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A Criminal Justice Perspective

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Fausto Martin De Sanctis holds a Doctorate in Criminal Law from the University of São Paulo's School of Law (USP) and an advanced degree in Civil Procedure from the Federal University of Brasilia (UnB) in Brazil. He was a Public Defender in São Paulo from 1989 to 1990, and a State Court Judge, also in São Paulo, from 1990 to 1991, until being appointed to the Federal Courts. He is currently a Federal Appellate Judge in Brazil's Federal Court for Region 3, with jurisdiction over the states of São Paulo and Mato Grosso do Sul.

Judge De Sanctis was selected to handle a specialized federal court created in Brazil to exclusively hear complex cases involving financial crimes and money laundering offenses. He is a world known expert on this topic and has been invited to participate in programs and conferences both in Brazil as well as internationally. Judge De Sanctis invites readers to e-mail him at fsanctis@trf3.jus.br.

From April 2 to September 28, 2012, Judge De Sanctis was a fellow at Federal Judicial Center in Washington, DC.

His recent publications include, among others:

"Popular Action: Using Habeas Corpus in the Context of Financial Crimes" in *Popular Action* ("Ação popular: A utilização do habeas corpus na dinâmica dos crimes financeiros" in *Ação Popular*. São Paulo: Saraiva, 2013).

"Coherent and Functional Criminal Law" ("Direito Penal Coerente e Funcional" in *Revista dosTribunais. Edição especial dos 100 anos.* Vol. 919. São Paulo: Revista dos Tribunais, May 2012).

"Telephone Tapping and Fundamental Rights," in *A Tribute to Afrânio Silva Jardim* ("Interceptações Telefônicas e Direitos Fundamentais" in *Tributo a Afrânio Silva Jardim*: *escritos e estudos*. Rio de Janeiro: Lúmen Júris, 2011).

Money Laundering through Gambling and Soccer. Analysis and Proposals (*Lavagem deDinheiro. Jogos de Azar e Futebol. Análise e proposições*. Curitiba: Editora Juruá, 2010).

Criminal Liability of Corporations and Modern Criminal Methods (*Responsabilidade Penal dasCorporações e Criminalidade Moderna*. São Paulo: Saraiva, 2009).

Organized Crime and the Disposal of Seized Assets: *Money Laundering, Plea Bargains*, *and Social Responsibility* (*Crime Organizado e Destinação de Bens Apreendidos. Lavagem de Dinheiro, Delação Premiada e Responsabilidade Social*. São Paulo: Saraiva, 2009).

"The Constitution and Freedoms" in *Constitutional Limitations on Investigations* ("Constituição e Regime das Liberdades" in *Limites Constitucionais da Investigação.* Rogério Sanches Cunha, Pedro Taques and Luiz Flávio Gomes. São Paulo: Revista dos Tribunais, 2009).

Judge De Sanctis has also written a number of articles published in newspapers and magazines specializing in law and economics.

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Contents

Chapter 1
Introduction

Art[1] is one of the many sectors attractive to criminals as a means of laundering the proceeds of all types of illegal activity. For centuries, artworks have been known targets of theft, robbery, and all sorts of forgery. Unfortunately, as Leonard DuBoff, Michael Murray and Christy King reveal, art theft has increased considerably in recent years, apparently generating billions of dollars on the illegal market.[2]

For example, one of the world's most important paintings—symbolizing the transition from the Middle Ages to the Renaissance—is the work by Jan Van Eyck titled *Adoration of the Mystic Lamb*.[3] Since its conception between 1426 and 1432, this artwork—comprising twelve panels painted in oil—was taken in three different wars, burned, dismembered, forged, smuggled, illegally sold, censored, hidden, made a pawn in diplomatic wrangling, recovered, hunted for first by Napoleon and later by the Nazis, recovered by Austrian agents, and actually stolen thirteen times. This masterpiece, with its puzzle-box appearance, is now an altarpiece in the cathedral in the heart of Ghent, Belgium.

At its center, it unfolds into an idealized field in which various figures, including saints, martyrs, priests, hermits, judges, Knights of Christ and a choir of angels are all in a pilgrimage to pay homage to the central figure, a lamb standing proud upon the sacrificial altar, bleeding into a golden chalice.

The level of detail that went into this grandiose work of art is unprecedented. Prior to its completion, only portrait miniatures and illuminated manuscripts

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[1] It is important to distinguish between art and handicrafts. According to Leonard DuBoff, Michael Murray and Christy King, an artisan does work that is essentially more manual than mental, working mechanically more than by inspiration. An artisan's work is essentially automatic; the success of his trade depends not on creation, but rather on dexterity and skillful application of preestablished rules. See *The Deskbook of Art Law*, Booklet A, *Art: The Customs Definition,* New York: Oceana, Second Edition, Release 2010–2012, issued Dec 2010, p. A-21.

[2] Cf. *The Deskbook of Art Law.* Booklet C (*Theft*). New York: Oceana, Second Edition, Release 2010–2012, issued Dec 2010, p. C1.

[3] The painting is known by various names. Many of the titles in use today were given by art historians for ease of identification. In Flemish (the language of Belgium), it is called *The Lamb of God*. It is also referred to as *The Mystic Lamb*, or simply, *The Lamb*.

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contained such rich detail. Thus its widespread fame is due to its beauty and artistic rendering,[4] as well as its importance to the history of art.[5]

There are several other known cases of extraordinary art theft. Confiscation of works of art belonging to Jewish families was one of the policies of the Nazi regime during World War II. Such works ultimately found their way to museums or the hands of collectors. Many of them were received as donations, or paid for in good faith at a fair price.[6]

Art theft is certainly no secret. However, money laundering through works of art is a recent phenomenon dating to the close of the twentieth century.

It was not by accident that this type of crime took such an unusual turn. Controls enacted pursuant to recommendations by the Financial Action Task Force (FATF), aimed at cracking down on money laundering, made it necessary to seek out new mechanisms for the laundering of ill-gotten gains. Furthermore, the globalization of financial markets and the rapid development of information technology have gradually steered the underworld economy toward new possibilities for the commission of financial crimes.

Like so many other businesses, art has been used by criminals to launder money and derive illegal income. As in the world of sports (gambling and ball games), the connections forged between criminals and the art world are not always motivated by monetary gain. Social prestige, rubbing elbows with celebrities and the prospect of dealing with authority figures may also attract private investors bent on skirting the law. Its high degree of specialization—inasmuch as few are really familiar with this market so historically dominated by unlawful practices (or perhaps honor among thieves?[7])—could also contribute toward attracting illegal activity.

In Geoffrey Lewis's view, following the 2004 declaration by nineteen of the world's leading museum directors, "the importance and value of universal museums deserves our detailed attention." The declaration argues that "the universal admiration for ancient civilizations would not be so deeply established today were it not for the influence exercised by the artifacts of these cultures, widely available to an international public in major museums."[8] This concept of a "universal

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[4] It pleases the eye and awakens the mind.

[5] Cf. Noah Charney. *Stealing The Mystic Lamb: The True Story of the World's Most Coveted Masterpiece*, p. 04.

[6] See Ralph Lerner. The Nazi Art Theft Problem and the Role of the Museum: A Proposed Solution to Disputes Over Title. 31 *N.Y.U. J. Int'l L & Pol*. 15, 1998.

[7] Prof. Diane Apostolos-Cappadona of Georgetown University in Washington, DC, in her *Art and Ethics* course, discusses the relationship between political, social and cultural realities identified as ethically relevant to the world of art, including theft and restitution, cultural heritage, public financing of art and museum holdings with an eye to engaging in the acquisition and alienation of art, especially religious art, as well as the role of museums as cultural and educational institutions. Statements obtained directly from the professor herself at a 4 PM meeting at Georgetown University on 04/19/2012, or www.georgetown.edu, Accessed May 8, 2012.

[8] Cf. "The 'Universal Museum': A Case of Special Pleading?" in *Art and Cultural Heritage: Law, Policy, and Practice*, p. 379.

museum" gives rise to a need to pay closer attention to crime that involves cultural heritage.

Art is an attractive sector for the practice of money laundering because of the large monetary transactions involved, the general unfamiliarity and confidentiality surrounding the art world, and the unlawful activity endemic to it (theft, robbery and forgery).

Our purpose here is to inquire into the scale of the problem and to look into legislative and institutional loopholes that might give power and mobility to organized crime, thereby making it a more deeply entrenched source of unprecedented illicit wealth. The carefree attitude that has characterized the industry must be confronted with a realistic understanding of the problem and must go beyond the adoption of measures taken in isolation or in an uncoordinated manner, lest conflict and instability continue to undermine its credibility and possibly even jeopardize its continued existence.

Indeed, repeated tolerance of illegal activity in the art world, which is known to be widespread, undermines the market and its credibility to the extent that authorities have been unable to properly enforce the good practices required by both the law and the will of society.

This analysis seeks to provide a basis for a number of important public decisions, to prompt specialists to speak up in order to keep art from being used or manipulated for illegal purposes, and to expound on the situational vulnerabilities confronting this market that are not clearly understood by authorities or society-at-large.

Inasmuch as art is a subject of universal interest, it must not be exempted from criminological scrutiny because of its great social, educational and cultural importance.

We must constantly reflect on how authorities are defied on a daily basis in their efforts to take steps to prevent money laundering and the financing of terrorism and organized crime. Closer scrutiny is necessary if we are to understand the new global situation that has encouraged the commission of serious crimes and the illegal enrichment of criminals. In other words, we must seek solutions that will make effective criminal enforcement possible.

We must be mindful that one of the essential criminological features inherent in money laundering, as Pedro Caeiro, citing Jorge Fernandes Godinho and Luís Goes Pinheiro, reminds us,[9] is its necessary links to organized crime, which in turn add considerable diversity to the types of conduct that its prosecution and enforcement may prevent.

Therefore, strong criminal enforcement on the part of government is required from the outset, including investigations into the assets of suspects, so that—by confirming their propriety and legitimate ownership—we may do away with the idea that crime pays, albeit despite occasional convictions and sentencing.

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[9] Cf. Pedro Caeiro, in *Branqueamento de capitais*. Manual distributed in a course sponsored by the OAS and the Brazilian Ministry of Justice and presented to Brazilian judges and prosecutors on October 17–21, 2005, p. 4.

The author's purpose is to go beyond a mere introduction to this captivating subject. Considerations will be presented in an effort to further the study of methods likely to add transparency to business dealings and thereby inhibit or curtail unlawful activity. This book seeks to dispel the many mysteries surrounding the business of art.

The idea is to connect a number of important dots in the world of art, where its business practices are concerned, so as to bring about improvements in crime prevention systems. Our hope is to provide a useful foundation for conducting a critical analysis that is both realistic and practical, and to include an overview of studies already conducted worldwide that touch upon this important and current topic.

Our aim is to provide a reading on this sector, a snapshot of the market that will provide the groundwork and guidance necessary to give it transparency and a backdrop sufficient for a particularized analysis. Some rigor in procedures for cataloging and investigation are in order, for we should remember that the resurgence of organized crime is often the result of a systemic atmosphere of inattention, mutual tolerance, and ethical codes which, however lofty, are in practice applied only selectively. Matters are worsened by the arrogance and permissiveness, if not covert complicity, of portions of civil society (the elite, the press, etc.) that insist on pointing out only the defects that do not suit their purposes.

