precautions.

[12] In July 2020, two countries were considered "High-risk" (Democratic People's Republic of Korea and Iran) and 18 were subject to increased monitoring (Albania, the Bahamas, Barbados, Botswana, Cambodia, Ghana, Iceland, Jamaica, Mauritius, Mongolia, Myanmar, Nicaragua, Pakistan, Panama, Syria, Uganda, Yemen and Zimbabwe), two of which had been determined to have made adequate progress, warranting an on-site visit, a hurdle that needs to be cleared before being removed from the Increased Monitoring List (sometimes known as the FATF Grey List).

[13] *Ibid.,* 10 (emphasis added).

[14] *See generally* Turner (2014–2015), 547.

Ultimately, the cost of FATF countermeasures could therefore include restrictions to access to global financial markets, decreased credit ratings, increased costs of borrowing and other concrete and quantifiable negative effects on the non-compliant. Therefore, the coercive explanation goes, violations of the "soft law" instruments issued by the FATF are ultimately sanctioned with penalties that are as "hard" as any within the sphere of international law.[15] The economic impact of these measures would be politically so costly that national Parliaments do not have the courage to go against the FATF and instead choose to legislate as "recommended" in the national Mutual Evaluation Reports.[16] In a recent refreshing econometric analysis of compliance with FATF norms, Mekpor, Aboagye and Welbeck conclude that, in fact, "[i]t seems as though countries are doing just enough to avoid being blacklisted by FATF giving the reputational repercussions of blacklisting", suggesting that the coercive analysis sufficiently explains the FATF's influence.[17]

Doron Goldbarhst has provided an elegant elaboration of this approach.[18] In addition to the direct threat of blacklisting, *Goldbarhst* argues that the power of FATF's standards is further explained by the organization's strategy of framing many of its key recommendations as essentially restatements of pre-existing "hard law" norms with obvious authority, such as, in the CTF context, the Terrorist Financing Convention or binding UN Security Council Resolutions. As *Goldbarhst* puts it, the FATF then "leverages these binding norms to support the implementation of all recommendations made by it, in manner that is indifferent to the normative source of the recommendation".[19] In other words, the FATF eagerly portrays its recommendations as reflective of a legal obligation, even in cases where they lack any clear foundation on authoritative instruments of international law, thereby inducing acquiescence. Coercive explanations often acknowledge also the role of powerful individual states, in particular the United States, as both the authors and the guarantors of the norms issued by the FATF, in particular in the CTF realm. *Goldbarhst* explains that the influence of individual powerful FATF members is multiplied due to the organization's "multi-layered" structure, whereby the FATF standards are developed in a relatively select group of 39 members in the "first layer", i.e. the FATF itself, but where compliance is required by a much broader range of jurisdictions that belong to the "second layer" (i.e. the regional bodies), which have limited say in developing the standards. This enables much more

[15] *Saby Ghoshray* refers to FATF standards as "hardened soft law", *see* Ghoshray (2014), 521–546, while Beekarry describes them as "the hardest type of soft norms", *see* Beekarry (2011), 158.

[16] For contributions emphasizing "coercive" arguments on the FATF's influence, see footnote 2 above.

[17] Mekpor et al. (2018), 442–459.

[18] Goldbarhst (2020), esp. 174–182.

[19] *Ibid.*, 177.

ambitious regulating than a setting where consent would be required by each participating jurisdiction individually.

If accurate, the coercive explanation of the FATF leaves it vulnerable to criticism. Critics could suggest that the organization's rule-making process lacks democratic legitimacy, that it serves to further amplify the influence of already powerful economies and that it threatens to punish those with insufficient resources to meet the standards set by their wealthier peers.

On the other hand, some contributors see value in a system capable of forming robust global rules in the absence of a requirement of consent from each individual state. Among such commentators is *Andrew Guzman*, who argues that such structures may be necessary for forming effective responses to urgent and critical global issues, where treaty-based (i.e. consent-driven) lawmaking is too slow and too unambitious.[20] *Goldbarhst* has noted this argument as well: "Prior to the establishment of the FATF, the need for consent was a major challenge for CTF (and AML) efforts ... The FATF overcame the need for consent by producing soft-law recommendations in a hard-law environment. ..."[21]

However, a competing set of explanations seek to challenge the coercive approach position, rejecting both the decisive role of a few powerful actors in the FATF and the centrality of the threat of formal punishment in explaining its influence instead of looking for answers in the working methods of the FATF and, more broadly, its collectivist nature. For lack of a better term, I shall call these "voluntarist" explanations in distinction to the coercive explanations described above.

Among the most important early contributions to this line of reasoning was made by Heng and McDonagh, who in 2008 formulated what they referred to as the "governmentality" approach to the FATF.[22] Among their arguments was the importance of "benchmarking": they argued that the driving force behind compliance with FATF standards was not the fear of formal sanctions but rather the perception of states (both members and non-members) of those standards as the "right way" to do things, conferring "moral legitimacy" on the rules pronounced by the FATF. In other words, Heng and McDonagh argue that countries seek to comply with the standards, not because of legal obligation or fear of being sanctioned but because they perceive the standards as reflective of the values of a community of which they wish to be accepted members.[23]

Kerwer and Hüssle subscribe to the perceived legitimacy of FATF standards as key drivers behind compliance.[24] They believe that this legitimacy rests primarily on the FATF's nature as an inclusive *expert* organization rather than a political body.

[20] Guzman (2012), 747.

[21] Goldbarhst (2020), 174. Goldbarhst is also very aware of the drawbacks of such a system and suggests a range of reforms to address them; *see* Goldbarhst (2020), pp. 178–182.

[22] Heng and McDonagh (2008), 553–573.

[23] *Ibid.,* esp. 566–567.

[24] Kerwer and Hülsse (2011), 50–67.

Compliance results from this legitimacy rather than fear of punishment; they argue—how else could one explain high levels of compliance among *non-member* states, which are not exposed to most of FATF's "formal" punishment methods? To be fair, *Kewer and Hüssle* do also recognize that coercion plays a "narrow role" in explaining FATF's influence: the FATF blacklist aims to secure a basic level of acceptance by states of FATF standards, they say, but those that have accepted this basic level are left to operate in a voluntary setting.

A more recent elaboration of the voluntarist explanation is the "experimentalist" approach, most visibly promoted in the FATF context by *Mark Nance*.[25] The fundamental source of the experimentalist criticism towards claims made by coercive arguments is that there is little actual evidence that blacklisting in fact has significant quantifiable adverse effects and that attempts to identify such effects have consistently failed.[26] If there is no true cost associated with being blacklisted, then why would states (or, more precisely, their legislatures or individual politicians) go to such lengths to avoid it?

Nance offers an alternative explanation, describing the FATF as exercising "experimentalist governance".[27] There are five elements that are crucial to this model of explanation of an organization:

(A) The role of penalties (i.e. threat of being placed on a list) is understood differently: they seek not to enforce "narrow" compliance (i.e. devout adherence to a norm as is) but rather to force *engagement* in the rule-making process itself, to help define more palatable versions of the norm.
(B) It involves a rule-making and peer review mechanism that is intentionally *reflective*, in that lessons learned in the implementation of a standard will feed to the further development of that standard in a continuous cycle, where the norm is developed by the entire network of participants rather than dictated by its most powerful members.
(C) The members of an experimentalist network are engaged not only in "shallow" persuasion of others (i.e. seeking to convince them to comply, for reward or penalty, despite their opposition to the norm) but also in *"deep" persuasion*, i.e. seeking to persuade them that the norm is, in fact, more worthy than its alternatives and the right thing to do.
(D) Experimentalist organizations are inclusive in that they offer a wider range of entities the opportunity to participate, thereby inducing *democratic destabilization*, where the sheer broadness of opinion, information and argumentation shakes preconceptions and promotes the development of improved standards.

[25] Nance (2018a), 131–152.

[26] *Ibid.,* 134.

[27] On experimentalist governance in general, *see e.g.* Dorf and Sabel (1998), pp. 267–473; Sabel and Zeitlin (2008), pp. 271–327; de Búrca et al. (2014), pp. 477–486. On commentaries favourable to an experimentalist explanation of the FATF, *see* e.g. Pavlidis (2021), pp. 765–773, esp. 767 (although Pavlidis does acknowledge also the role of coercion).

(E) The experimentalist explanation rejects the distinction between "hard" and "soft" law as unhelpful, instead preferring to focus on "the social construction of obligation", i.e. seeking to understand norms as they actually operate in their *social context* rather than through dogmatic legal analysis.[28]

For the proponents of this approach, the FATF is a textbook example of experimentalist governance. *Nance* recounts the board participation of different actors in FATF's work ("large and small states; powerful and weak states; post-industrial and developing economies; umbrella organizations and more specific organizations"), the iterative development of FATF standards, the iterative Mutual Evaluation Rounds and their feedback on the standards themselves, the often broad and open-ended content of particular recommendations and FATF's preferred method of making decisions through negotiated consensus rather than a majority vote. *Nance* concludes that understanding the FATF is meaningfully possible only through the experimentalist lens. The coercive explanation is simply not up to the task.

Specifically, voluntarist explanations, such as the experimentalist approach, offer a different view as to why the FATF wields the influence it does. As *Nance* observes in concluding his experimentalist thesis of the FATF:

> For scholars of FATF, an experimentalist understanding means taking more seriously the internal operations and process of FATF. This is difficult, as it requires careful process tracing to identify. To do otherwise, however, is to risk imputing causation to what in fact is correlation. Many observers argue that FATF is driven by the US and EU because their interests align. This overlooks substantial disagreements among the US and the many diverse members of the EU. It also ignores the possibility that the causal arrows, in some cases, point in the opposite direction. If this experimentalist interpretation is correct, it means that FATF, the network, plays a much larger role in shaping actor preferences than has previously been acknowledged.[29]

The following section intends to take *Nance* up on his call to engage in "careful process tracing" of a particular norm developed in the FATF. Hopefully, we can thereafter in the conclusion of this chapter plausibly reflect on the relative merits of these two competing yet plausible strands of explanations that were once described by *Kewer and Hüssle* as "irritatingly" contradictory.[30]

3 The Evolution of the Concept of Administrative Asset Freezes

3.1 Adoption of UNSCR 1373 (2001)

At the turn of the millennium, the most substantial international legal instrument of a general application on countering the financing of terrorism was the International

[28] Nance (2018a), 135–136.