This effort began with the author's reflections on many points. Some of the main questions to take into account when studying this phenomenon, and which will be answered in Chapter 8 of this book, are:

- Are there any restrictions on the transportation of masterpieces out of the country?
- Do international auction houses (IAHs) or art galleries only ask sellers where the proceeds should be deposited? And what is done if the reply is a tax haven? Does anyone ever inquire into the source of the money the buyer deposits?
- Should buyers make deposits directly to the account of the IAH or gallery, or to the seller's account? How does one verify the source of funds, especially if supplied by a third party?
- Should an IAH or gallery ever turn in a Suspicious Activity Report to a financial crimes enforcement agency, such as FinCEN in the United States or COAF in Brazil?
- What is the role of insurance companies?
- Are auctions or artworks ever used to launder money? For example, might an individual hire someone to buy his own art at an inflated price?
- What can be said about flea markets for works of art?
- How are nondisclosure agreements between buyers and sellers handled when there is a need for proper monitoring by government authorities?
- Can artwork be purchased from an IAH with stored value instruments or prepaid access cards? Can payments be made through remittance companies or foreign exchange brokers?

Questions such as these come up on a daily basis during my time in court. When I was given the opportunity to conduct research with support from the Federal Judicial Center (FJC) in Washington, DC, from April 2 to September 28, 2012,

I visited U.S. Federal Courts, the Library of Congress and the FJC's own library, attended several seminars and talks, and researched online (especially on *LexisNexis* and *Westlaw*). I have also been in contact with U.S. authorities, including federal prosecutors, professors, museum and auction house representatives, judges and FBI and INTERPOL agents, all of whom provided me with valuable information.

The difficulties in obtaining specific information on money laundering—even amid such a wealth of sources—were underscored, in my eyes, by the expressions of perplexity, reflection and deep thought on the faces of persons I contacted. Coupled with this were expressions conveying sober acknowledgment of the complexity, difficulty and scope of a problem that defies every effort toward a solution. Small wonder, then, that it propagates so masterfully throughout the underworld.

This book is divided into nine chapters. Chapter 2 deals with overarching topics of money laundering, and civil and criminal legislation affecting the protection of artwork. Chapter 3 addresses the difficult task of catching financial criminals. Chapter 4 is about the world of art and the roles of the people in it. Here, important cases from U.S. and Brazilian courts that were covered by the media will be discussed. Chapter 5 seeks to organize all of this into a scholarly context. Chapter 6 addresses forms of payment and the use of NGOs, trusts, associations and foundations, and their potential for the movement of ill-gotten gains. International legal cooperation, repatriation and asset forfeiture are analyzed in Chap. 7. Chapter 8 deals specifically with responses to the questions raised at the outset, among others, which may go a long way towards clarifying how the prevention of money laundering applies to the art industry. Conclusions are also covered here. The ninth and final chapter covers national and international proposals for improving the industry so as to prevent money laundering and the financing of terrorism.

Although this work may, at a glance, appear to cover the entire subject, this is actually far from the case. It has, however, aimed at achieving a logical and practical "completeness" in describing an unexplored and virtually unknown world in which art is used in the commission of serious crimes. The purpose here is to see to it that the use of artistic media in the commission of crimes will seldom, if ever, be carried to fruition.

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Chapter 2
Civil and Criminal Legislation Regarding Money Laundering and the Protection of Cultural Heritage

2.1 Money Laundering: The Crime Defined

A great deal of attention has focused on money laundering due to the highly sophisticated nature of its criminal practices—practices that have been internationally organized and professionally executed for a considerable amount of time.

Organized crime has had a relatively free hand in its efforts to make criminal assets legal. This is made possible by the total ineffectiveness of current national and international laws, which have not kept pace with the changing situation.

Gilson Dipp points out that organized crime takes advantage of the "inertia of States, and their closely-regulated executive, legislative and judicial branches, which are bound by the principle of territoriality—the idea that the law holds only within its boundaries. This is a hopelessly dated notion. Each State must, without giving up its sovereignty, achieve broad international cooperation. To insist on a 19th-century conception of sovereignty is to allow organized crime to exercise its will to the detriment of formal sovereignty."[1]

On the other hand, the understanding that organized crime greatly affects our economic and social fabric led to the realization that a new class of felony had to be clearly established. Such is also the case in the category of financial crimes, which is principally characterized by the absence of social scrutiny.

Francisco de Assis Betti views financial crimes as crimes that are generally "marked by the absence of social scrutiny, due to several factors including an excessive attachment to material things such as profit and egotistical zeal among the owners of capital, who are scornful of the lower classes and confident in their own impunity. Most of these crimes are covered up by collusive public officials. When the crimes do come to light, evidence is poorly produced and the facts are difficult to ascertain, given the specialized assessment required, culminating almost always in impunity."[2]

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[1] Interview published 11/03/2004 on the *Consultor Jurídico* website. www.conjur.com.br. Accessed June 18, 2012.

[2] In BETTI, Francisco de Assis. *op. cit*., p. 20.

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Money laundering was at first linked to drug trafficking. Recognition of the crime of money laundering traces its origins, in Europe, to a 1980 recommendation by the Council of Europe. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention of 1988) is considered the international milestone that paved the way for worldwide political and criminal analysis of the subject.

All efforts to categorize money laundering as a crime on its own were closely associated with the international traffic in narcotics. Two separate aspects appear to have been decisive in bringing about an international mobilization to punish the conversion of the proceeds of criminal drug trafficking into apparently legal wealth.

The first is the predictable inefficacy of the methods used in the war on drugs. The second factor stems from the economic impact that the movement of so-called "narcodollars" has on the economies of many countries—enough to interfere greatly with the normal course of production, competition and consumption.

Thus, there was a strong international push for the adoption of a means to combat money laundering. The United Nations Vienna Convention of 1988 provided an international legal framework, although it was specifically organized to battle the traffic of narcotic drugs and psychotropic substances.

The failure of traditional legislation to deal with these new issues was well known. It was a constant concern in many countries in their struggle against serious crime because permitting the flow of illegal capital poses a threat to everyone and undermines the confidence in law enforcement institutions.

Mireille Delmas-Marty and Geneviève Giudicelli-Delage assert that "beginning in the late 1980s, the international community became aware of the shortcomings—if not futility—of national rights when faced with increasingly effective international crime prospering precisely because of the disparities between, and lack of harmony among, national legislative bodies…. The UN Convention signed at Vienna on December 20, 1988, was the first response to bring harmony to enforcement."[3]

It is important to take into account that criminalizing money laundering emerged as a measure to inhibit the use and benefit of illegally acquired assets. Thus, it is a crime derived from another, and could not exist without the antecedent crime having been previously committed. It is, in the words of Jean Larguier and Philippe Conte, a "consequential crime," as opposed to behavior preceding or concurrent with the primary act or attempt.[4]

To confidently benefit from its illegal income, organized crime has protected itself well, much like the Government, causing the latter to turn to the most modern mechanisms for combating crime.

Francisco de Assis Betti adds that it is not always "easy for a criminal to use the proceeds of crime." Profligate spending and the eccentricities that always accompany the easy acquisition of money, and immediate purchases way above one's standard of living, are outward signs of wealth which give rise to suspicion,

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[3] Cf. DELMAS-MARTY, Mireille; GIUDICELLI-DELAGE, Geneviève. *Droit pénal des affaires*. 4th ed. Paris: Presses Universitaire de France, 2000. pp. 309–310.

[4] In CONTE, Philippe; LARGUIER, Jean, *op. cit*., p. 238.

and are conducive to investigations by either police or internal revenue authorities. Experienced criminals therefore try to come up with arrangements for investing their criminal proceeds and work with others inclined to conceal these assets and obliterate the money trails in order to avoid enforcement efforts.[5]

To the extent that society has realized that serious crime can encompass more than just violent crime, more and more States have ratified international regulatory instruments without restrictions, demonstrating that they are no longer willing to tolerate open-ended criminality within their borders.

The links between money laundering and organized crime necessitated immediate and aggressive intervention by governments, not least to ensure their very survival.

Article 3 of the Vienna Convention of 1988 requires that each signatory take all necessary steps to fight drug trafficking and to establish as criminal offenses under domestic law all of the practices enumerated therein. The practices in question are divided into three groups within Section 1 of Article 3. The first group (item "a" of Article 3, Section 1) refers to the drug trafficking itself as it describes production, manufacture, extraction, preparation or sale [3(1)(a)(i)], cultivation [3(1)(a)(ii)], possession or purchase for any of the above purposes [3(1)(a)(iii)], transportation and distribution [3(1)(a)(iv)], and the organization, management or financing of any of the offenses enumerated above [3(1)(a)(v)]. The second group (item "b" of Article 3, Section 1) deals with money laundering whereby all signatory States agree to outlaw the conversion or transfer of property that is derived from offenses provided in item "a" [3(1)(b)(i)] and the concealment or disguise of the true nature, location, disposition or ownership of said property [3(1)(b)(ii)]. Finally, the third group (item "c" of Article 3, Section 1) addresses other types of contact in connection with narcotics trafficking or money laundering, such as the acquisition, possession or use of the proceeds of narcotics trafficking [3(1)(c)(i)], possession of materials or equipment related to narcotics trafficking [3(1)(c)(ii)], inciting or inducing others to commit the offenses therein enumerated [3(1)(c)(iii)], and aiding or abetting the commission of any of the offenses therein enumerated [3(1)(c)(iv)].

Observe that money laundering is in essence a derivative crime because the offense is contingent upon an antecedent crime.

In 1992, in the Bahamas, the OAS General Assembly passed and adopted Model Regulations on money laundering offenses related to drug trafficking, which define, in Article 2, behavior considered unlawful. This led to the drafting of numerous laws in Latin America, including Colombia (Law No. 333 of 1996), Chile (Law No. 9366/1995), Paraguay (Law No. 1015/1997) and Venezuela. Money-laundering legislation was already in place in Argentina, Ecuador, Mexico and Peru before the Model Regulations were adopted in the Bahamas, but after the Vienna Convention.

When the Money-Laundering Law was promulgated in Brazil, the crime in question had already lost its characterization as a crime derived solely from

[5] In BETTI, Francisco de Assis. *op. cit*., p. 39.

drug-trafficking crimes, as was the case in many of the countries that make the offense illegal. For example, Spain, Switzerland, Austria, the United States, Canada, Australia and Mexico no longer classify money laundering as a mere appendage of drug trafficking. Given the evidence that the money-laundering problem is not exclusively a drug trafficking issue, and faced with the deleterious consequences of the entry of the proceeds from certain types of crime into a nation's economy, many legislative bodies began to extend the concept of money laundering by associating it with other types of antecedent crimes.

The crime of money laundering had to be separated from drug trafficking because there was no justification for legislating against only that particular form of illicit enrichment. However, this presented serious questions of legal doctrine, such as the question of what legal interest is actually being protected.

Indeed, when money laundering was a crime exclusively in connection with drugs, it could be argued that the legal justification—albeit in an indirect and reflexive manner—was the same as that for drug trafficking. This is clearly the case in the Vienna Convention, which makes no formal distinction between drug trafficking per se and enrichment therefrom.

Argentine legislation, originally under Article 25 of Law No. 23737/1989 and currently under Article 3 of Law No. 25246/2000, provides a penalty of two to ten years for all who engage in money laundering even without having participated or cooperated in the predicate crime from which the money was obtained. Thus, if a prerequisite for liability for money laundering is the absence of some antecedent narcotics violation, we may infer that this is a case of violation of one and the same criminal legal interest, so as to avoid *bis in idem*.