[29] Nance (2018a), 148.

[30] Kerwer and Hülsse (2011), 64.

Convention for the Suppression of the Financing of Terrorism ("Terrorism Financing Convention").[31] It had been adopted by the UN General Assembly in December 1999 and would enter into force in April 2002 after its 22nd ratification.[32] While the thrust of the Convention was to require the criminalization of the act of financing terrorism,[33] its Article 8 also contained a provision on freezing assets intended to the be used for the commission of acts of terrorism:

1. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the **identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing [terrorist crimes]** as well as the proceeds derived from such offences**, for purposes of possible forfeiture.**
2. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the forfeiture of funds used or allocated for the purpose of committing the offences set forth in article 2 and the proceeds derived from such offences.[34]

The scope of assets to be frozen under the Convention was thereby limited to such assets that could be specifically identified as having been intended for terrorist purposes, and their freezing was envisaged to generally lead to the confiscation of those assets.

As such, the measures required by the Convention closely resembled measures already used and familiar in most jurisdictions, including in the Nordic countries, with respect to other types of crimes and assets associated with their commission. The main relevance of the provision was, rather than to create a new type of coercive measure or investigative tool, to ensure that while states went about criminalizing terrorism financing, they would also ensure that these types of freezing and seizing tools were extended to that (new) type of crime as well. In this chapter, such measures will be referred to as the *freezing of assets as part of a criminal proceeding*.

In a rapid and robust response to the terrorist attacks against the United States on 11 September 2001, the United Nations Security Council adopted Resolution 1373 (2001), invoking its powers under Chapter VII of the UN Charter to impose binding norms of international law.[35] The Resolution contained a broad range of counterterrorism measures, including the mandatory criminalization of the "provision and collection" of funds for the purposes of terrorism financing, echoing what was contemplated in the Terrorism Financing Convention.

Most importantly for the present chapter, UNSCR 1373 (2001) also introduced an asset freezing requirement, which differed from the "traditional" model endorsed by the Convention. Paragraph 1(c) of the Resolution requires all states to

[31] *International Convention for the Suppression of the Financing of Terrorism,* New York, 9 December 1999, United Nations Treaty Series vol. 2178, 197.

[32] United Nations Treaty Collection, Status of Treaties, https://treaties.un.org/.

[33] *Ibid.*, Article 2.

[34] *Ibid.*, Article 8.

[35] Charter of the United Nations, Chapter VII.

> . . .[f]reeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities.[36]

In other words, while the Convention required the freezing of *specific* assets used in the commission of terrorism, UNSCR 1373 (2001) turned this around by targeting the persons committing the acts and requiring the freezing of *all* their assets, regardless of whether those assets were tied to any particular act of terrorism.[37]

UNSCR 1373 (2001) also differed significantly from earlier UN sanctions resolutions that had imposed targeted asset freezes. For instance, Resolution 1267 (1999), which laid the foundation for a system of targeted sanctions against the Taliban and al-Qaida, specifically empowered a committee operating under the Security Council to identify by name those persons and entities whose assets must be frozen. In a stark difference, UNSCR 1373 (2001) requires states themselves to identify which persons to target.

While it was clear that paragraph 1(c) of UNSCR 1373 (2001) strived for something different than Article 8 of the Terrorism Financing Convention, the details of how to implement the Resolution were left to the Member States. The Resolution takes no position on, for instance, whether the freezing should be executed as part of a *criminal* or an *administrative* proceeding, nor does it provide for any threshold for the level of certainty of guilt that should trigger these measures. The requirement was, simply, to establish a mechanism capable of identifying persons satisfying the defined criteria as laid down by law and then freezing their assets "without delay".

A guidance document issued by the Counter-Terrorism Committee Executive Directorate (CTED), a body assigned to support the Security Council Counter-Terrorism Committee (CTC), later suggested (and continues to suggest to this day) that the choice of framework was up to the individual Member State:

> States should have in place a legal provision that provides for the freezing of terrorist funds and assets pursuant to resolution 1373 (2001) and establish a designating mechanism with adequate due process consideration, as well as a dedicated mechanism to address foreign asset-freezing requests . . . *Asset-freezing mechanisms may be of an administrative or criminal nature*, provided that the State can freeze without delay and on an *ex parte* basis.[38]

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[36] UNSCR 1373 (2001), paragraph 1(c). Paragraph 1(d) provides for a complementary obligation to prevent any funds or assets from being made available for the benefit of such persons.

[37] There were other expansions as well, including broadening the scope also to entities "owned or controlled" or those "acting on behalf of" terrorists, as well as "funds derived or generated" from the relevant assets.

[38] The quotation is from the most recent guidance document, Counter-Terrorism Committee Executive Directorate (CTED), *Technical Guide to the Implementation of Security Council Resolution 1373* (2019), paragraphs 51 and 55 (emphasis added).

3.2 Evolution of the FATF Standard on UNSCR 1373 (2001)

The FATF also reacted almost instantly to the 9/11 attacks. Until then, its mandate had exclusively covered money laundering, but within weeks of the attacks, it was extended to cover also countering the financing of terrorism. Already in October 2001, the existing *FATF 40 Recommendations* were supplemented by the so-called *IX Special Recommendations*.[39] Each of the new Special Recommendations dealt with a specific aspect of countering the financing of international terrorism, including also the implementation of UNSCR 1373 (2001) and other counterterrorism sanctions resolutions adopted by the Security Council.

Among the newly created Special Recommendations, the first paragraph of *Special Recommendation III* dealt with counterterrorism asset freezes pursuant to UNSCR Resolutions, providing as follows:

> Each country should implement measures to **freeze without delay funds or other assets of terrorists, those who finance terrorism and terrorist organisations in accordance with the United Nations resolutions** relating to the prevention and suppression of the financing of terrorist acts.[40]

A set of Interpretative Notes accompanying the *IX Special Recommendations* described the nature of the measures envisaged under Special Recommendation III thusly:

> It should be stressed that none of the obligations in Special Recommendation III is intended to replace other measures or obligations that may already be in place for dealing with funds or other assets in the context of a criminal, civil or administrative investigation or proceeding. The focus of Special Recommendation III instead is on the **preventative measures that are necessary and unique** in the context of stopping the flow or use of funds or other assets to terrorist groups.[41]

As for identifying and designating those whose assets are to be frozen, the Interpretative Note further provided that

> [j]urisdictions should develop and implement procedures to freeze the funds or other assets . . . without delay and without giving prior notice to the persons or entities concerned . . . **Consequently**, these procedures must ensure (i) the **prompt determination whether reasonable grounds or a reasonable basis exists** to initiate an action under a freezing mechanism **and** (ii) the subsequent **freezing** of funds or other assets **without delay upon determination that such grounds or basis for freezing exist**.[42]

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[39] Financial Action Task Force, *IX Special Recommendations* (2001).

[40] Financial Action Task Force, *IX Special Recommendations* (Update of 2008) 2 (emphasis added). https://www.fatf-gafi.org/publications/fatfrecommendations/documents/ixspecialrecommendations.html.

[41] Financial Action Task Force, *IX Special Recommendations* (Update of 2008), 7.

[42] *Ibid.*, 11. The Interpretative Note to Special Recommendation III contained also a number of other specific pieces of guidance as to how it should be implemented, including on appointing competent authorities to make freezing decisions, maintaining sanctions on those failing to comply with the freeze, etc., which are not present in UNSCR 1373 (2001); these are not, however, essential for the present chapter.

Special Recommendation III itself is hollow in terms of substance, in that it only recommends countries that implement UNSCR Resolutions, including UNSCR 1373 (2001), which they were bound by international law to do anyway. However, the Interpretive Note adds something that was not present in paragraph 1(c) of UNSCR 1373 (2001): that the trigger for the freezing action should be the determination by the state in question that *reasonable grounds or basis* exists for believing the person has committed or attempted to commit a terrorist crime (or that any of the other paragraph 1(c) criteria, such as "being owned or controlled by", were satisfied). UNSCR 1373 (2001) itself made no mention of such a threshold, yet the Interpretive Note confidently pronounces that *as a consequence* of the Resolution, the threshold should be reasonable grounds. However, there does not appear to be any objective reason why this specific threshold arises from the binding UNSCR 1373 (2001).

Finally, with respect to international co-operation, the Interpretative Note explained:

> Additionally, to ensure that effective co-operation is developed among jurisdictions, **jurisdictions should examine and give effect to, if appropriate, the actions initiated under the freezing mechanisms of other jurisdictions. When** (i) a specific notification or communication is sent and (ii) **the jurisdiction receiving the request is satisfied, according to applicable legal principles, that a requested designation is supported by reasonable grounds,** or a reasonable basis**,** to suspect or believe that the proposed designee is a terrorist, one who finances terrorism or a terrorist organisation**, the jurisdiction receiving the request must ensure that the funds or other assets of the designated person are frozen without delay**.[43]

Again, this was something of which UNSCR 1373 (2001) made no mention: the existence of a requirement to treat foreign requests for asset freezes with essentially the same threshold as that of domestically initiated freezes.

In 2012, the FATF merged it with the 40 AML Recommendations and the additional special CTF Recommendations, creating the set of standards in force today (there are now 40 recommendations in total). In the new framework, Recommendation 6 on *Targeted financial sanctions related to terrorism and terrorism financing* reads as follows:

> Countries should **implement targeted financial sanctions regimes to comply with United Nations Security Council resolutions** relating to the prevention and suppression of terrorism and terrorist financing. **The resolutions require countries to freeze without delay** the funds or other assets of, and to ensure that no funds or other assets are made available, directly or indirectly, to or for the benefit of, any person or entity either (i) designated by, or under the authority of, the United Nations Security Council under Chapter VII of the Charter of the United Nations, including in accordance with resolution 1267 (1999) and its successor resolutions; or (ii) designated by that country pursuant to resolution 1373 (2001).[44]

The text of the Recommendation made by the FATF is unambiguous: "countries should implement targeted financial sanctions regimes *to comply with United Nations Security Council resolutions*". In other words, insofar as it concerns

[43] *Ibid.*, 8.

[44] *FATF Recommendations (2012),* 11.

UNSCR 1373 (2001), the action recommended by the FATF was to establish a domestic asset freeze mechanism that satisfies the requirements laid down by the Security Council.

On this specific issue, then, like its predecessor, the new Recommendation appears to not add anything substantive on top of the requirement on the Member States to implement UNSCR 1373 (2001), already a binding obligation under international law. For instance, like Special Recommendation III, Recommendation 6 appears to be entirely neutral on the procedural design of the mechanism, including on whether states ought to pursue domestic asset freezes as part of their criminal or administrative procedural legal frameworks.

However, the new Recommendations were also accompanied by a set of Interpretative Notes.[45] For Recommendation 6, parts of the guidance remained unchanged (such as the point on "reasonable grounds"[46] and the requirement to treat foreign requests similarly as domestically initiated processes[47]), but a lot more substance was added.[48] For the purposes of this chapter, two additions were made that are particularly important.

Firstly, an addition was made to the description of the nature of the asset freezing measures:

> It should be stressed that none of the obligations in Recommendation 6 is intended to replace other measures or obligations that may already be in place for dealing with funds or other assets in the context of a criminal, civil or administrative investigation or proceeding … **Measures under Recommendation 6 may complement criminal proceedings against a designated person or entity, and be adopted by a competent authority or a court, but are not conditional upon the existence of such proceedings.** Instead, the focus of Recommendation 6 is on the preventive measures that are necessary and unique in the context of stopping the flow of funds or other assets to terrorist groups; and the use of funds or other assets by terrorist groups.[49]

Secondly, as for identifying and designating those whose assets are to be frozen, the amended Interpretative Note now provides in a similar fashion that

> **[w]hen deciding whether or not to make a … designation, countries should apply an evidentiary standard of proof of "reasonable grounds" or "reasonable basis**". For designations under resolutions 1373 (2001), the competent authority of each country will apply the legal standard of its own legal system regarding the kind and quantum of evidence for the determination that "reasonable grounds" or "reasonable basis" exist for a decision to designate a person or entity, and thus initiate an action under a freezing mechanism … **Such … designations should not be conditional upon the existence of a criminal proceeding.**[50]

[45] *Ibid.,* 29–112.

[46] *Ibid.,* 41.

[47] *Ibid.,* 39.

[48] For the full Interpretative Note on Recommendation 6, *see FATF Recommendations,* 37–44.

[49] *FATF Recommendations*, 37 (emphasis added).

[50] *FATF Recommendations*, 39 (emphasis added).

Since these were thusly accepted by the organization as the appropriate interpretation, it was no longer a major leap to adopt them in the *FATF Methodology*, a guidance document on conducting Mutual Evaluations, as one of the specific criteria against which compliance with Recommendation 6 should be assessed.[51]

In other words, since 2012, the FATF has explicitly maintained the position that in implementing UNSCR 1373 (2001), it is incumbent upon a state to ensure that (i) it can designate persons as terrorists and freeze their assets *in an administrative proceeding* and, moreover, *even in the absence of any criminal proceeding relevant to that designation* and that (ii) such designations are made on basis of an evidentiary standard of *reasonable grounds* and that (iii) foreign requests are treated equally with domestically initiated processes.[52] As described above, nothing in the text of UNSCR 1373 (2001) suggested that either of these would be required by the Security Council.

However, simultaneously with the development of the new FATF requirements, the Security Council itself decided to lend its weight behind the organization. Already in 2005, it had endorsed, in broad terms, the work of the FATF by "strongly urging" UN Members States "to implement the comprehensive, international standards embodied in the Financial Action Task Force's (FATF) Forty Recommendations on Money Laundering and the FATF Nine Special Recommendations on Terrorist Financing",[53] repeating this message of general endorsement in 2011.[54]

After the adoption of the new *FATF Recommendations*, the Security Council went further, stating in 2014 as follows:

> [The Security Council] *strongly urges* Member States to **apply the elements in FATF's Interpretive Note to Recommendation 6**, and to take note of, inter alia, related best practices for effective implementation of targeted financial sanctions related to terrorism and terrorist financing, and ***takes note*** **of the need to** have appropriate legal authorities and procedures **to apply and enforce targeted financial sanctions that are not conditional upon the existence of criminal proceedings, and to apply an evidentiary standard of proof of "reasonable grounds" or "reasonable basis"**....[55]

In other words, while falling short of actually issuing a legally binding order on the Member States to follow the letter the new Interpretative Note to Recommendation 6, the Security Council did specifically make known its approval of it and (again

[51] Financial Action Task Force, *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems* (2013) ("FATF 2013 Methodology"), 32–33: "6.2. In relation to designations pursuant to UNSCR 1373, countries should: ... (d) apply an evidentiary standard of proof of 'reasonable grounds' or 'reasonable basis' when deciding whether or not to make a designation. Such (proposals for) designations should not be conditional upon the existence of a criminal proceeding...."

[52] Again, there are also a number of other specific requirements that have been developed by the FATF in relation to asset freezes; *see in detail FATF 2013 Methodology,* 32–35; these are not, however, essentially for the present chapter and not as fundamental as the three listed here.

[53] UN Security Council Resolution 1617 (2005).

[54] UN Security Council Resolution 1989 (2011), paragraph 11.

[55] UN Security Council Resolution 2161 (2014).

without issuing a binding norm) "took note" that freezing mechanisms "needed" to be independent of criminal proceedings and based on the "reasonable basis" standard, as suggested by the FATF.

Consequently, while nominally (and uncontroversially) only recommending since 2001 that states implement a binding UN Security Council Resolution on asset freezes, the FATF had in fact decided by 2012 that it expected states to do so in a particular manner perceived by the FATF as the only appropriate approach: by establishing an *administrative procedure for freezing terrorists' assets based on the evidentiary standard of reasonable grounds where foreign requests are treated equally with domestically initiated processes*. This interpretation was then echoed with approval by the Security Council a few years later, in 2014, although in terms that fell short of issuing a binding norm of international law that would have required compliance.

4 Evolution of Domestic Asset Freezing Laws in Nordic Countries

4.1 Introduction: FATF Third and Fourth Round of Mutual Evaluations

The following account on the development of domestic laws draws significantly (though not exclusively) on the Mutual Evaluation Reports and the various follow-up reports of the Nordic countries in the third and fourth round evaluations in the FATF. These rounds were chosen because the third was the first one where Special Recommendation III was in force and the fourth round is the most recent one, still ongoing at the time of the writing of this chapter.

In the third round, countries would be placed in a so-called "regular follow-up process" following their initial Mutual Evaluation Report if their system showed significant deficiencies (as most jurisdictions did).[56] Countries in regular follow-up were required to report back in two years with progress made on those Recommendations that had not received a "Largely Compliant" (LC) or "Compliant" (C) grade. A country could then be removed from the regular follow-up when it had shown sufficient action and, in particular, when all of the six "Core Recommendations" and ten "Key Recommendations" had reached a level of either LC or C.[57] Special Recommendation III was considered a Key Recommendation.

[56] Specifically, the criteria for being placed in regular follow-up were: "a) Where any of Recommendations 1, 5, 10, 13 or Special Recommendations II or IV are rated either PC or NC; or b) Where the Plenary so decides." *See* Financial Action Task Force, *Third Round of AML/CFT Mutual Evaluations, Process and Procedures* (2009).

[57] *Ibid.,* 12–14. Core Recommendations were Recommendations 1, 5, 10, and 13 as well as Special Recommendations II and IV.

The Plenary, when assessing whether to release a country from follow-up, was however granted some discretion related to this rule: it would "retain some limited flexibility" for Key (but not Core) Recommendations "if substantial progress has also been made on the overall set of Recommendations that have been rated [Partially Compliant (PC)] or [Non-Compliant (NC)]".[58]

Additionally, countries would be directed into "enhanced follow-up" if they did not show adequate progress in the regular follow-up. The enhanced follow-up would consist of more frequent reporting to the FATF and the following additional gradual steps:

a) Sending a letter from the FATF president to the relevant minister(s) in the member jurisdiction, drawing attention to the non-compliance with the FATF Recommendations.
b) Arranging a high-level mission in the member jurisdiction to reinforce this message, where a meeting will be held with ministers and senior officials.
c) In the context of the application of Recommendation 21 by its members, issuing a formal FATF statement to the effect that the member jurisdiction is insufficiently in compliance with the FATF Recommendations, and recommending appropriate action, and considering whether additional countermeasures are required.
d) Suspending the jurisdiction's membership of the FATF until the Recommendations have been implemented.
e) Terminating the membership of the jurisdiction.[59]

In the Fourth Evaluation Round, the major change was to introduce a framework to measure not only the technical compliance of the country with the Recommendations but also the practical effectiveness of the system. For this chapter, which focuses on the interplay between the FATF and domestic laws, however, technical compliance remains the key issue also when looking at the fourth round evaluations.

Here, a similar division into "regular" and "enhanced" follow-up remained, with the same threats levied against those in the enhanced version. However, instead of the focus on getting a passing grade on "Core and Key" Recommendations to be removed from follow-up, the fourth round procedures take a different stance:

> The general expectation is for countries to have addressed most if not all of the technical compliance deficiencies by the end of the 3rd year, and the effectiveness shortcomings by the time of the follow-up assessment.[60]

In a footnote, the process document further explains:

[58] *Ibid.*, 13.

[59] *Ibid.,* 14.

[60] Financial Action Task Force, *Consolidated Process and Procedures for Mutual Evaluations and Follow-Up, "Universal Procedures"* (2019), 14.

> It is up to the Plenary to determine the extent to which its members are subject to this general expectation, depending on the member's context.[61]

In other words, the special attention given to Key Recommendations, such as the one on asset freezes, on which this chapter focuses, was no longer present (although, in a sense, a more limited set of "Core Recommendations" remain[62]).