With the shedding of this exclusive link with the originating crime, many questions emerged as to the legal justification for criminalizing money laundering. Today there is no question that the crime of money laundering falls within the category of financial crimes because of the great effect it has on socio-economic order. There is no doubt that introducing large sums of money that originated in crime into the market interferes with the normal course of production, consumption and competition.

Another difficulty with money laundering is that it is not simple to accomplish, nor does it follow any preset rule. The commission of the crime involves processes that are often complex and sophisticated, with actions taken in a concatenated or scattered manner, all in an effort to make dirty money look legal. One could indeed simply define money laundering as a procedure whereby one transforms goods acquired through unlawful acts into apparently legal goods. However, overriding considerations of legality and legal security do not permit us to make use of such a simple definition.

The crime of money laundering, classically speaking, involves three stages of conduct, namely: concealment or placement, in which goods acquired by unlawful means are made less visible; monitoring, dissimulation or layering, in which the money is severed from its origins, removing all clues as to how it was obtained; and integration, in which the illegal money is reincorporated into the economy after acquiring a semblance of legality. Added to this is the recycling stage, which consists of wiping out all records of those previous steps completed.

Faced with the complexity of the various forms of conduct and processes comprising money laundering, one is struck by the almost complete impossibility of imposing legal restraints other than through combined means, by proscribing more than one form of conduct, and open-ended means, since the large number of activities described in the Vienna Convention and adopted by most countries calls for intervention for full classification within the limits therein imposed. Additionally, money laundering is always a derivative crime, so that it must necessarily be connected, to a greater or lesser extent, to its antecedent crime. All of these issues give innumerable peculiarities to the crime of money laundering, peculiarities that must be gradually sorted out by jurisprudence or case law.

In Brazil's case, money laundering was not typified in the main body of the Criminal Code, as was done, for instance, in the United States (in 18 U.S.C. § 1956). This poses an undeniable difficulty, for if the crime in question were codified, it would have to be promptly adapted to the principles and rules of the Criminal Code. Because this system is integrated and hierarchical, there would be no margin for unjustifiable exceptions. Such is the case in France, Italy, Switzerland and Colombia.

Created in December of 1989 by the seven richest countries in the world (G-7[6]), the Financial Action Task Force (FATF, or *Groupe d'Action Financière sur le blanchiment des capitaux*—GAFI), organized under the aegis of the Organization for Economic Cooperation and Development (OECD), has a mandate to examine, develop and promote policies for the war on money laundering. It initially included twelve European countries along with the United States, Canada, Australia, and Japan. Other countries joined afterward (including China in 2007), as well as international organizations (the European Commission and the Gulf Cooperation Council). Brazil joined, initially as an observer and later as a full member, at the XI Plenary Meeting, held in September of 1999.

The OECD is an intergovernmental agency organized to promote measures for the fight against money laundering. Its list of Forty Recommendations, drafted in 1990, was revised in 1996. Another eight recommendations were drawn up in 2003 (on financing of terrorism) and a ninth in 2004 (also about financing of terrorism). On February 16, 2012, all forty-nine recommendations were revised, improved and condensed into forty.

These recommendations are not binding, but they do exert strong international influence on many countries (including nonmembers) to avoid losing credibility, because they are recognized by the International Monetary Fund and the World Bank as international standards for combating money laundering and the financing of terrorism. In the 1996 version, they were adopted by 130 countries. In the 2003–2004 version, they were adopted by over 180 countries.

It is important to mention that the idea of improving and condensing the Recommendations to avoid distortion and duplication, and to also incorporate the nine Special Recommendations on the financing of terrorism into the basic text

[6] United States, Japan, Germany, France, United Kingdom, Italy and Canada, which has since been joined by Russia (G8).

(Forty Recommendations), originated in Brazil when it presided over the FATF between 2008 and 2009.

Some initial resistance to altering wording that had already become assimilated was overcome. No substantial changes were offered, and all focus was on fine-tuning the Recommendations to make them clearer and more objective, and as a result more easily enforceable. All of this changed and facilitated matters, including the member nations' methods of evaluation.

The following are relevant provisions contained in the 2012 version of the Recommendations:

Countries should identify, assess, and understand the money laundering and terrorism financing risks of the country, and take action to mitigate them (*Risk-Based Approach—RBA*, Recommendation No. 1). Countries should ensure cooperation among policy-makers, the Financial Intelligence Units (FIUs) and law enforcement authorities, and domestic coordination of prevention and enforcement policies (Recommendation No. 2). The current text of Recommendation No. 2 (this was in Recommendation No. 31 before) adds legitimacy to Brazil's National Strategy for the Fight against Corruption and Money Laundering (ENCCLA).[7] The crime of

[7] According to a study conducted by the Brazilian Federal Justice Council's Judiciary Studies Center on the effectiveness of Law No. 9613/1998, through September of 2001 the Brazilian Federal Police had conducted only 260 police investigations, and most (87%) of the federal judges polled in that study answered that there were no active proceedings in their courts relating to money laundering through 12/31/2000, the date on the survey form (FEDERAL JUSTICE COUNCIL, *A critical analysis of the money laundering law*). In 2002 and 2003, with Minister Gilson Dipp of the Appellate Court presiding, and participation from representatives of the Federal Courts, the Office of the Federal Prosecutor, the Federal Police and the Brazilian Federation of Bank Associations (FEBRABAN), the Council drew up substantive recommendations to improve investigation and prosecution of criminal money laundering by engaging the cooperation of various government departments responsible for implementing the law. It was embryonic to the ENCLA (National Strategy for the Fight against Money Laundering and Recovery of Assets), later renamed the National Strategy for the Fight against Corruption and Money Laundering (ENCCLA). The ENCCLA is made up of the primary agencies involved in the matter, which are the Office of the Attorney General, the Council for Financial Activities Control (COAF), the Justice Ministry's Asset Recovery and International Legal Cooperation Council Department (DRCI), the Federal Justice Council (CJF), the Office of the Federal Prosecutor (MPF), the Office of the Comptroller-General (CGU) and the Brazilian Intelligence Agency (ABin), annually setting policy for all actions to be carried out in the execution of Law No. 9613/1998, on account of private and uncoordinated—if not conflicting—agendas having been observed among government agencies responsible for said enforcement. A meeting was held on December 5–7, 2003, in Pirenópolis in the State of Goiás, to develop a joint strategy for the fight against money laundering. To monitor progress toward the goals set forth in the objectives of access to data, asset recovery, institutional coordination, qualification and training and international efforts and cooperation, an Integrated Management Office for the Prevention of and Fight against Money Laundering (GGI-LD), was created in compliance with Target 01 of ENCLA/2004. This Office is composed of the primary government agencies, as well as the Judicial Branch and Attorney General's Office, conducting both breakout sessions and plenary meetings on various occasions. Every year they define new Actions (formerly Targets), in hopes that the conclusions arrived at during their work sessions will be transformed into substantive outcomes.

money laundering should apply to predicate offenses, which may include all serious offenses, any of a long list, or any offenses punishable by a maximum penalty of more than one year, and criminal liability should apply to all legal persons, irrespective of any civil or administrative liabilities (Recommendation No. 3). No criminal convictions should be necessary for asset forfeiture. Furthermore, with reference to the Vienna Convention (1988), the Terrorist Financing Convention (1999), and the Palermo Convention (transnational organized crime, 2000), the burden of proof on confiscated goods should be reversed (Recommendation No. 4). Countries should criminalize the financing of terrorism (Recommendation No. 5). Countries should implement financial sanction regimes to comply with UN Security Council resolutions on terrorism and its financing (Recommendation No. 6), and on the proliferation of weapons of mass destruction and its financing (Recommendation No. 7). Countries should establish policies to supervise and monitor non-profit organizations, so as to obtain real-time information on their activities, size and other important features, such as transparency, integrity and best practices (Recommendation No. 8). Financial institution secrecy laws, or professional privilege, should not inhibit the implementation of the FATF Recommendations (Recommendation No. 9). Financial institutions should be required to undertake customer due diligence and to verify the identity of the beneficial owner, and be prohibited from keeping anonymous accounts or those bearing fictitious names (Recommendation No. 10). Financial institutions should also be required to maintain records for at least five years (Recommendation No. 11) and closely monitor politically exposed persons (PEPs), that is, persons who have greater facility to launder money, such as politicians (in high posts) and their relatives (Recommendation No. 12). The 2012 version expanded the definition of PEPs to include both nationals and foreigners, and even international organizations.

Other provisions worth mentioning include:

Financial institutions should monitor wire transfers, ensure that detailed information is obtained on the sender as well as on the beneficiary, and prohibit transactions by certain people pursuant to UN Security Council resolutions, such as resolution 1267 of 1999 and resolution 1373 of 2001, for the prevention and suppression of terrorism and its financing (Recommendation No. 16). Designated non-financial businesses and professions (DNFBPs), such as casinos, real estate offices, dealers in precious metals or stones, and even attorneys, notaries and accountants, must report suspicious operations, and those who report suspicious activity must be protected from civil and criminal liability (Recommendation No. 22, in combination with Nos. 18 through 21). Countries should take measures to ensure transparency and obtain reliable and timely information on the beneficial ownership and control of legal persons (Recommendation No. 24), including information on trusts—settlors, trustees and beneficiaries (Recommendation No. 25). Financial Intelligence Units (FIUs) must have timely access to financial and administrative information, either directly or indirectly, as well as information from law enforcement authorities in order to fully perform their functions, which include analysis of suspicious statements on operations (Recommendations Nos. 26, 27, 29 and 31). Casinos must be subject to effective supervision and rules to prevent money laundering (Recommendation No. 28). Countries should establish the means for

conducting freezing and seizure operations, even when the commission of the predicate crime may have occurred in another jurisdiction (country), and implement specialized multidisciplinary groups or task forces (Recommendation No. 30). Authorities should adopt investigative techniques such as undercover operations, electronic surveillance, access to computer systems, and controlled delivery (Recommendation No. 31). The physical transportation of currency should be restricted or banned (Recommendation No. 32). Proportionate and dissuasive sanctions should be available for natural and legal persons (Recommendation No. 35). There should be international legal cooperation, pursuant to the Vienna Convention (international traffic, 1988), Palermo Convention (transnational organized crime, 2000) and Mérida (corruption, 2003) (Recommendation No. 36). Countries should provide mutual assistance to facilitate a quick, constructive and effective solution (Recommendation No. 37), including the freezing and seizure of accounts, even with no prior conviction (Recommendation No. 38). Countries should quickly execute extradition requests (Recommendation No. 39), and spontaneously take action to combat predicate crimes, money laundering, and terrorism financing (Recommendation No. 40).

Thus, as of the 2012 revision, the Recommendations set forth general guidelines, with details given in Interpretative Notes. The glossary has made it easy to place the standards adopted in proper perspective and also provides important clarifications.

The Interpretative Notes are best described as a sort of common ground made to fit both common law and civil law countries.

One important innovation, albeit not the purpose of the February 2012 review, was pointing out the need for countries to adopt the Risk-Based Approach (RBA). In other words, before applying certain measures, standards must be established to guide public policies for preventing and combating money laundering, terrorism financing and (this is new) the proliferation of weapons of mass destruction.

With regard to politically exposed persons (PEPs), what was once a simple requirement to monitor certain foreign nationals or authority figures now refers to domestic entities, understood to include international organizations.

The FATF pressed for the creation of similar agencies known as FATF-Style Regional Bodies (FSRBs), intended to integrate the global network for the war on money laundering, including:

(a) *Asia–Pacific Group on Money Laundering* (APG, which includes Australia, Bangladesh, Brunei, Cambodia, Taiwan, Cook Islands, Fiji, Hong Kong, India, Indonesia, Japan, South Korea, Malaysia, Marshall Islands, Mongolia, Nepal, New Zealand, Niue, Pakistan, Palau, the Philippine Islands, Samoa, Singapore, Sri Lanka, Thailand, Tonga, the United States and Vanuatu);
(b) *Eurasian Group* (EAG, including Belarus, Kazakhstan, Russia, Kyrgyzstan, the People's Republic of China and Tajikistan);
(c) *Middle East and North Africa Financial Action Task Force* (MENAFATF, made up of Algiers, Bahrain, Egypt, Jordan, Kuwait, Lebanon, Morocco, Oman, Qatar, Saudi Arabia, Syria, Tunisia, Yemen and the United Arab Emirates);
(d) *Caribbean Financial Action Task Force* (CFATF or GAFI CARAÏBE, for Central America and the Caribbean, namely Antigua and Barbuda, Anguilla,

Bahamas, Barbados, Belize, Bermuda, British Virgin Islands, Cayman, Costa Rica, Dominica, the Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Montserrat, the Dutch Antilles, Nicaragua, Panama, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, the Turks and Caicos Islands, Trinidad and Tobago, and Venezuela);

(e) *Moneyval* (Council of Europe, composed of Albania, Andorra, Armenia, Azerbaijan, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Georgia, Hungary, Latvia, Lichtenstein, Lithuania, Moldavia, Malta, Monaco, Poland, Romania, Russia, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Macedonia and the Ukraine);

(f) *Eastern and Southern Africa Anti-Money Laundering Group* (ESAAMLG: Botswana, Kenya, Lesotho, Malawi, Mozambique, Mauritius, Namibia, South Africa, Swaziland, Seychelles, Uganda, Tanzania, Zambia and Zimbabwe);

(g) *Financial Action Task Force on Money Laundering in South America* (GAFISUD, composed of Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay and Mexico);

(h) *Intergovernmental Action Group against Money Laundering in West Africa* (GIABA);

(i) Central African Action Group against Money Laundering (GABAC).[8]

A group resembling an FSRB is the Offshore Group of Banking Supervisors—OGBS (composed of Aruba, Bahamas, Bahrain, Barbados, Bermuda, Cayman Islands, Cyprus, Brault, Guernsey, Hong Kong, the Isle of Man, Jersey, Labuan, Malaysia, Macau, Mauritius, Netherlands Antilles, Panama, Singapore and Vanuatu).

The purpose of these groups is to promote the adoption and effective implementation of the Forty Recommendations, requiring member nations to accept multilateral oversight and mutual evaluations.

The FATF does not appear particularly concerned with art, for in recommending the compulsory reporting of suspicious operations on the part of designated non-financial businesses and professions (DNFBPs), at no time did it mention that sector. It went no further than to include casinos, real estate offices, dealers in precious metals or stones, attorneys, and notaries and accountants, suggesting that they be subject to internal controls, and recommending protection of whistleblowers from civil and criminal liability (Recommendation No. 22, together with Nos. 18–21).

Despite estimates running into the billions for the underworld dealing in works of art,[9] the Financial Action Task Force has not addressed the problem.

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[8] See 2010–2011 Annual Report for the Financial Action Task Force/Groupe d'Action Financière. www.fatf-gafi.org. Accessed May 20, 2012.

[9] Cf. Robert Spiel Jr. places the annual amount involved in global theft of artworks at $1.3 billion (in *Art Theft and Forgery Investigation*, pp. 31 and 237–238). The FBI estimates that the international traffic in artworks amounts to some $6 billion annually, while UNESCO reportedly claims the amount is in excess of $1 billion a year (Cf. Tailson Pires Costa and Joceli Scremin da Rocha, *A incidência da Receptação e do Tráfico Ilícito de Obras de Arte no Brasil*. https://www.metodista.br/revistas/revistas-ims/index.php/…/523, pp. 264–265).

2.2 International Laws and Treaties Regarding Money Laundering and the Protection of Cultural Heritage: A General Perspective

The United Nations Educational, Scientific and Cultural Organization (UNESCO) drafted a Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property on November 14, 1970. It sought to prevent the illegal traffic in artwork by requiring special export licenses and an administrative control system to enable Member States to prevent illegal importation and exploitation of artworks.[10]

The Bureau of Educational and Cultural Affairs of the United States Department of State provides important support to the claims of States for violations of the aforesaid UNESCO Convention. In 2012, it allocated $6 million for

[10] Article 6 reads: *The States Parties to this Convention undertake: (a) To introduce an appropriate certificate in which the exporting State would specify that the export of the cultural property in question is authorized. The certificate should accompany all items of cultural property exported in accordance with the regulations; (b) to prohibit the exportation of cultural property from their territory unless accompanied by the above-mentioned export certificate; (c) to publicize this prohibition by appropriate means, particularly among persons likely to export or import cultural property.* Article 7 reads: *(a) To take necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned. Whenever possible, to inform a State of origin Party to this Convention of an offer of such cultural property illegally removed from that State after the entry into force of this Convention in both States; (b) (i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution; (ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party.* Article 10 reads: *(a) To restrict by education, information and vigilance, movement of cultural property illegally removed from any State Party to this Convention and, as appropriate for each country, oblige antique dealers subject to penal or administrative sanctions, to maintain a register recording the origin of each item of cultural property, names and addresses of the supplier, description and price of each item sold and to inform the purchaser of the cultural property of the export prohibition to which such property may be subject; (b) to endeavor by educational means to create and develop in the public mind a realization of the value of cultural property and the threat to the cultural heritage created by theft, clandestine excavations and illicit exports.*

the conservation of artworks (not just within the United States) and another $1 million for training government agencies, including federal prosecutors.[11]

Another important international convention likewise intended to combat the illegal trade in artworks is the UN Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT). Its preamble addresses the concerns over the illegal trade in cultural objects,[12] and requires Member States to establish common rules for restitution or repatriation for the return of the property illegally removed. Observe that the Convention requires the return even of articles acquired in good faith.[13]

In the wake of recommendations contained in the Convention Concerning the Protection of the World Cultural and Natural Heritage, drafted at the UNESCO General Conference on October 17–November 21, 1972, and dated 11/23/1972,[14] it became important for Governments to confer upon artwork "a function in the life of the community" (Article 5).

It is indeed incumbent upon all to protect the cultural heritage of mankind, as provided in the Convention Concerning the Protection of the World Cultural and Natural Heritage, specifically:

> Article 4:
> Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage… situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and cooperation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.
>
> Article 5:
> To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage… each State Party to this Convention shall endeavor… d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage.
>
> Article 11 – 1:
> Every State Party to this Convention shall, in so far as possible, submit to the World Heritage Committee an inventory of property forming part of the cultural and natural

[11] BUREAU of Educational & Cultural Affairs. United States Department of State, meeting with Margaret G.H. MacLean, Senior Analyst, on 06/21/2012, at 3 PM, in SA5, Fifth Floor; and exchanges.state.gov/heritage/culprop/review.html. Accessed June 22, 2012.

[12] "Deeply concerned by the illicit trade in cultural objects and the irreparable damage frequently caused by it, both to these objects themselves and to the cultural heritage of national, tribal, indigenous or other communities, and also to the heritage of all peoples, and in particular by the pillage of archaeological sites and the resulting loss of irreplaceable archaeological, historical and scientific information."

[13] Article 3: *(1) The possessor of a cultural object which has been stolen shall return it. (2) For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.*

[14] The United States has been a party to it since 12/07/1973 (date of ratification), and Brazil since 09/01/1977 (date of acceptance; by Legislative Decree No. 74 dated 06/30/1977, only as of 11/07/1977). (Cf. http://whc.unesco.org/en/statesparties. Accessed May 21, 2012).

> heritage, situated in its territory and suitable for inclusion in the list provided for in paragraph 2 of this Article. This inventory, which shall not be considered exhaustive, shall include documentation about the location of the property in question and its significance.
>
> Article 11 – 2:
> On the basis of the inventories submitted by States in accordance with paragraph 1, the Committee shall establish, keep up to date and publish, under the title of 'World Heritage List,' a list of properties forming part of the cultural heritage and natural heritage, as defined in Articles 1 and 2 of this Convention, which it considers as having outstanding universal value in terms of such criteria as it shall have established. An updated list shall be distributed at least every two years.

Article 15 created the Fund for the Protection of the World Cultural and Natural Heritage called "The World Heritage Fund," and Article 16 provides, in addition to voluntary contributions, a pledge to deposit contributions to the Fund every two years.[15] Finally, Article 29 requires the State Parties to prepare reports for the General UN Educational, Scientific and Cultural Organization, which are then brought to the attention of the World Heritage Committee.

Such measures were adopted to thwart ordinary crime against works of art (robbery, theft, receiving, forgery), but were not thought out in terms of money laundering and terrorism financing. Commission of ordinary crime sometimes constitutes a single element in money laundering, and the art used for this crime is only for appearances of legitimacy and legal activities.

Then, the United Nations Convention against Transnational Organized Crime was convened in Palermo on 11/15/2000,[16] following the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 12/20/1988 (Article 5).[17] Both global regulatory guidelines require the State Parties to make laundering the proceeds of crime itself a crime (Article 6), and provide for the confiscation of "proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds" [Article 12(1)(a)]. Parallel to that is the United Nations Convention against Corruption held at Mérida in 2003 (Article 31, item 5—confiscation and seizure of money in an amount equivalent to the proceeds of crime).[18]

Items 2, 3 and 4 of Article 12 of the United Nations Convention against Transnational Organized Crime held at Palermo correspondingly assert that "State Parties shall adopt such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation; if the proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds; if proceeds

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[15] With reservations, on the part of Brazil (in the ratifying decree).

[16] In Brazil, promulgated by Decree No. 5015 dated 03/12/2004, and passed by Legislative Decree No. 231 dated 09/29/2003.

[17] Ratified by Brazil by Decree No. 154 dated 06/26/1991.

[18] Ratified by Brazil by Decree No. 5687 dated 01/31/2006.

of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds."

Such provisions accurately depict the new world order with respect to combating organized crime, including narcotics trafficking and corruption.

It is sometimes alleged by defendants that the property seized has no links to the crime. It is then up to the judge to properly estimate the amount that flowed from the proceeds of the unlawful conduct imputed, mindful of the need to enforce the requirements set forth in the foregoing Conventions, as well as Article 387, Section IV, of the Brazilian Code of Criminal Procedure, which requires that the sentence be fixed at the "minimum amount required for reparation of damages caused by the infraction, taking into account all losses suffered by the aggrieved party," in order to put the confiscation into effect—that is, to secure definitive forfeiture of that amount for the injured party or to the State as indemnification for damages caused by unlawful conduct.