In the following subsections, the chapter examines how each of the Nordic countries was assessed, specifically with regard to Special Recommendation III and, subsequently, Recommendation 6, in the third and fourth round evaluations.

4.2 Norway

Norway implemented UNSCR 1373 (2001) initially by a provisional decree in the immediate aftermath of the 9/11 attacks, in October 2001, followed by implementation through the Criminal Procedure Act (Lov om rettergangsmåten i straffesaker, LOV-1981-05-22-25) in 2002.[63] The amendments made to the Criminal Procedure Act empowered a prosecutor to take a decision (without needing a court order) to freeze "with just cause" the funds of a person suspected of committing or attempting to commit a terrorist act or the offence of terrorist financing.[64] From the preparatory works of the amendment, it is clear that a criminal procedural framework was deliberately chosen over an administrative one, after broad consultations.[65]

This was the state of affairs when Norway, a member of the FATF since 1991, underwent its third round of mutual evaluation in 2005. In 2005, the FATF standards consisted of the 40 FATF Recommendation and the IX Special Recommendations—with Special Recommendation III governing compliance with UNSCR 1373 (2001).

The FATF accepted the Norwegians' contention that it had made efforts to comply with Special Recommendation III but found many weaknesses in the system it had established. In issuing a "Partially Compliant"[66] rating on Norway for Special

[61] *Ibid.,* note 18.

[62] Ibid., 13–14, where the procedures mandate that the "country would be placed into enhanced follow up if it has 8 or more NC/PC ratings for technical compliance, or is rated NC/PC on any one or more of R.3, 5, 10, 11 and 20", placing particular importance therefore on these five Recommendations (which do not include Recommendation 6).

[63] *Prop. 100 L (2018 – 2019), Proposisjon til Stortinget (forslag til lovvedtak), Endringer i straffeloven mv. (terrorrelaterte folkerettslige forpliktelser m.m.),* 42.

[64] Financial Action Task Force, *Third Mutual Evaluation/Detailed Assessment Report, Anti-Money Laundering and Combating the Financing of Terrorism, Norway* (2005).

[65] *Ot.prp. nr. 61 (2001-2002), Om lov om endringer i straffeloven og straffeprosessloven mv. (lovtiltak mot terrorisme – gjennomføring av FN-konvensjonen 9. desember 1999 om bekjempelse av finansiering av terrorisme og FNs sikkerhetsråds resolusjon 1373 28. September 2001)*, 55–56.

[66] The scale used by the FATF is "Non-Compliant", "Partially Compliant", "Largely Compliant" and "Compliant".

Recommendation III, the FATF summarized the main shortcomings with regard to UNSCR 1373 (2001) as relating to the lack of measures to monitor compliance, lack of a clear basis for humanitarian exemption under the asset freeze law, limitation on the scope of the measures due to the narrow definition of the concept of "terrorism financing" in Norwegian law, lack of communication within the government and lack of guidance towards economic operators.[67]

In the paragraphs leading to the summary, the Report also expresses some dissatisfaction on the overall nature of the freezing mechanism: "The underlying rationale for [UNSCR 1373 (2001) and [Special Recommendation III] is to implement measures that are both of a preventive and deterrent nature; however, this approach is lacking in the Norwegian system."[68] Objections presumably raised by Norwegians on the potential human rights implications of ordering asset freezes unconnected to criminal proceedings were not accepted:

> Freezing orders in the context of terrorist financing may raise sensitive issues, particularly concerning human rights. However, proper implementation of both [UNSCR 1373 (2001)] and Special Recommendation III can be achieved (and has been achieved by countries with legal systems similar to Norway's) while still meeting international obligations concerning the respect for human rights and the fight against terrorism.[69]

However, the fact that the asset freezes occurred as part of Norway's criminal procedural framework was not rejected as such, and since no mention of the procedural choice is made in the "Summary of factors" underlying the Partially Compliant rating, Norway would have been well in its rights to believe that the mechanism it had in place was in principle capable of satisfying Special Recommendation III once the gaps relating to compliance monitoring, humanitarian exemptions, the definition of terrorism financing and information sharing were addressed. In 2009, the FATF assessed the progress Norway had made in a "Follow-Up Report" on the Mutual Evaluation,[70] which finally concluded (grudgingly[71])

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[67] Financial Action Task Force, *Third Mutual Evaluation/Detailed Assessment Report, Anti-Money Laundering and Combating the Financing of Terrorism, Norway* (2005), Compliance with Special Recommendation III, Summary of factors underlying rating, 47.

[68] *Ibid.,* 47.

[69] *Ibid.* These

[70] Financial Action Task Force, *Mutual Evaluation Fourth Follow-Up Report, Anti-Money-laundering and Combating the Financing of Terrorism, Norway* (2009), 15–17, where these correspond with the "deficiencies" Norway had been expected to address.

[71] *Ibid.*, 4–5: "Overall, Norway has reached a satisfactory level of compliance with all core Recommendations and eight of the key Recommendations, but has not reached a satisfactory level of compliance with two of the key Recommendations – SR III and SR I ... The mutual evaluation follow-up procedures indicate that, for a country to have taken sufficient action to be considered for removal from the process, it must have an effective AML/CFT system in force, under which it has implemented all core and key Recommendations at a level essentially equivalent to C or LC, taking into account that there would be no re-rating. The Plenary does, however, retain some limited flexibility with regard to the key Recommendations if substantial progress has also been made on the overall set of Recommendations that have been rated PC or NC ... Consequently, it is

that Norway had made sufficient progress overall to be released from the follow-up procedure, although deficiencies on Special Recommendation III remained.

The first phase of the next evaluation round of Norway culminated when a new Mutual Evaluation Report was approved by the FATF Plenary in October 2014.[72] This time, the standards against which they were measured were the new 2012 *FATF Recommendations*, where the recommendation to comply with UNSCR 1373 (2001) was contained in Recommendation 6. The underlying laws in Norway were largely unchanged, although additional guidance had been issued towards financial institutions.[73]

In line with the new interpretations adapted and the new *FATF Methodology*, the Norway 2014 MER no longer beats around the bush:

> Norway has sought to implement targeted financial sanctions pursuant to UNSCR 1373 through a mechanism to freeze terrorist assets in the [Criminal Procedure Act] . . . Norway does have a mechanism which allows authorities to freeze without delay any assets of a natural or legal person suspected of terrorism offences, or an enterprise directly or indirectly owned or controlled by a suspected person . . . **However, under this mechanism, a freezing order can only able be made as part of an ongoing criminal investigation** . . . Therefore, while this mechanism provides for additional terrorist asset freezing, it does not implement all aspects of the targeted financial sanctions pursuant to UNSCR 1373 as required by Recommendation 6. **Norway cannot consider requests for designation by foreign countries,** although the asset freezing mechanism may be used when acting upon a rogatory letter from another country if Norwegian authorities open an investigation.[74]

In other words, whereas the connection of asset freezes to ongoing criminal proceedings was mentioned merely as a mellow *obiter dictum* criticism in 2005, by 2014, it was among the main reasons that Norway is seen to not comply adequately with Recommendation 6—despite the admission that the country was able to freeze "without delay" funds of those suspected of terrorism, as required by UNSCR 1373 (2001).[75]

All available evidence suggests that the Norwegians have never shared the FATF's position that the effective implementation of UNSCR 1373 (2001) is only achievable through an administrative freezing mechanism. Norway made a conscious decision to adopt a different approach in 2002, defended this aspect of their mechanism successfully in the 2005 Mutual Evaluation and entered the 2014 Evaluation with no indication that its position had changed. They were never

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recommended that **this would be an appropriate circumstance for the Plenary to exercise its flexibility and remove Norway from the regular follow up process**. . ." (emphasis added).

[72] Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures, Norway, Mutual Evaluation Report* (2014), http://www.fatf-gafi.org/publications/mutualevaluations.

[73] *Ibid.*, 150.

[74] *Ibid.*, 150–151 (emphasis added).

[75] Due to this and many other perceived shortcomings, Norway is ultimately placed in an "enhanced follow-up process", requiring it to report back frequently on the progress it has made.

going to prevail, however, against the explicit criterion adopted in evaluation *Methodology*, stating that there was no acceptable alternative.

Ultimately, the Norwegian Government appears to have succumbed. In 2019, it presented a bill to Parliament for the modification of several terrorism-related laws, including the provisions governing domestic asset freezes pursuant to UNSCR 1373 (2001).[76] It proposes moving the mechanism from the scope of the Criminal Procedure Act to a section of the Police Act that authorizes certain types of preventative measures in the absence of (typically, prior to) any formal criminal proceeding.

The proposal steadfastly maintains that there is no binding legal obligation on Norway to change its ways. It also continues to hold the view that information gathering and assessment required to identify persons to target is precisely the kind of work that is most effectively and expertly conducted in the framework of criminal investigations or proceedings. Moreover, the government contends that the execution of asset freezes through these tested and capable institutions and processes would best serve to ensure that the rights of the persons targeted are appropriately respected and that there is proper public accountability for the actions taken. The need to look for alternative solutions, the government pointedly states, is born only out of the criticism levied against Norway by the FATF in the 2014 MER.[77]

4.3 Finland

Finland, also a member of the FATF since 1991, was assessed in the third round of FATF Mutual Evaluation in 2007, two years after Norway. Targeted sanctions, including those pursuant to UNSCR 1373 (2001), were implemented in Finland primarily through EU-level regulations. The EU maintained a joint list of persons involved in terrorism, as required by UNSCR 1373 (2001), and their funds were frozen through a directly applicable EU regulation. Decisions on who to target were ultimately made by the EU Council.[78]

However, the EU-level mechanism had, from the perspective of the Mutual Evaluation of Finland, one crucial flaw: it did not apply to persons within the Union. The EU was perceived to lack jurisdiction to impose binding asset freezing obligations within the Union as its powers related to targeted sanctions derived from its foreign and security policy competence. Due to this reason (and the consequent inability of Finland to consider de-listing requests or freezing requests from third countries, the scope of the criminalization of "terrorism financing", the scope of the definition of "funds" in the EU regulations and a lack of guidance to economic

[76] *Prop. 100 L (2018 – 2019), supra* note 61, esp. pp. 44–45.