Under Article K.3 of the Treaty of Maastricht (1992), European Union Member States agreed to adopt a common policy in their domestic efforts, and the 1998 joint action (98/773/JHA) sought to include money laundering as a type of organized crime. This was revoked in part by the Framework Decision[19] of the European Union Council dated 06/26/2001, whereby Member States agreed not to make reservations on Articles 2 and 6 of the European Convention of 1990 (including the rule that provides for money laundering resulting generically from criminal conduct), since only *serious infractions* can be at issue, and provided measures for confiscation and criminal action on the proceeds of crime having a maximum penalty of greater than one year, or crimes considered serious (Article 1).

The Framework Decision of 02/24/2005 (2005/212/JHA) on forfeiture of products, instruments and property related to the crime, allows "extended powers of confiscation" aimed not only at forfeiture of assets of all those found guilty, but also assets acquired by their spouses or companions, or whose property may have been transferred to some company under the influence or control of the guilty parties—for organized criminal practices such as counterfeiting, trafficking in persons or assisting illegal immigration, sexual exploitation of children and child pornography, traffic in narcotics, terrorism, terrorist organizations and money laundering, provided they be punishable by a sentence of a maximum of at least five to ten

[19] Decision and framework decision (Title VI of the European Union Treaty): With the entry into force of the Treaty of Amsterdam, these new instruments under Title VI of the European Union Treaty ("Provisions on Police and Judicial Cooperation in Criminal Matters") replaced joint action. Framework decisions are used to bring together the legislative and regulatory provisions of Member States. They are proposed on a motion by the Commission or by a Member State, and must be unanimously adopted. They are binding on Member States as to results to achieve, and leaves it to national courts to decide on the manner and the means of achieving them. Decisions address all other goals besides the conference committee work on legislative and regulatory provisions of the Member States. Decisions are binding and all measures necessary to carry out the decisions within the scope of the European Union are adopted by the Council through qualified majority vote.

years of imprisonment, or, in the case of laundering, with a maximum penalty of at least four years of imprisonment, and by their nature generating financial income (Article 3, Sections 1–3).

Note that the Palermo Convention provides for international cooperation on matters of confiscation [Article 13(1)], and expressly provides that the proceeds of crime be allocated to finance a United Nations Organizations Fund, so that it may assist Member States in obtaining the wherewithal with which to enforce the Convention [Articles 14(3)(a) and 30(2)(c)].

Artworks could well be included in the scope of this Convention if one could point to convincing evidence that they might be related to the commission of antecedent crimes and to money laundering. If the art market were indeed being used for purposes of money laundering, those circumstances would justify judicial search and seizure, and possibly confiscation as well.

2.3 National Laws and Enforcement: A Perspective from the United States and Brazil

In the United States, legislation fully supports confiscation of property in both administrative and criminal proceedings. The United States Code, Title 19 § 1595a (c), establishes customs forfeiture by providing that "[m]erchandise which is introduced or attempted to be introduced into the United States contrary to law shall be treated as follows: (1) The merchandise shall be seized and forfeited if it… (a) is stolen, smuggled, or clandestinely imported or introduced." There is a "failure to declare" law in the United States, 19 U.S.C. § 1497, which provides for forfeiture of any article not declared or mentioned orally or in writing.[20]

The U.S. Cultural Property Implementation Act of March 1983 (19 U.S.C. §§ 2601—2613), provides a series of administrative measures. Section 2609(a) of the Act establishes that "[a]ny designated archaeological or ethnological material or article of cultural property which is imported into the United States in violation of Section 2606 of this title or Section 2607 of this title[21] shall be subject to seizure and forfeiture."

The U.S. criminal code (18 U.S.C.) establishes as a crime:

> § 542 (Entry of goods by means of false statements)
> Whoever enters or introduces… into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal,… or makes any false

[20] 19 U.S.C. § 1497: *(a) In general (1) Any article which—(A) is not included in the declaration and entry as made or transmitted; and (B) is not mentioned before examination of the baggage begins—(i) in writing by such person, if written declaration and entry was required, or (ii) orally, if written declaration and entry was not required; shall be subject to forfeiture and such person shall be liable for a penalty determined under paragraph (2) with respect to such article.*

[21] These deal with stolen works.

statement in any declaration without reasonable cause to believe the truth of such statement, or procures the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement [shall be guilty of a crime].

§ 545 (Smuggling goods into the United States)
Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been brought into the United States contrary to law [shall be guilty of a crime]. Merchandise introduced into the United States in violation of this section shall be forfeited to the United States.

§ 1956 (Money Laundering)
(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—(A) (i) with the intent to promote the carrying on of a specified unlawful activity; or with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or knowing that the transaction is designed in whole or in part—(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. (…) (2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States—(A) with the intent to promote the carrying on of specified unlawful activity; or (B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part— (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or (ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer, whichever is greater, or imprisonment for not more than twenty years, or both (…).[22]

§ 1957 (Engaging in monetary transactions in property derived from specified unlawful activity).
Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).[23]

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[22] 18 U.S.C. § 1956: *(a) (1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—(A) (i) with the intent to promote the carrying on of specified unlawful activity; or (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or (B) knowing that the transaction is designed in whole or in part—(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or (ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. For purposes of this paragraph, a financial transaction shall be considered to be one involving the*

(Footnote 22 continued)
proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement. (2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States— (A) with the intent to promote the carrying on of specified unlawful activity; or (B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part— (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or (ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer, whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true. (3) Whoever, with the intent—(A) to promote the carrying on of specified unlawful activity; (B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or (C) to avoid a transaction reporting requirement under State or Federal law, conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section. (b) Penalties.—(1) In general.—Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3), or section 1957, or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of—(A) the value of the property, funds, or monetary instruments involved in the transaction; or (B) $10,000. (2) Jurisdiction over foreign persons.—For purposes of adjudicating an action filed or enforcing a penalty ordered under this section, the district courts shall have jurisdiction over any foreign person, including any financial institution authorized under the laws of a foreign country, against whom the action is brought, if service of process upon the foreign person is made under the Federal Rules of Civil Procedure or the laws of the country in which the foreign person is found, and—(A) the foreign person commits an offense under subsection (a) involving a financial transaction that occurs in whole or in part in the United States; (B) the foreign person converts, to his or her own use, property in which the United States has an ownership interest by virtue of the entry of an order of forfeiture by a court of the United States; or (C) the foreign person is a financial institution that maintains a bank account at a financial institution in the United States. (3) Court authority over assets.—A court may issue a pretrial restraining order or take any other action necessary to ensure that any bank account or other property held by the defendant in the United States is available to satisfy a judgment under this section. (4) Federal receiver.—(A) In general.—A court may appoint a Federal Receiver, in accordance with subparagraph (B) of this paragraph, to collect, marshal, and take custody, control, and possession of all assets of the defendant, wherever located, to satisfy a civil judgment under this subsection, a forfeiture judgment under section 981 or 982, or a criminal sentence under section 1957 or subsection (a) of this section, including an order of restitution to any victim of a specified unlawful activity. (B) Appointment and authority.—A Federal Receiver described in subparagraph (A)—(i) may be appointed upon application of a Federal prosecutor or a Federal or State regulator, by the court having jurisdiction over the defendant in the case; (ii) shall be an officer of the court, and the powers of the Federal Receiver shall include the powers set out in section 754 of title 28, United States Code; and (iii) shall have standing equivalent to that of a Federal prosecutor for the purpose of

(Footnote 22 continued)
submitting requests to obtain information regarding the assets of the defendant—(I) from the Financial Crimes Enforcement Network of the Department of the Treasury; or (II) from a foreign country pursuant to a mutual legal assistance treaty, multilateral agreement, or other arrangement for international law enforcement assistance, provided that such requests are in accordance with the policies and procedures of the Attorney General. (c) As used in this section—(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7); (2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction; (3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected; (4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree; (5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery; (6) the term "financial institution" includes— (A) any financial institution, as defined in section 5312 (a)(2) of title 31, United States Code, or the regulations promulgated thereunder; and (B) any foreign bank, as defined in section 1 of the International Banking Act of 1978 (12 U.S.C. 3101); (7) the term "specified unlawful activity" means—(A) any act or activity constituting an offense listed in section 1961 (1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31; (B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving—(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act); (ii) murder, kidnapping, robbery, extortion, destruction of property by means of explosive or fire, or a crime of violence (as defined in section 16); (iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978); (iv) bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official; (v) smuggling or export control violations involving—(I) an item controlled on the United States Munitions List established under section 38 of the Arms Export Control Act (22 U.S.C. 2778); or (II) an item controlled under regulations under the Export Administration Regulations (15 C.F.R. Parts 730-774); (vi) an offense with respect to which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States; or (vii) trafficking in persons, selling or buying of children, sexual exploitation of children, or transporting, recruiting or harboring a person, including a child, for commercial sex acts; (C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848); (D) an offense under section 32 (relating to the destruction of aircraft), section 37 (relating to violence at international airports), section 115 (relating to influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member), section 152 (relating to concealment of assets; false oaths and claims; bribery), section 175c (relating to the variola virus), section 215 (relating to commissions or gifts for procuring loans), section 351 (relating to congressional or Cabinet officer assassination), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 541 (relating to goods falsely classified),

(Footnote 22 continued)
section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 554 (relating to smuggling goods from the United States), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 831 (relating to prohibited transactions involving nuclear materials), section 844 (f) or (i) (relating to destruction by explosives or fire of Government property or property affecting interstate or foreign commerce), section 875 (relating to interstate communications), section 922(l) (relating to the unlawful importation of firearms), section 924 (n) (relating to firearms trafficking), section 956 (relating to conspiracy to kill, kidnap, maim, or injure certain property in a foreign country), section 1005 (relating to fraudulent bank entries), 1006 (relating to fraudulent Federal credit institution entries), 1007 (relating to Federal Deposit Insurance transactions), 1014 (relating to fraudulent loan or credit applications), section 1030 (relating to computer fraud and abuse), 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1111 (relating to murder), section 1114 (relating to murder of United States law enforcement officials), section 1116 (relating to murder of foreign officials, official guests, or internationally protected persons), section 1201 (relating to kidnapping), section 1203 (relating to hostage taking), section 1361 (relating to willful injury of Government property), section 1363 (relating to destruction of property within the special maritime and territorial jurisdiction), section 1708 (theft from the mail), section 1751 (relating to Presidential assassination), section 2113 or 2114 (relating to bank and postal robbery and theft), section 2252A (relating to child pornography) where the child pornography contains a visual depiction of an actual minor engaging in sexually explicit conduct, section 2260 (production of certain child pornography for importation into the United States), section 2280 (relating to violence against maritime navigation), section 2281 (relating to violence against maritime fixed platforms), section 2319 (relating to copyright infringement), section 2320 (relating to trafficking in counterfeit goods and services), section 2332 (relating to terrorist acts abroad against United States nationals), section 2332a (relating to use of weapons of mass destruction), section 2332b (relating to international terrorist acts transcending national boundaries), section 2332g (relating to missile systems designed to destroy aircraft), section 2332h (relating to radiological dispersal devices), section 2339A or 2339B (relating to providing material support to terrorists), section 2339C (relating to financing of terrorism), or section 2339D (relating to receiving military-type training from a foreign terrorist organization) of this title, section 46502 of title 49, United States Code, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 422 of the Controlled Substances Act (relating to transportation of drug paraphernalia), section 38 (c) (relating to criminal violations) of the Arms Export Control Act, section 11 (relating to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, section 16 (relating to offenses and punishment) of the Trading with the Enemy Act, any felony violation of section 15 of the Food and Nutrition Act of 2008 (relating to supplemental nutrition assistance program benefits fraud) involving a quantity of benefits having a value of not less than $5,000, any violation of section 543(a)(1) of the Housing Act of 1949 (relating to equity skimming), any felony violation of the Foreign Agents Registration Act of 1938, any felony violation of the Foreign Corrupt Practices Act, or section 92 of the Atomic Energy Act of 1954 (42 U.S.C. 2122) (relating to prohibitions governing atomic weapons) environmental crimes (E) a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.); or (F) any act or activity constituting an offense involving a Federal health care offense; (8) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory,

(Footnote 22 continued)
or possession of the United States; and (9) the term "proceeds" means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity. (d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section. (e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate, and, with respect to offenses over which the Department of Homeland Security has jurisdiction, by such components of the Department of Homeland Security as the Secretary of Homeland Security may direct, and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury, the Secretary of Homeland Security, and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Secretary of Homeland Security, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental Protection Agency. (f) There is extraterritorial jurisdiction over the conduct prohibited by this section if—(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and (2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000. (g) Notice of Conviction of Financial Institutions.—If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or section 5322 or 5324 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution. (h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy. (i) Venue.—(1) Except as provided in paragraph (2), a prosecution for an offense under this section or section 1957 may be brought in—(A) any district in which the financial or monetary transaction is conducted; or (B) any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted. (2) A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place. (3) For purposes of this section, a transfer of funds from one place to another, by wire or any other means, shall constitute a single, continuing transaction. Any person who conducts (as that term is defined in subsection (c)(2) any portion of the transaction may be charged in any district in which the transaction takes place.