[77] *Ibid.,* Sections 5.3.4. and 5.11.3.

[78] Financial Action Task Force, *Third Mutual Evaluation Report, Anti-Money Laundering and Combating the Financing of Terrorism, Finland* (2007), 52.

operators), Finland, like Norway, was assigned a "Partially Compliant" grade in its 2009 Mutual Evaluation Report.[79]

For Finland, this marked the beginning of a lengthy process. It initially held out from even attempting to domestically address this deficiency because, as part of the Lisbon Treaty, which entered into force in 2009, the EU was granted competence to impose "internal" asset freezes. However, for reasons beyond this chapter, the EU has been to this day unable to agree on the specifics of the mechanism. The Member States that wish to freeze the assets of persons within their borders must therefore rely on their domestic laws.

The FATF was therefore unsatisfied. The deficiencies in its AML/CTF system identified in the 2009 MER were deemed serious enough for Finland to be placed in a lengthy follow-up process, which ultimately involved as many as *nine* follow-up reports to the FATF.[80] In 2012, the Finnish Government determined it was no longer feasible for it to wait for an EU-level solution. A bill was submitted to Parliament to enact an *Act on the Freezing of Funds with a view to Combatting Terrorism* (laki varojen jäädyttämisestä terrorismin torjumiseksi (325/2013), "Freezing Act"), which was approved, after some debate, in May 2013.[81]

The Act empowered the Finnish National Bureau of Investigation (NBI), a national-level police agency, to order the freezing of funds of anyone who, "with reasonable cause", was suspected of involvement in a terrorist crime or was charged or convicted of such an offence, as well as certain associated persons and entities. Police authorities and prosecutors in Finland were required to notify the NBI whenever they deemed there to be a reasonable cause to suspect someone. The threshold of "reasonable cause" was intended to be the same as in criminal procedural law: police authorities are required by law to initiate a criminal investigation on any person suspected, with reasonable cause, of an offence.[82]

The Act also enabled the NBI to order a freeze on the basis of a foreign request; here, however, the threshold was set differently: the requesting state had to show that there was an "ongoing investigation on the basis of credible evidence" of an act that would be classified as a terrorist offence under the Finnish Criminal Code (rikoslaki (39/1889)).[83]

Finland returned to the FATF in 2013, reporting on the entry into force of the Freezing Act and its subsequent capability to domestically designate terrorists as required under UNSCR 1373 (2001) and recommended by *Special Recommendation III*. Reception at the FATF, however, was less than enthusiastic. In its overall conclusion, the FATF states: "While Finland recently introduced the Act on the

[79] *Ibid.,* 53–54 and 57.

[80] https://www.fatf-gafi.org/countries/#Finland.

[81] Government Proposal HE 61/2012 vp. The author of this chapter was a legal officer in the Finnish Foreign Ministry at this time, and secretary to the inter-department working group charged with reviewing the issue and ultimately drafting the proposal to Parliament on required laws.

[82] *Ibid.,* p. 20.

[83] *Act on the Freezing of Assets with a view to Combating Terrorism (325/2013),* Section 3.

Freezing of Funds with a view to Combating Terrorism, 2013, several of its provisions do not comply with the FATF requirements. As a result, Finland's level of compliance with [Special Recommendation III] is still at [Partially Compliant]."[84] This included the higher threshold for foreign requests.[85] Nevertheless, as it had with Norway, the Plenary decided grudgingly to release Finland from the follow-up process despite deficiencies, including Special Recommendation III.[86]

Finland's next evaluation, this time under the new *FATF Recommendations* and the 2013 *Methodology*, was conducted in 2019. For reasons that are not clear from the official documentation, though perhaps should be credited to more persuasive argumentation by the Finnish delegation,[87] the FATF had grown much happier with the Finnish system by the time the new Mutual Evaluation Report was approved: Finland's rating with the new Recommendation 6 was deemed to be "Largely Compliant" with only "minor shortcomings", despite no apparent changes in the mechanism since 2013, when it was still deemed to be riddled with deficiencies.[88] Among these remaining shortcomings, preventing Finland from scoring the fully "Compliant" grade was the threshold for foreign requests.

4.4 Sweden

Sweden was evaluated by the FATF in 2006. In terms of UNSCR 1373, paragraph 1 (c), Sweden's system suffered from identical flaws as Finland's: there was no legal basis to freeze the assets of "domestic" terrorists.[89] There had been a proposal in 2002 to establish a domestic mechanism, but the proposal was rejected—possibly due to the introduction of the EU-wide measures referred to above.

In its defence in the 2006 FATF discussion, Sweden referred to the prospect of amendments to the EU Treaties that would establish competence for the EU to freeze funds within the Union and its own active support for such amendments.[90] It also pointed out that it had launched domestically an official commission tasked with proposing a complete overhaul of its domestic sanctions legislation; the report was still being prepared when the 2008 Mutual Evaluation Report was approved.[91] Not

[84] Financial Action Task Force, *9th Follow-up Report, Mutual Evaluation of Finland* (2013), 29.
[85] *Ibid.,* 25.
[86] *Ibid.*, 7.
[87] Coincidentally, unlike in 2013, the author of this chapter was no longer in charge of making those arguments to the FATF in 2019.
[88] Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures, Finland, Mutual Evaluation Report* (2019), 167.
[89] Financial Action Task Force, *Third Mutual Evaluation/Detailed Assessment Report, Anti-Money Laundering and Combating the Financing of Terrorism, Sweden* (2006), 42–47.
[90] *Ibid.*, 42–43.
[91] *Ibid.* 43.

surprisingly, the FATF issued a grade of only "Partially Compliant" for Special Recommendation III,[92] and overall, Sweden was placed in the "follow-up process" requiring it to update the FATF on its progress.

When Sweden's fourth follow-up report to the 2006 MER was debated in the FATF in 2010, nothing much of relevance had changed for Special Recommendation III. Sweden reported that any domestic processes to address the gaps had been put on hold since the Treaty of Lisbon, which had entered into force in December 2009, had established EU-level competence to freeze the assets of "internal" terrorists. However, the EU had failed to exercise this competence, and therefore Sweden was still unable to point to either a domestic or EU-level mechanism that would have addressed the gap. The FATF reprimanded Sweden:

> Sweden has chosen to only rely on common EU action to adopt restrictive measures, including the freezing of funds of terrorism suspects, although it has explored possibilities to take national measures . . . The new EU treaty framework provides a hitherto not existing legal ground to adopt legislation at the EU level which would create the possibility to adopt freezing measures also against EU internals. According to the new treaty, the initiative to adopt such legislation belongs to the EU Commission, and Sweden trusts that it will be adopted in due course . . . Nevertheless, **under the old or new Treaty framework, as other EU member states have done, Sweden should and could have taken domestic measures to implement requirements not covered on the EU level. This shortcoming remains.**

However, as Sweden had made significant progress on most other areas of concern, the Plenary decided to release Sweden from the follow-up process in 2010 using its "flexibility", despite the continuing deficiencies with regard to Special Recommendation III.[93]

The next full round of evaluation of Sweden, this time under the new *FATF Recommendation* and the associated *Methodology*, was conducted in 2017. The 2017 MER notes that Sweden had not adopted any new legislation to address the gaps and was again afforded a "Partially Compliant" rating for Recommendation 6.[94] Sweden was placed in what is known as "enhanced follow-up process", described by the organization itself as a process that "based on the FATF's traditional policy that deals with members with significant deficiencies (for technical compliance or effectiveness) in their AML/CFT systems, and involves a more intensive process of follow-up" than the standard "follow-up process".[95] In 2018, after their first follow-up report, they were partially absolved and moved to the regular follow-up.

There no was concrete progress on Recommendation 6 to report. However, the tone of Sweden's engagement in it had changed. Whereas on earlier occasions it had mostly sought reliance on prospective changes in EU-level regulations, there was now an admission that national measures would be needed. Sweden had developed

[92] *Ibid.*, 47.

[93] *Ibid.*, 5.

[94] Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures, Sweden, Mutual Evaluation Report* (2017), 150–154.

[95] *Ibid*, note 1.

yet another draft legislative proposal, which had been submitted first to the Minister for Foreign Affairs and thereafter sent out for public consultation.[96]

The current proposal[97] recommends that public prosecutors be granted the power to order an asset freeze on the basis of reasonable grounds to suspect someone of having committed, or attempted to commit, a terrorist offence, as defined in Swedish law, and to give effect to foreign requests. The memorandum, while clearly based on extensive research and proposing a sophisticated asset freezing regime, is not always able to hide its lack of enthusiasm on what it has been tasked to do—for instance when, in assessing the overall impact of the proposed legislation, it notes:

> The proposed law on the freezing of assets is intended to ensure that Sweden fulfils its obligations under Resolution 1373 (2001) in full. Resolution 1373 (2001) in turn aims to prevent terrorism and terrorist financing. Whether freezing measures really prevent terrorism and terrorist attacks is not entirely easy to judge. However, the international community has considered that such measures, in combination with many others, are necessary in the fight against terrorism.[98]

4.5 Denmark

Denmark's third round of Mutual Evaluation Report was approved by the FATF in 2006.[99] For Special Recommendation III, Denmark relied on the same EU level as the other Nordic EU members, which enabled freezing the assets of terrorists outside the Union. For those falling within the scope of the EU measures, including terrorists within the EU, Denmark informed the FATF that it had in place another measure.

Its Criminal Code (Straffeloven), and criminal procedure provided for the "preventive confiscation of any assets, including funds and objects, which may be applied to commit crimes" and the freezing of assets "on the basis that there are reasonable grounds to suspect an individual committed an offence and seizure is necessary to secure evidence or the claim for confiscation (including preventive confiscation)".[100] This appeared to satisfy the "reasonable grounds" threshold requirement.[101]

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[96] *Ibid.*, 9.

[97] (SOU 2018:27), *Ekonomiska sanktioner mot terrorism,* Betänkande av 2015 års sanktionslagsutredning (2018).

[98] *Ibid.*, 157 (translation by the author of this chapter). The original text in Swedish reads: "Den föreslagna lagen om frysning av tillgångar syftar till att Sverige ska uppfylla sina förpliktelser enligt resolution 1373 (2001) fullt ut. Resolution 1373 (2001) syftar i sin tur till att förhindra terrorism och finansiering av terrorism. Huruvida frysningsåtgärder verkligen förhindrar terrorism och terroristattentat är inte helt lätt att bedöma. Det internationella samfundet har emellertid ansett att sådana åtgärder, i kombination med många andra, är nödvändiga I kampen mot terrorism."

[99] Financial Action Task Force, *Third Mutual Evaluation Report in Anti-Money Laundering And Combating the Financing of Terrorism, Kingdom of Denmark* (2006).

[100] *Ibid.*, 65.

[101] *Ibid.,* 65–66.

However, the Report noted that in Denmark, "there is not a basis for (nor policy in favour of) seizing funds collected/received, etc. to support terrorists or terrorist organizations for non-terrorism related activities". Under the domestic measures, therefore, "Denmark may thus not freeze all funds and assets of persons who commit or attempt to commit or participate in or facilitate the commission of terrorist acts, but only those funds that will be used for terrorism purposes". The Report summarizes the Danish defence for this as follows:

> Danish authorities explained that they view the freezing requirements of [UNSCR 1373 (2001)] as covering only assets that will be used in one way or another for terrorism purposes, and would not act to freeze assets for other purposes outside of the obligations with respect to persons who have been listed for whom the wider obligation is applied. They believe that Article 1(c) of [UNSCR 1373 (2001) must be read in the context of Article 8 of the Terrorist Financing Convention which requires measures to identify, detect, freeze or seize "any funds used or allocated for the purpose of committing [a terrorist act]". The Danish view is that the condition of a connection to a terrorist act must be taken into account in interpreting Article 1(c) of UNSCR 1373 (2001). **They state that outside situations where there is a direct legal basis in a UN Resolution or EU regulation, freezing assets that are beyond those that might in one way or another be used for terrorism purposes might conflict with the Danish Constitution or the European Convention for the Protection of Human Rights and Fundamental Freedoms**. **They believe their interpretation is consistent with the principles on the law of property set forth in Section 73 of the Danish Constitution and the first Additional Protocol to the European Convention for the Protection of Human Rights.**[102]

The FATF was sceptical:

> Although Danish authorities have a different view, [UNSCR 1373 (2001)] appears to go further than the Terrorist Financing Convention with a requirement that all resources of those who participate in or facilitate the commission of a terrorist act (including by collecting or providing funds), not merely funds that are intended for use in the commission of the crime be frozen.[103]

Otherwise, they saw no issue with the domestic mechanism that Denmark had established: "These mechanisms, with [this] one exception, appear to meet the requirements of obligations imposed by S/RES/1373."[104] Denmark was rated "Partially Compliant" for Special Recommendation III.[105] There were other Key Recommendations and three Core Recommendations that were also below bar (all rated PC),[106] sending Denmark into regular follow-up.

In 2010, Denmark applied to be removed from the follow-up procedure.[107] For Special Recommendation III, the follow-up report hesitates due to a change in the scope of the criminalization of the offence of financing terrorism in Danish law:

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[102] *Ibid.*, 66.

[103] *Ibid*.

[104] *Ibid.*

[105] *Ibid*, 64–71.

[106] *Ibid.,* 188–199.

[107] Financial Action Task Force, *Mutual Evaluation, Third Follow-up Report, Anti-Money Laundering And Combating the Financing of Terrorism, Kingdom of Denmark* (2010).

> [Denmark] stated [in 2006] that, outside situations where there is a direct legal basis in a UN resolution or EU regulation, freezing assets that are beyond those intended for use for terrorist purposes might conflict with the Danish Constitution or the European Convention for the Protection of Human Rights and Fundamental Freedoms. The deficiency relates to this limitation in how Denmark's alternative freezing mechanism may be applied...
>
> Denmark's MER considered [the] alternative asset freezing mechanism broadly adequate to meet Denmark's SRIII obligations in the circumstances where the EU Regulation is inapplicable. However, the MER highlighted as a deficiency that there is not a basis for seizing funds not intended to support terrorist acts by terrorists or terrorist organisations ... The changes to the scope of the offence corresponding to terrorist financing appear sufficient to address the technical deficiency noted in the MER, although its practical application has yet to be fully tested as a standalone asset freezing mechanism. However, the **FATF's understanding and application of SRIII has developed since 2006, and it is not clear that the preventive confiscation mechanism should be considered an adequate substitute** for asset freezing powers in those cases to which the EU regulation does not apply.[108]

The Report concluded that because of this (and some uncertainty as to the EU-level mechanism), Denmark could not be given a better grade than "Partially Compliant".[109] On all other Core and Key Recommendations, Denmark was given a passing grade. Again, the Plenary decided to exercise its discretion and relieve Denmark from follow-up, given that Special Recommendation III was the only key deficiency and the gap was largely due to the "development in the FATF's understanding" of its own Recommendation.[110]

By the fourth round evaluation of Denmark, in 2017, the tone has changed:

> The Danish authorities have advised that they would rely on court-based powers under the criminal justice framework ... However, this is untested so it is unclear whether the various statutory criteria to which they are subject would be treated as met by the courts by the fact of listing alone, or whether evidence of a link to actual or expected criminality would be required. Even if these powers are applicable in this context, the use of them would be dependent on first receiving intelligence ... in order to identify the relevant assets.
>
> ...the absence of any specific measures to freeze the assets of listed EU internals constitute [s a] significant deficienc[y] in meeting [criteria laid down in the *2013 Methodology]* which are fundamental components of [Recommendation 6] There are also significant deficiencies in the absence of formal mechanisms to designate or seek designation of individuals not listed by the UN....[111]

There is no more hesitance as to whether the confiscation procedures within the criminal law framework might be satisfactory. There are also no longer references to any Danish qualms over the compatibility of comprehensive administrative asset freezes and fundamental rights—whether because the Danes no longer saw this as a problem or, perhaps more likely, because the authors of the Report no longer

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[108] *Ibid.*, 19–20.

[109] *Ibid.*, 21.

[110] *Ibid.* 4–5.

[111] Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures, Denmark, Mutual Evaluation Report* (2017), 151–157.

considered them noteworthy, given yet further developments in the FATF's "understanding" of Recommendation 6.

Denmark received a resounding "Partially Compliant" rating on Recommendation 6 as well as 18 other Recommendations and was ushered into enhanced follow-up. At the time of writing, they had produced two "enhanced follow-up reports", in 2018[112] and 2019,[113] the first of which improved grades on nine of the problem recommendations and the second on three, leaving six to be addressed and Denmark still in enhanced follow-up.

For Recommendations 6, the first follow-up report remained silent on any movement on a domestic asset freezing mechanism. The second report hinted at what is to come: "On [Recommendation 6], initial steps have been taken to establish a national procedure to implement [UNSCR 1373 (2001)]."[114]

4.6 Iceland

Iceland's third evaluation round report was approved in the FATF Plenary in 2006.[115] Of all the Nordic countries, it was the only one graded entirely "Non-compliant" for Special Recommendation III. The Report was deeply critical:

> Iceland does not have effective laws and procedures to give effect to freezing designations in the context of [UNSCR 1373 (2001)]. While [a Government "Announcement"] creates a basic legal framework give effect to [UNSCR 1373 (2001)], [it] does not fully cover all persons who commit or attempt to commit terrorist acts . . . As a practical matter . . . the only lists that can be enforced are those [issued by UN Security Council under resolution 1267 (1999)].
>
> . . .[A] domestic mechanism to enact [UNSCR 1373 (2001) should be implemented to be able to designate terrorists at a national level as well as to give effect to designations and requests for freezing assets from other countries.[116]

As Iceland would have been preparing to report back to the FATF on a follow-up to the Mutual Evaluation, a devasting financial crisis took hold of the country as all three of its major private banks went into default and derailed the country, putting it in severe economic depression and political unrest. Consequently, the next time

[112] Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures, Denmark, 1st Enhanced Follow-up Report & Technical Compliance Re-Rating* (2018).

[113] Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures, Denmark, 2nd Enhanced Follow-up Report & Technical Compliance Re-Rating* (2019).

[114] *Ibid.*, 4.

[115] Financial Action Task Force, *Third Mutual Evaluation Report, Anti-Money Laundering and Combating the Financing of Terrorism, Iceland* (2006).

[116] *Ibid.*, 36–39.

Iceland took centre stage, the FATF was in the fourth evaluation round, and Iceland's report was approved in the Plenary in 2018.[117]

Some improvement had been made since 2006 on what was now Recommendation 6, but largely not as it related to UNSCR 1373 (2001). Here, Iceland's system still left much to be desired:

> Iceland has no mechanism in place to identify targets for domestic designations ... Iceland considers adoption of EU designations, but there is no explicit timeframe for consideration or requirement to act promptly ... Regulation on Actions Against Terrorism ... requires the Minister for Foreign Affairs to consult with the DPO as to whether there is a reasonable basis to give effect to a designation request from another country.[118]

Overall, the fourth round evaluation results for Iceland were nearly catastrophic. Out of the ten "effectiveness" measures, which range from Low to Substantial, it received six "Lows" and only one "Substantial".[119] A staggering 22 of the 40 Recommendations were rated below a passing grade. Iceland's follow-up report in June 2019 was an improvement, but 12 below grade recommendations remained.[120] Recommendation 6, too, remained at "Partially Compliant"; however, Iceland, too, was able to report that it had, finally, put forward a legislative proposal to establish a domestic asset freeze mechanism.[121]

Things were not looking up to Iceland overall, however. In October, the FATF announced that Iceland had "strategic AML/CFT deficiencies" in its system and would be placed on the list of "Monitored Jurisdictions".[122] Iceland is in the process of executing an "Action Plan", devised jointly with the FATF, to address the most significant of these deficiencies. The content of the Action Plan is not public.