[23] 18 U.S.C. § 1957: *(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b). (1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both. (2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction. (c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity. (d) The circumstances referred to in subsection (a) are—(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or (2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class*

§ 2314 (Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting)
Whosoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, valued at $5,000 or more, knowing the same to have been stolen, converted or taken by fraud [shall be guilty of a crime].

Through this legislation, the United States Attorney's Office for the Southern District of New York was able to seize, confiscate or repatriate many works of art either stolen or fraudulently sent to the United States under false or defective documentation.[24]

(Footnote 23 continued)
described in paragraph (2)(D) of such section). (e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate, and, with respect to offenses over which the Department of Homeland Security has jurisdiction, by such components of the Department of Homeland Security as the Secretary of Homeland Security may direct, and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury, the Secretary of Homeland Security, and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Secretary of Homeland Security, the Postal Service, and the Attorney General. (f) As used in this section—(1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956 (c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956 (c)(4)(B) of this title, but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution; (2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and (3) the terms "specified unlawful activity" and "proceeds" shall have the meaning given those terms in section 1956 of this title.

[24] The chief prosecutor for the Asset Forfeiture Unit, Sharon Cohen Levin, provided the author with substantial and pertinent information (in her office at One Saint Andrews Plaza) as to claims filed for recovery of goods, among them: United States v. An Antique Platter of Gold, Known as a Gold Phiale Mesomphalos, 400 B.C.; United States v. Tenth Century Marble Wall Panel Sculpture of a Guardian from the Tomb of Wang Chuzhi; United States v. Paintings Known as *Venus and Adonis* and *Hercules and Omphale* by Andrea Appiani; United States v. Head of Alexander the Great; United States v. A Silver Rhyton in the Shape of a Griffin, 700 B.C.; United States v. A South Arabian Alabaster Plaque or Stele, 300–400 A.D.; United States v. A Colossal Roman Marble Portrait of the Emperor Trajan; United States v. One Egyptian Alabaster Offering Vessel; United States v. A Bronze Statute of Zeus; United States v. An Archaic Etruscan Pottery Ceremonial Vase, 7th Century B.C., and A Set of Rare Villanovan and Archaic Etruscan Blackware with Buchero and Impasto Ware, 8th–7th B.C.; United States v. Indian Artifacts; United States v. Marble Sarcophagus of Child; United States v. A Pair of Gold Earrings; United States v. Roman Marble Portrait Head of the Emperor Marcus Aurelius (sold at Christie's of New York); United States v. Decrees of Anna Ioannovna to Kaysarov (1733), Aleksandr I, II and III (1825, 1867, 1892), Nicolay I (June and April, 1832) and Empress Catherine II (1762); United States v. The Painting Known as *Le Marché*, created by Camille Pissarro; United States v. Lega ed Il Cigno (Leda and the Swan), an oil on copper painting by Lelio Orsi; United States v. One Julian Falat painting entitled *Off to the Hunt* and One Julian Falat painting entitled *The Hunt*; United States v. The painting known as *Hannibal*, by Jean-Michel Basquiat, et al. as *Modern Painting with Yellow Interweave*, by Roy Lichtenstein, *Figure Dans Une Structure* by Joaquin

In Brazil, Bill No. 3443/2008, converted into Law No. 12683 of 07/09/2012, which amended Law No. 9613 of 03/03/1998, was hotly debated by many agencies that take part in the National Strategy for the Fight against Corruption and Money Laundering (ENCCLA). The ENCCLA comprises over sixty members, including many government agencies, such as Brazil's Federal Revenue Department, the Central Bank, the Ministry of Justice, State and Federal Attorneys' Offices, the Federal Police, and State and Federal Courts. The ENCCLA strives to honor all international commitments entered into by Brazil, and keeps up with all countries that are members of the Financial Action Task Force on Money Laundering (FATF).[25]

Among its recommendations is a need to close the loopholes that make money laundering feasible. Another recommendation is to require individuals in significant levels of trust (auditors, bank managers, insurance, real estate and capital goods brokers, etc.) to submit Suspicious Activity Reports to Financial Intelligence Units, which are key to all crime fighting systems.

In closing with a set list of antecedent crimes, it attempted to fine-tune and update the law to the most modern standards of money-laundering legislation, and thus provided preemptive asset forfeiture. Just as positive was the change requiring Suspicious Activity Reports from boards of trade, recordkeeping entities and all those involved in mediating, brokering or negotiating the trade of athletes. It was lax, however, in not including, for example, notification requirements on the part of sports clubs, sports federations and sports confederations.

By the new language imparted by Law 12683 of 09/07/2012, the crime of money laundering is now defined as:

> Art. 1 Concealing or disguising the nature, origin, location, disposition, movement or ownership of goods, securities or money derived directly or indirectly from a criminal offense.
>
> Penalty: Three to ten years of imprisonment and a fine.
>
> § 1 The same penalty shall apply to anyone who, in order to conceal or disguise the use of goods, securities or money arising directly or indirectly from a criminal offense:
>
> I – converts them into legal assets;

(Footnote 24 continued)

Torres-Garcia, *Composition Abstraite* by Serge Poliakoff; *Roman Togatus*, unattributed Sculptor (Edemar Cid Ferreira Collection); United States v. One Terra Cotta Urn from Italy dating from the Ninth Century B.C.; United States v. Portrait of A Musician Playing A Bagpipe (Holocaust Property); United States v. An Oil Painting Known as Saint Hieronymus (Holocaust Property); United States v. Ancient Hebrew Bible, 1516 (Holocaust Property); United States v. Portrait of Wally, a painting by Egon Schiele (Holocaust Property).

[25] The most recent Argentine anti-money-laundering law (Law No. 26683 of 06/21/2011), in addition to including self-laundering, increases the minimum sentence from two years to three years (while keeping the maximum at ten years), requires the laundered money to have originated from a "criminal act" instead of a "crime," adds language to the Criminal Code making corporations subject to criminal liability, and establishes forfeiture of assets with no need for criminal conviction, provided illegal origin can be established, including cases of bankruptcy, flight, statutory limitations or the existence of any reason for suspending or terminating criminal proceedings, or when the defendant acknowledges the illegal source of the goods. (INFORME ANNUAL 2011. *Unidad de Información Financiera*. Buenos Aires: Departamento de Prensa, Ministerio de Justicia y Derechos Humanos/Presidencia de la Nación, 2012, pp. 24–26.).

II – acquires, receives, trades, negotiates, gives or receives them in guarantee or in bailment, keeps them on deposit, negotiates or transfers them;

III – imports or exports goods at a price other than their true value.

§ 2 The same penalty shall also apply to anyone who:

I – makes use – in financial or business dealings – of goods, securities or amounts they know or have reason to know are the proceeds of crime;

II – is a member of any group, association or office while aware that its primary or secondary activity involves the commission of crimes as provided herein.

§ 3 Such attempts are punishable pursuant to the sole paragraph of Article 14 of the Criminal Code.

§ 4 The penalty shall be increased by one-third to two-thirds if the crimes established in this Law are committed as repeat offenses or through a criminal organization.

§ 5 The penalty may be reduced by one-third to two-thirds, and may be served under a work-release or similar program, or the judge may suspend the sentence or instead sentence the defendant to curtailment of rights if the first principal, second principal or accomplice freely cooperates with the authorities, and provides information to assist in the investigation of the crimes, identifies the perpetrators or identifies the whereabouts of the goods, securities or monetary proceeds of the crime.

Brazil's National Institute of Historic and Artistic Heritage (IPHAN) is a federal agency under the Ministry of Culture. Its mandate is to oversee and protect the stewardship of archaeological collections that are federal property (under Article 20, X of the Federal Constitution, and Article 17 of Law No. 3924 of 07/26/1961) and may not be preserved by private entities. It also extends protection to property having historical, artistic and cultural value. The Brazilian Constitution establishes, in Article 20, Section X, that all archaeological and prehistoric sites belong to the Union, and in Article 23, Sections III and IV, that all governing bodies (the Union, the states, the Federal District and the municipalities) shall be responsible for the protection of "documents, works and other assets of historical, artistic or cultural value (…) and archaeological sites" and also must "prevent the loss, destruction, or changing of the characteristics of works of art and other goods of historical, artistic and cultural value."[26]

[26] The Brazilian Constitution and the framework for cultural protection: *TITLE I Fundamental Principles (…) Art. 4 The international relations of the Federative Republic of Brazil are governed by the following principles: (…) Sole paragraph. The Federative Republic of Brazil shall seek the economic, political, social and cultural integration of the people of Latin America, with a view toward forming a Latin American community of nations. (…) TITLE II Fundamental Rights and Guarantees. CHAPTER I INDIVIDUAL AND COLLECTIVE RIGHTS AND DUTIES. Art. 5 Everyone is equal before the law, with no distinction whatsoever, guaranteeing to Brazilians and foreigners residing in the Country the inviolability of the rights to life, liberty, equality, security and property, on the following terms: (…) LXXIII – any citizen has standing to bring a popular action to annul an act injurious to the public patrimony or to the patrimony of an entity in which the State participates, to administrative morality, to the environment and to historic and cultural patrimony; except in a case of proven bad faith, the plaintiff is exempt from court costs and from the burden of paying the prevailing party's attorneys' fees and costs (…) TITLE III Organization of the State (…) CHAPTER II THE UNION (…) Art. 23 The Union, the States, the Federal District and the Municipalities shall have in common the power: (…) III – protect documents, works, and other assets of historical, artistic and cultural value, monuments, remarkable natural landscapes and archaeological sites; IV – to prevent the loss, destruction, or*

(Footnote 26 continued)
changing of the characteristics of works of art and other goods of historical, artistic and cultural value; V – to furnish means of access to culture, education and science; (…) Art. 24 The Union, the States and the Federal District shall have concurrent power to legislate on: (…) VII – protection of the historical, cultural, artistic, touristic, and scenic patrimony; VIII – liability for damages to the environment, consumers, property and rights of artistic, aesthetic, historical, touristic, and scenic value; IX – education, culture, teaching and sports; (…) CHAPTER IV THE MUNICIPALITIES (…) Art. 30 The Municipalities have the power to: (…) IX – Promote protection of local historical and cultural patrimony, observing federal and state legislation and supervision; (…) TITLE VIII The Social Order (…) CHAPTER III EDUCATION, CULTURE AND SPORTS. Section I EDUCATION (…) Art. 213 Public funds shall be allocated to public schools, and may be directed to community, religious, and philanthropic schools, as defined in law, that: (…) II, § 1 – University research and extension activities may receive financial support from the government. (…) Section II CULTURE. Art. 215 The National Government shall guarantee to all full exercise of their cultural rights and access to sources of national culture, and shall support and grant incentives for appreciation and diffusion of cultural expression. § 1 – The National Government shall protect expressions of popular, indigenous and Afro-Brazilian cultures and those of other participant groups in the process of national civilization. § 2 – The law shall provide for establishing highly significant commemorative dates for various national ethnic segments. § 3 – The law shall establish a National Culture Plan, of multi-year duration, seeking the cultural development of the country and the integration of public actions that lead to: (Added by Constitutional Amendment No. 48 of 2005) I – defense and valorization of Brazilian cultural patrimony; (Added by Constitutional Amendment No.48 of 2005) II – production, promotion and diffusion of cultural goods; (Added by Constitutional Amendment No. 48 of 2005) III – formation of qualified personnel for the multiple dimensions of cultural management; (Added by Constitutional Amendment No. 48, of 2005) IV – democratization of access to cultural assets; (Added by Constitutional Amendment No. 48 of 2005) V – valorization of ethnic and regional diversity. (Added by Constitutional Amendment No. 48, of 2005) Art 216. Brazilian cultural heritage includes material and immaterial goods, taken either individually or as a whole, that refer to the identity, action, and memory of the various groups that form Brazilian society, including: I – forms of expression; II – modes of creating, making, and living; III – scientific, artistic, and technological creations; IV – works, objects, documents, buildings, and other spaces used for artistic-cultural manifestations; V – urban complexes and sites of historical, landscape, artistic, archaeological, paleontological, ecological and scientific value. § 1 – The Government, with the collaboration of the community, shall promote and protect Brazilian cultural heritage by inventories, registries, surveillance, monument protection decrees, expropriation, and other forms of precaution and preservation. § 2 – It is the responsibility of public administration, as provided by law, to maintain governmental documents and take measures to make them available for consultation by those that need to do so. § 3 – The law shall establish incentives for production and knowledge of cultural property and values. § 4 – Damages and threats to the cultural patrimony shall be punished, as provided by law. § 5 – All documents and sites bearing historical reminiscences of the old hideouts for fugitive slaves are declared to be historical monuments. § 6 – States and the Federal District may bind up to five-tenths of one percent of their net tax receipts from the state fund for cultural development for financing cultural programs and projects, but these resources may not be used for payment of: (Added by Constitutional Amendment No. 42 of 12/19/2003) I – personnel expenses and payroll charges; (Added by Constitutional Amendment No. 42 of 12/19/2003) II – debt service; (Added by Constitutional Amendment No. 42 of 12/19/2003) III – any other current expense not linked directly to the supported investments or stock. (Added by Constitutional Amendment No. 42 of 12/19/2003) Section III SPORTS. Art. 217 It is the duty of the State to foster formal and informal sporting activities as each individual's right, observing: § 3 – The Government shall encourage leisure as a means of social promotion. CHAPTER IV SCIENCE AND TECHNOLOGY (…) Art. 219. The domestic market comprises part of the national patrimony and shall be encouraged to make viable cultural and socio-economic development, the well-being of the population and the technological autonomy of Brazil,

(Footnote 26 continued)
as provided by federal law. CHAPTER V SOCIAL COMMUNICATION. Art. 220 The expression of thoughts, creation, speech and information, through whatever form, process or vehicle, shall not be subject to any restrictions, observing the provisions of this Constitution. § 1 – No law shall contain any provision that may constitute an impediment to full freedom of the press, in any medium of social communication, observing the provisions of art. 5, IV, V, X, XIII and XIV. § 2 – Any and all censorship of a political, ideological and artistic nature is forbidden. § 3 – It is the province of Federal law to: I – regulate public entertainment and shows, and it is the responsibility of the Government to advise about their nature, the ages for which they are not recommended and the locales and times unsuitable for their exhibition; II – establish legal measures that afford individuals and families the opportunity to defend themselves against radio and television programs or schedules that contravene the provisions of art. 221, as well as against commercials for products, practices, and services that may be harmful to health and the environment. § 4 – Commercial advertising of tobacco, alcoholic beverages, pesticides, medicine, and therapies shall be subject to legal restrictions, in the terms of subparagraph II of the preceding paragraph, and shall contain, whenever necessary, warnings about harms caused by their use. § 5 – The media of social communication may not, directly or indirectly, be subject to monopoly or oligopoly. § 6 – Publication of printed means of communication shall not require a license from any authority. Art. 221 Production and programming by radio and television stations shall comply with the following principles: I – preference for educational, artistic, cultural and informational purposes; II – promotion of national and regional culture and fostering any independent production aimed at its dissemination. III – regionalization of cultural, artistic and journalistic production, according to percentages established by law; IV – respect for ethical and social values of the individual and the family. Art. 222 Ownership of journalism firms and firms broadcasting sound or images with sound is restricted to native-born Brazilians or those naturalized for more than ten years, or to legal entities organized under Brazilian law and with their headquarters in the Country. (New language provided by Constitutional Amendment No. 36 of 2002) § 1 – In either case, at least seventy percent of the total capital and voting capital of journalism firms and firms broadcasting sound or images with sound must be owned, directly or indirectly, by native-born Brazilians or those naturalized more than ten years, who must manage the activities and determine the programming content. (New language provided by Constitutional Amendment No. 36 of 2002) § 2 – In any means of social communication, editorial responsibility and activities of selecting and directing programming are restricted to native-born Brazilians or those naturalized for more than ten years. (New language provided by Constitutional Amendment No. 36 of 2002) § 3 – Irrespective of the technology utilized for rendering the service, electronic means of social communication shall observe the principles enunciated in art. 221, in the form of specific law that shall also guarantee the priority of Brazilian professionals in the execution of national productions. (Added by Constitutional Amendment No. 36 of 2002) § 4 – Participation of foreign capital in the firms referred to in § 1 shall be regulated by law. (Added by Constitutional Amendment No. 36 of 2002) § 5 – Changes in controlling shareholders in the firms referred to in § 1 shall be communicated to the National Congress. (Added by Constitutional Amendment No. 36 of 2002) Art. 223 The Executive has the power to grant and renew concessions, permits and authorizations for the services of broadcasting sounds and images with sounds, observing the principle of complementary roles of private, public, and state systems. § 1 – The National Congress shall consider such acts within the time period of art. 64, §§ 2 and 4, starting from the date of receipt of the message. § 2 – Non-renewal of concessions or permits requires approval by at least two-fifths nominal vote of the National Congress. § 3 – Grants or renewals shall be legally effective only after consideration by the National Congress, in accordance with the preceding paragraphs. § 4 – Cancellation of a concession or permit prior to its expiration date requires a judicial decision. § 5 – The term of a concession or permit shall be ten years for radio stations and fifteen years for television stations. Art. 224. For the purposes of the provisions of this chapter, the National Congress shall institute, as an auxiliary agency, the Social Communications Council, as provided by law. CHAPTER VI THE ENVIRONMENT (…) CHAPTER VII FAMILY, CHILDREN, ADOLESCENTS, YOUTHS AND ELDERLY (…) Art. 227

Article 24 of Legislative Decree (Decreto-lei) No. 25 of 11/30/1937, which organized the protection of historical and artistic patrimony of Brazil, requires that "the Union maintain—for the preservation and exhibition of historical and artistic works—in addition to the National Historical Museum and the National Museum of Fine Arts, other national museums as may become necessary, and shall also make provisions to promote the establishment of state and municipal museums having similar purposes."

There is also a provision for administrative seizure (of illegally exported national heritage works[27]), and for forfeiture arising from crime (generic provision for all proceeds from or instrumentalities of crime; and a provision in Brazil's Money-Laundering Law, Article 91, Sections I and II of the Criminal Code, and Article 7, Section I of Law No. 9613 of 03/03/1998, as amended by Law No. 12683/2012).

The relevance and originality of all this warrant revisiting a very apropos line of reasoning in the author's work[28] having to do with confiscation even when there is no previous criminal conviction. As was already discussed, the Financial Action Task Force (FATF) Recommendations (in particular, Recommendations Nos. 4 and 30), the UN Convention on the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, December 20, 1988, Article 5), the UN Convention against Transnational Organized Crime (Palermo, 2000, Article 12, Item 7), the UN Convention against Corruption (Mérida, 2003, Article 20, Article 30, Item 8 and Article 47), and the Council of Europe Convention on Laundering, Search, Seizure

(Footnote 26 continued)
It is the duty of the family, the society and the Government to assure children, adolescents, and youths, with absolute priority, the rights to life, health, nourishment, education, leisure, professional training, culture, dignity, respect, liberty and family and community harmony, in addition to safeguarding them against all forms of negligence, discrimination, exploitation, violence, cruelty and oppression. (…) CHAPTER VIII INDIANS. Art. 231 The social organization, customs, languages, creeds and traditions of Indians are recognized, as well as their original rights to the lands they traditionally occupy. The Union has the responsibility to delineate these lands and to protect and ensure respect for all their property. § 1 – Lands traditionally occupied by Indians are those on which they live on a permanent basis, those used for their productive activities, those indispensable for the preservation of environmental resources necessary for their well-being and those necessary for their physical and cultural reproduction, according to their uses, customs and traditions. (…) Art. 232 Indians, their communities and their organizations have standing to sue to defend their rights and interests, with the Public Ministry intervening at all stages of the proceeding. (…) (Added by Constitutional Amendment No. 65 of 2010) TITLE IX General Constitutional Provisions (…) Art. 242. (…) § 1 – Teaching of Brazilian history shall take into account the contribution of different cultures and ethnic groups the formation of the Brazilian people. (…).

[27] Cf. Article 15 of Legislative Decree No. 25 of 11/30/1977 (legislation organizing protection of national historic and artistic patrimony) and Law No. 3924 of 07/26/1961 (regulating public assets of interest to the Union, e.g., archaeological and ethnological assets) in combination with Law No. 4845 of 11/19/1965 (banning exportation of artworks produced in Brazil with provisions for their seizure).

[28] In *Lavagem de Dinheiro. Teoria e Prática.* Campinas: Millennium, 2008, pp. 163–173.

and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw, 2005, Article 2) all recommend that consideration be given to the adoption of confiscatory measures absent prior criminal conviction, or measures shifting the burden of proving the legal source of assets onto the accused.

To increase the likelihood of recovering assets of criminal origin, States are urged to draft laws instituting Civil Forfeiture Actions for Illegally Acquired Assets as a means of fighting money laundering by interrupting the usufruct of the proceeds of crime.