5 Conclusions

5.1 Some General Observations

At long last, it is time to return to the questions that were raised in the introduction to this chapter. Firstly, why did the Nordic countries, famous for their respect for international law and support of multilateral institutions, resist the full implementation of paragraph 1(c) of UNCSR 1373 (2001), and the FATF interpretation of it, for

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[117] Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures, Iceland, Mutual Evaluation Report,* (2018).

[118] *Ibid.,* 128.

[119] *Ibid.,* 11.

[120] Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures, Iceland, Follow-up Report & Technical Compliance Re-Rating* (2019), 12.

[121] *Ibid.*

[122] *Outcomes of FATF Plenary, 16–18 October 2019,* http://www.fatf-gafi.org/publications/fatfgeneral/documents/outcomes-plenary-october-2019.html.

so long? Secondly, what can we say of the reasons that seem to have led each of them, to varying degrees, to move closer to full implementation in the past few years? And, finally, how do the answers to these two questions reflect on the competing "coercive" and "voluntarist" explanations of FATF's global influence on the development of domestic laws in jurisdictions around the world?

The intention of the previous section was to follow the advice of *Nance*, who suggested that in order to meaningfully comment on the FATF's influence, one should engage in "careful process tracing" of the standard(s) being examined.[123] This is not always easy to do since much of the deliberations and debates underlying the FATF's work, in terms of both developing its standards and the Mutual Evaluations, is not public. FATF public documents do not usually reveal who proposed what, who opposed it on what grounds, whether one side won outright or if a compromise was struck. The FATF, with its consensus-based decision-making, appears mostly to speak with one voice in public. However, there are some sources available that do provide fruitful insights. Firstly, in some cases, paragraphs in publicly available documentation, in particular in Mutual Evaluation and Follow-up Reports, while written in a matter-of-factly tone, betray an underlying disagreement among participants to the Evaluation. Secondly, domestic sources of the Member States sometimes offer a glimpse of critical national views on the FATF doctrine. Finally, other sources and developments external to the FATF occasionally offer clues as to the originator or proponent of a particular FATF standard or interpretation.

5.2 *Reasons for Nordic Resistance*

The opposition of the Nordic countries to the FATF asset freezing standard was relentless for more than a decade. Even after being battered, to varying extents, in the initial mutual evaluation reports in the third round, four of the five countries made no concrete steps to comply during the entire lengthy follow-up process. The only exception was Finland, which enacted the *Freezing Act*, but only in 2013, after having spent six years in the punishing follow-up process, submitting no less than nine follow-up reports along the way. All four of the Nordic countries that eventually exited the follow-up did so with Special Recommendation III as essentially the only Core or Key Recommendation not satisfactorily implemented,[124] in each case requiring the Plenary to exercise its "flexibility" towards FATF requirements to

[123] *Supra*, note 29.

[124] In Norway's case, it was determined that also Special Recommendation I still had deficiencies, but the Report noted "that the main concerns relating to SR I are with regard to the insufficient implementation of SR III, and so the underlying issues are the same", and in Denmark's case, Recommendation 35 had problems, but the Report noted that "Plenary may nevertheless decide that on a risk-sensitive basis R. 35 should be considered equivalent to LC"; *see* Financial Action Task Force, *Mutual Evaluation Fourth Follow-Up Report, Anti-Money-laundering and Combating the Financing of Terrorism, Norway* (2009), 4, and Financial Action Task Force, *Mutual Evaluation,*

see the countries released. This prolonged resistance to one specific standard is striking, given the importance these countries typically place on adherence to international norms and to co-operation within international organizations, even when this entails compromise.

The explanation of why the Nordics were so reluctant to implement the administrative asset freeze standard begins with its origins. As noted, the United Nations Security Council adopted UNSCR 1373 (2001) almost instantaneously after the September 11 attacks. The United States drafted the resolution, and reportedly, almost no modifications were made to this US draft by other Security Council members.[125] Such unanimity is rare, but in this case understandable, given the international sympathy towards the United States and the equally broad revulsion over the cruelty of attacks it had suffered.

For the United States, a system of asset freezing outside the criminal procedural framework was nothing new. Under the *International Economic Power Act (IEEPA)*, the President was authorized to impose unilateral targeted sanctions, typically asset freezes, in situations where the President determined key US security interests to be in jeopardy.[126] While the source of the underlying threat had to be external, the competencies granted under the *IEEPA* extended to certain domestic persons connected to that threat, for instance those acting on behalf of a foreign terrorist organization.

In fact, President Bush had invoked the IEEPA in response to the September 11 attacks just a few days before the adoption of UNSCR 1373 (2001) with *Executive Order 13224.*[127] The Executive Order authorized, among other things, the freezing of assets of persons the Treasury and State Departments determined to have committed, or pose a significant risk of committing, acts of terrorism, as well as persons associated with them.

In the third round of mutual evaluations of the FATF, in 2006, the United States' compliance with UNSCR 1373 (2001) was praised extensively:

> **Overall, the U.S. has built a solid, well-structured system aimed at effectively implementing the UN sanctions under [UNSCR 1373 (2001)].** The statistics on the frozen terrorist related assets speak for themselves. Indeed, the measures in place correspond to most recommendations set out in the FATF Best Practices Paper for SR III. Combating terrorism in all its facets and targeting particularly the financial aspects obviously being a prime concern in U.S. policy, it has engaged substantive resources to cut off the financial basis from terrorist entities and activities. The [Office of Foreign Assets Control (OFAC)]

Third Follow-up Report, Anti-Money Laundering And Combating the Financing of Terrorism, Kingdom of Denmark (2010), 5, respectively.

[125] Stiles and Thayne (2006), p. 158.

[126] *International Emergency Economic Powers Act,* United States Public Law 95–223 (28.12.1977).

[127] *Executive Order 13224 of September 25, 2001, Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism.*

> plays a central role in this process. This authority has powerful means, both legal and structural, at its disposal to fulfil its mission and it uses them quite adequately, as the figures show.[128]

Compare the apparent ease with which the US complied with the Special Recommendation with, for instance, the summary by MONEYVAL, the European "regional FATF-style body", of the third round of evaluation among its 28 Member States:

> **Countries performed poorly in respect of [Special Recommendation III], with 24 countries (82.7 %) receiving ratings in the lower range and none were rated as "compliant". More than a quarter of MONEYVAL countries were found to be "non-compliant".** This is problematic in terms of the general readiness of jurisdictions to freeze terrorist assets.[129]

Moreover, no other permanent member of the Security Council had appropriate measures in place for the domestic implementation of paragraph 1(c) of UNSCR 1373 (2001) in the third round of evaluations—except for the United Kingdom, which had adopted appropriate domestic legislation that entered into force just as its mutual evaluation process was starting in late 2006.[130]

In light of the above, it is no stretch to say that paragraph 1(c) of UNSCR 1373 (2001), drafted by the United States, reflected the content and concepts of US domestic law, which were, broadly speaking, unfamiliar in other jurisdictions across the world. The unfamiliarity of the concept of domestic administrative asset freezes was surely one of the primary reasons the Nordic countries so resisted it.[131] Adopting the new standard would have required a significant overhaul of the way these countries had traditionally approached counterterrorism financing, and

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[128] Financial Action Task Force, *Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism, United States of America* (2006) 58–59.

[129] MONEYVAL, *3rd Round of Mutual Evaluation Reports, Horizontal Review,* (2010). The 28 Members assessed were Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Georgia, Hungary, Latvia, Liechtenstein, Lithuania, Malta, Moldova, Montenegro, Monaco, Poland, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, "the former Yugoslav Republic of Macedonia", and Ukraine, and in addition Israel.

[130] For the UK, see Financial Action Task Force, *Third Mutual Evaluation Report, Anti-money Laundering and Combating the Financing of Terrorism, the United Kingdom of Great Britain and Northern Ireland* (2007), 64–77, and for the other Permanent Members of the Security Council, see Financial Action Task Force, *Third Mutual Evaluation Report, Anti-money Laundering and Combating the Financing of Terrorism, People's Republic of China* (2007), 41–45; Groupe d'Action Financier, *Rapport d'Évaluation Mutuelle, Lutte Contre le Blanchiment de Capitaux et le Financement du Terrorism, France* (2011), 147–172; and Financial Action Task Force, *Second Mutual Evaluation Report, Anti-money Laundering and Combating the Financing of Terrorism, Russian Federation* (2008), 46–53.

[131] The first Finnish domestic memorandum contemplating the establishment of an administrative asset freezing system says so explicitly, noting that "[t] he working group is of the opinion that a preventative administrative asset freezing mechanism is *prima facie* an element foreign to the Finnish legal system" (translation by the author of this chapter), *see* Ulkoasiainministeriö, *Terroristivarojen jäädyttämistä koskeva hallinnollinen järjestelmä,* työryhmämietintö (2009), 10.

understandably they were reluctant to accept that they needed to do so. More specifically, they framed their resistance in both constitutional and practical terms.

The constitutional opposition arose from concerns over the compatibility of the standard with fundamental rights. The Danish evaluation process provides the clearest written example of this argument: as we saw above, they fought admirably to convince the FATF that a more traditional asset freezing mechanism, such as the one envisaged by the Terrorist Financing Convention, was to be preferred and that the alternative administrative mechanism advocated by the FATF did not appear to be consistent with the Danish Constitution, the European Convention for Human Rights and its first Additional Protocol.[132]

It seems safe to assume that the Norwegians, as well, explicitly raised human rights concerns during their evaluation since their third round report had to explicitly reject those concerns, noting, with a hint of arrogance, that the "proper implementation of both [UNSCR 1373 (2001)] and Special Recommendation III can be achieved (and has been achieved by countries with legal systems similar to Norway's) while still meeting international obligations concerning the respect for human rights and the fight against terrorism".[133]

As for the practical reasons for opposing the standard, the Nordics appeared to be authentically unconvinced that the mechanism would add much in terms of the effectiveness of their counterterrorism activities and therefore found it redundant, given that there are other, more "traditional" measures already in place.

There is ample evidence of this scepticism. In 2009, when Finland was contemplating establishing an administrative freezing mechanism for the first time, triggered by the FATF evaluation, the preparatory working group stated in no uncertain terms:

> The Working Group is of the opinion that an administrative freezing mechanism would not significantly improve the ability of domestic law enforcement to prevent terrorism financing. We believe that existing powers and processes under anti-money laundering laws are adequate for these purposes ... The Working Group further considers that an administrative asset freezing mechanism would also not be needed for the purposes of giving effect to requests from third countries ... In light of the above, the Working Group is of the opinion that a need to establish an administrative asset freezing mechanism stems primarily from Finland's international obligations.[134]

As we mentioned in Sect. 4, both Norway[135] and Sweden,[136] too, remained vocally unconvinced of the necessity of administrative asset freezing measures, even as they were preparing to enact laws to establish them.

Despite the concerns related to fundamental rights and "the doubts over the usefulness of the administrative asset freezing mechanism today, in 2020, Finland

[132] *Supra*, 21.

[133] *Supra,* 14–15.

[134] *Supra* note 127, 9–10.

[135] *Supra*, 16.

[136] *Supra*, 20.

has adopted an administrative asset freezing system, Norway, Sweden, and Iceland each has developed a legislative proposal to establish one, and even Denmark has taken its "initial steps" to do the same. What, then, has changed?

What the chapter has hopefully succeeded to establish is that when the Nordics were evaluated in 2006–2007, there was still a struggle ongoing in the FATF over the "correct" understanding of the asset freezing requirement but that sometime during the decade to follow, the Nordics and any like-minded states had lost that struggle. Specifically, it was shown in Sect. 3 that there was still hesitance within the FATF under the old *Special Recommendations* as to the appropriate interpretation and application of the asset freezing recommendation. This was also visible in Sect. 4, where particularly for Norway and Denmark, the evaluation reports appeared to still maintain the possibility that another type of system might yet satisfy *Special Recommendation III.*[137]

By the time the fourth evaluation round started, however, the issue was settled, as we saw in Sect. 3. The Interpretative Note and, in particular, the assessment Methodology expressly stated that the only thing that would do was an *administrative procedure for freezing terrorists' assets based on the evidentiary standard of reasonable grounds where foreign requests are treated equally with domestically initiated processes*. There was no room left to suggest otherwise, and no verbal acrobatics could confuse evaluators from seeing a deficiency where any of these elements was not present. The Nordics had lost the argument, pure and simple.

So *what had changed* was that the content of the FATF standard and all the associated documentation had crystallized into this singular understanding that no longer left room for a dissenting opinion. Just as importantly, *nothing el*se *had*. The Nordic comments recounted above, even the most recent ones, all maintain the same tone of disapproval, or at least of scepticism, towards the whole exercise, as they have exhibited from the start. The evaluation procedures described above in Sect. 4.1 do not seem to impose an increased threat of being placed into an "enhanced follow-up", or not being released from the regular kind, for not adequately complying with Recommendation 6. If anything, the current procedures appear to be *more relaxed* when it comes to Recommendation 6 since it is no longer considered a "Key Recommendation" that ought to carry particular weight in these considerations.

Therefore, the most convincing conclusion in light of the evidence at hand is simply that as long as the obligation under the *FATF Recommendations* was unclear, the Nordic countries allowed other considerations to weigh in their calculations and ultimately held those considerations as more important than the FATF standard; however, as soon as the scope of the FATF standard was settled, they felt compelled to comply with it.

[137] *Supra*, 15 and 21, respectively.

5.3 *Reflections on Coercion and Voluntarism*

The above conclusion does not explain *why* they were so compelled. This final section will reflect on the extent to which the "coercive" and "voluntarist" explanations on the FATF may be able to shed light on this remaining question.

At first sight, the Nordic history with Recommendation 6 does not appear to be constituent with the voluntarist interpretation of the FATF, as summarized in Sect. 2.2.

In the voluntarist model, an organization does not seek to enforce "narrow" compliance with a rule at the threat of penalty but rather seeks to force engagement by members to the rule-making process itself in order to develop a better and more broadly acceptable version of the norm. For the asset freezing standard, the opposite appears to have taken place. Faced with a norm the Nordic countries fundamentally objected to, they no doubt engaged in their mutual evaluations and other FATF debates in attempts to convince members of the organization otherwise, to accept that different means could achieve the same goal and that flexibility was therefore justified. Nevertheless, over time, the relevant standard drifted farther away not only from their position but also from any position that would have challenged the original "correct" interpretation.

Neither was the development of the standard *reflective*, as it ought to have been for the voluntarist explanation, in the sense that the content of the standard would have been developed by a collective network of equal partners rather than dictated by the most powerful members. If anything, it appears that the standard was moulded by the United States at the international level to reflect the content of US domestic laws, disregarding the fact that other jurisdictions were unfamiliar with it, and then forced upon opposing FATF members rigidly as it was understood by the US.

Moreover, the Nordic experience does not seem to reflect the kind of *deep persuasion* that the voluntarist explanations would suggest take place in the FATF, in other words that those opposing would choose to comply because they were persuaded that they had been wrong in their initial opposition, rather than being forced to accept a norm of which they disapproved, or that they had finally seen the norm as morally legitimate or otherwise more worthy than its alternatives. As shown above, the Nordic countries appear to still regard administrative asset freezes as unnecessary, at best. Similarly, there appears to have been little *democratic destabilization* on the original asset freezing requirement since its inception. As noted, if anything, it appears to have developed to rigidly require the type of mechanisms the United States preferred already in 2001, and no amount of competing ideas, opinions or information appeared to have changed that.

To give due respect to voluntarist arguments, it should be noted that the focus of this chapter has been very narrowly on one FATF standard, which has a very particular history and role anchored in tragic terrorist attacks in the United States. It is entirely possible that for other FATF standards with other kinds of histories, the voluntarist explanation offers valuable insights, perhaps more so than other existing approaches. In fact, it might even be that one of the reasons why countries such as the

Nordics have been so reluctant and slow to implement this particular standard is that, in this particular instance, the FATF failed to exercise a voluntarist governance approach: in the absence of broad participation and the ability to feed into the development of the norm, members rejected it, whereas many other standards have not faced a similar opposition due to a more collectivist drafting history. More research would be needed to assess this.

Turning now to coercive approaches, it appears that they also fall short of providing a complete explanation of the Nordic history with the asset freezing standard. Most importantly, it is difficult to reconcile the significant change in the attitude of the Nordic countries towards the standard from mid-2000s to late 2010s with the idea that the fundamental force driving compliance with FATF standards would be the fear of formal penalties for non-compliance. As described above, if anything, the risk of penalties for non-compliance with the asset freezing requirement has been *reduced* in that time, and certainly nothing suggests that it would have increased. Yet all five countries appear more inclined to comply today than they were 15 years ago.

However, for this particular standard, at least, the coercive explanations appear to be correct in their suggestion that individual powerful states may be tempted to utilize an organization such as the FATF to dictate norms for the rest of the world. The history of Special Recommendation III and Recommendation 6 is, in light of the evidence we have, quite clearly an attempt by the United States to impose a particular model—their own—upon the world.

Even a more insightful contribution from the coercive camp is that of *Goldbarhst*, when he calls out the FATF on broadly invoking binding norms of international law in support of its own standards, regardless of whether those norms in fact support the specific content of the standard.[138] The relationship between UNSCR 1373 (2001) and Recommendation 6, as elaborated above, surely vindicates this *Goldbarhst* proposition, at least in this limited context.

Ultimately, then, the change of heart in the Nordics did not come about through any inclusive mechanism whereby they would have seen the error of their ways or managed to refine the standard to something more in line with their preferences. It also does not appear to have been motivated, at least primarily, by fear of formal penalty. Neither the coercive approaches nor the voluntarists are able to exhaustively explain the Nordic history with the asset freezing standard.

Unfortunately, the evidence at hand does not offer a firm basis on which to formulate a conclusive alternative explanation. Neither FATF documents nor the national documentation developed in relation to the Nordics' compliance with Special Recommendation III or Recommendation 6 directly addresses the issue of why their governments appear to have shifted their position over time. However, the explanation is likely to stem at least partially from a Nordic policy preference that goes beyond the FATF: namely multilateralism.

[138] *Supra*, note 18.

While the Nordics operate in different foreign and security policy contexts compared to each other, some being members of North Atlantic Treaty Organization (NATO) and others not, some belonging to the European Union while others have opted out, they all profess a deeply rooted commitment to, and aspiration to promote, compliance with international law and respect of multilateral institutions.[139] As small nations, their security interests are better served and their voices heard louder in a rule-based multilateral world rather the one dominated by raw power politics.

In this light, the issue to explain is not why the Nordics are now accepting to implement the FATF standard but rather why they continued to oppose it for so long. I argue that the primary answer lies in the development of the standard itself. As long as there was room to argue within the FATF that there were several equally valid ways of implementing the standard, the Nordics could maintain both a policy of strict adherence to international standards, in general, and opposition to a specific, disputed interpretation of one standard, in particular. However, once it was settled within the FATF beyond dispute that there was only one appropriate method of implementation, it was no longer possible to maintain both positions. The opposition to the particular FATF standard, being the less fundamental of the competing policy goals, had to give in.

These insights are, of course, limited to the particular experience of these select countries in relation to this specific standard. They certainly do not validate either of the competing approaches over the other. Further research on other FATF standards and their detailed histories would therefore help understand their relative merits and whether either of them ultimately offers a sufficient explanation of FATF's global influence.

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[139] *See,* for instance, *Norway's Role and Interests in Multilateral Cooperation,* Meld. St. 27 (2018–2019) Report to the Storting (white paper), 5, stating: "International cooperation is crucial to Norway's security, economy and prosperity . . . A key goal for Norwegian foreign policy over the coming years is therefore to support binding international cooperation and the multilateral system, enabling us to strengthen our ability to address common challenges and safeguard national and global interests."

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