For example, on September 5–6, 2005, judicial authorities of the Office of the Federal Prosecutor, the Attorney General's Office, and the Justice Ministry's Asset Recovery and International Legal Cooperation Department (DRCI), met to discuss the project, given the participation of Kimberly Prost, UN specialist on Drugs and Crime. The meeting was again taken up on October 7 of that same year and then again on March 20, 2006, to finalize the project and conclude the discussions.

The primary focus was on establishing quicker means of recovering illegal assets—means that did not require a decision on the defendant's criminal liability, but rather, a judicial recognition restricted to proof of the illegal origin of the assets, absence of proper title for their acquisition, or a mismatch between income level and assets acquired.

Leaving illegally obtained money in the hands of criminals—especially members of organized criminal gangs—encourages the reentry of those monies into the underworld, or back into the original illegal business practices occurring prior to, or even after serving a sentence, with the potential for serious harm to society.

ENCCLA Target No. 19 of 2008, foreseeing the need to confiscate illegal goods, highlighted the importance of a law to enable the taking of urgent measures in administrative proceedings. The Office of the Attorney General then agreed to draft a bill which, if passed, could apply to both administrative proceedings and lawsuits charging administrative dishonesty, irrespective of the civil actions addressed here.

Civil action opens up new inroads for obtaining assets that would end up financing organized crime, inasmuch as they are derived from it. They allow the State to deal with the proceeds of crime. They must also be clearly regulated so as on the one hand to not offend fundamental rights of the individual, and on the other to serve as a quick and effective tool for the recovery of illicit assets.

The civil action in question would indeed be an extension of State powers regarding illegal assets, inasmuch as it would allow definitive forfeiture while dispensing with a final decision by a court and still respecting the rights of the individual.

The rights of those who received the property in good faith, or of third parties in a similar situation, must be protected. They must therefore be assured the right to answer the civil charges, and even assured payment of minor expenses (like living expenses) during discussion of their situation. One could prove, for example, having rented the house in good faith without knowing that it was used for illegal purposes (such as prostitution).

It would not be appropriate, however, for the defense to argue adverse possession, because it would be too easy to deflect the purpose of the action if, for instance, the owner were to pay someone to allege uninterrupted possession.

We should mention that the burden of proof as to the illegal origin of the assets and monetary amounts does, in principle, fall on the State and includes not only the proceeds of the crime, but also its instrumentalities, such as cars, boats, houses and businesses. To be clear, it is only if the assets are included in an income tax return that the burden of proof is on the State, as opposed to the owner, possessor or bearer.

Note that criminal sanctions are oftentimes perceived as a temporary setback (even when penalties are severe), whereas the compulsory transfer of valuable assets to the State, such as cars, mansions and luxury items, causes more trouble to criminals because of its irreversible nature.

But civil action is not intended as a means of giving the State yet another punitive instrument. Yet it does have this effect, to the extent that those accustomed to having illegal assets value them very highly, even when compared to their own individual freedom. Hence, civil action to terminate ownership does indeed become a valuable instrument in fighting crime and is also more effective in the recovery of illegal assets.

It is much more difficult to obtain a satisfactory outcome in serious and complex crimes, especially money laundering, because criminals have made use of qualified professionals to enable them to distance themselves from the crime. Civil action is quite useful here because the value judgment involved is different. What must be proven is a link. It is not a judgment of merits as in a criminal procedure, but rather a determination of the probabilities that the assets are the product of illegal activity.

Indeed, the cost involved in gathering evidence of a crime such as money laundering, coupled with the difficulty of obtaining a favorable outcome, even in the presence of strong suspicion of criminal activity, has caused governments to rethink the entire system in terms of adopting less costly methods—methods more closely hedged in with the necessary guarantees—as a strong ally in the recovery of illicit assets.

It is important to the success of the action that specific cooperative agreements between States be entered into, thereby opening up a broad avenue for the recovery of illegal assets.

Due to its autonomous nature, the action under consideration may be brought concurrently with criminal prosecution, provided it does not jeopardize criminal investigations, which are often secret. If during the course of bringing civil action it is found that criminal prosecution can feasibly be quickly resolved, the civil suit should be suspended pending the outcome of criminal proceedings.

One must, however, be mindful of the absolute autonomy of civil action. Situations such as the death of a defendant or subject of an investigation, statutory limitations, insufficient evidence, criminal immunity or obtaining of evidence from abroad may burden, if not thwart, recovery of illegal assets.

Civil action could be improved by permitting preventive seizure or impoundment prior to definitive forfeiture, thus allowing the appointment of a custodian of property, but without preemptive alienation (before the decision becomes final), which could be risky because the judgment of merits is different from that in criminal courts, except in cases of deterioration.

Should a settlement occur in civil proceedings, the effect in criminal court would favor reducing the sentence, whether by acknowledgment of subsequent repentance (CPB—Brazilian Criminal Code, Article 16), or by mitigating circumstances, such as voluntary cooperation (CPB Article 65, Section III, Item b), or by plea bargaining.[29]

To avoid improper management of such actions (purely personal or political filings), specific rules of procedure must be established, such as, for instance, rejection of filings once ten or fifteen years have elapsed following possession or holding, prior analysis of the history of the ownership of the assets through forensic examination, and a preliminary hearing with the defendant—all to preclude arbitrary or baseless filings.

Civil action for termination of ownership is accepted procedure in the United Kingdom, Iceland, Italy, the United States, Colombia (through Law No. 793 of 12/27/2002), Australia and South Africa.

In the United States, the Treasury Department's Office of the Comptroller of the Currency (OCC) requires that all banks file Suspicious Activity Reports (SARs) with the Financial Crimes Enforcement Network (FinCEN), also a Treasury Department agency. This must be done whenever any violation is known or suspected, and also whenever a suspicious transaction involves money laundering or any violation of the rules made pursuant to the Bank Secrecy Act (BSA).[30]

Note that the OCC has received requests to amend the expression "known or suspected violation" because of its breadth of scope. The conclusion was made, however, that attempted crimes, or the potential for the same, must be reported in order to bolster the effectiveness of efforts to combat money laundering. There was, however, more clarity provided on the requirement that banks report suspicious activities "for any reason" because critics considered the expression overly broad and rendered meaningless the $5,000 threshold for Suspicious Activity Reports. The OCC decided that reporting was required on any operation involving $5,000 or more, provided the banks know, suspect, or have reason to suspect that the operation involves money derived from illegal activities; there is some intent to conceal or disguise the money;

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[29] Many Brazilian laws contain such provisions, among them: Criminal Code (Article 159, § 4, as amended by Law No. 9269 of 04/02/1996); Law No. 7492 of 06/16/1986 (Article 25, § 2, with new language added by Law No. 9080 of 07/19/1995); Law No. 8072 of 07/25/1990 (Article 8, sole paragraph); Law No. 8137 of 12/27/1990 (Article 16, sole paragraph, new language added by Law No. 9080/1995); Law 9034 of 05/03/1995 (Article 6); Law No. 9613 of 03/03/1998 (Article 1, § 5); Law No. 9087 of 07/13/1999 (Articles 13–15); and Law No. 11343 of 08/23/2006 (Article 41).

[30] Cf. John K. Villa. *Banking Crimes: Fraud, Money Laundering and Embezzlement*, vol. 2, App. 2A1.

it might form part of a plan to circumvent reporting; the money has no legal or business purpose; or the money does not match the customer's expected profile.[31]

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[31] Cf. John K. Villa. *Banking Crimes: Fraud, Money Laundering and Embezzlement*, Vol. 2, App. 2A5-6.

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Chapter 3
Deterring Criminals from Engaging in Financial Crimes

Financial crime laws have become increasingly important in recent years. Many changes have taken place to keep up with the globalization of the economy. Until recently, there were great schisms between East and West and between North and South, and even a "cold war" complete with communist-derived socialism. As the idea of a market economy gained prevalence, even in countries with no such tradition (such as China), and technological innovations advanced, there grew a need for new managerial practices applied to businesses.

Criminals likewise evolve over time. Despite the positive hopes brought on by the advent of globalization, a cutthroat and destructive competitiveness also developed. There are new and growing fears because we do not know where all of this is headed (although trends look ominous).

The globalization inherent in today's world, with all its advantages and disadvantages, fosters a transnational and technological criminal enterprise, practiced even by large conglomerates and businesses, that necessitates unprecedented cooperative exchanges among nations.

The special field of financial crime law is justified by the simple idea that market rules alone cannot address all of the aspirations emerging within the context of the course of business practices—oftentimes crossing through dangerous, ethical gray areas.

The legal protection of property requires government intervention and social and economic regulation so that the rules of conduct with regard to business practices may be stabilized and hence preserved.

Objects of legal protection enjoy a sort of global protection, not just by criminal law, but rather through the expectation of general stability engendered by rules fostering the proper and honest functioning of markets (of corporations, of private and public roles, of derivative securities, etc.).

F. M. De Sanctis, *Money Laundering Through Art*, DOI: 10.1007/978-3-319-00173-9_3,

This is an area of criminal law designed to fill in loopholes in the definitions[1] of crimes against property owing, in large part, to increases in criminal infractions resulting from the exponential increase of economic activity within the state and of international financial relationships.

Of course Criminal Law does apply, albeit in a fragmented, subsidiary (last-resort) role, with no expectation that its financial branch will function in more than a supporting, symbolic role. Yet when we see that such principles are invoked indiscriminately, without the slightest basis in reason, the result is a systemic lack of protection to the economic order.

The take-away here is that financial crime is a very current subject, "whether by the magnitude of the material damage it causes, or by its capacity to adapt to, and survive, social and political changes, or even because of its readiness to come up with defenses and to defeat all efforts to combat it."[2]

Conceptualizing financial crime is no simple task. It does not lend itself to simple measurement by the extent of resulting damages. The classification of financial crimes rests on the collectivized or supra-individual nature of the legal interests or assets that are to be protected.

Reducing intervention to only those alleged facts actually held meritorious is just as imperative as trimming away criminal liability hidebound by excessive formalism. Yet the fact remains that administrative sanctions alone have not sufficed to enforce the basic duties that we, as citizens, are bound by as actors in the economic system.

Brazil's Federal Constitution, for example, went even further. Under the title *The Economic and Financial Order*, Chapter I, *The General Principles of Economic Activity,* it regulates economic and financial order, and even provides criminal liability for companies "without prejudice to the individual liability of the managing officers of a legal entity, establish the liability of the latter, subjecting it to punishments compatible with its nature, for acts performed against the economic and financial order and against the savings of the people" (Article 173, para 5).

Criminal law has from the outset concerned itself with protecting the basic institutions of government and citizens' most basic interests. Over time, however, in addition to being relied upon to provide minimum standards of coexistence, it began to also lend itself to the protection of new social and economic interests. A radical shift in government intervention strategies were enacted to combat the intimidating phenomenon of organized crime that was petulantly working its will on politicians, journalists, judges, businessmen, and others.

White-collar financial crime must be tackled alongside the image of the criminal and the social effects of that type of conduct. The conclusions advanced by

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[1] In PEDRAZZI, Cesare. O Direito Penal das Sociedades e o Direito Penal Comum. *Revista Brasileira de Criminologia e Direito Penal*. Rio de Janeiro: Instituto de Criminologia do Estado da Guanabara, 1965, vol. 9, p. 133.

[2] Cf. OLIVEIRA, Eugênio Pacelli de, Coordinator. *Direito e processo penal na justiça federal: doutrina e jurisprudência.* São Paulo: Atlas, 2011, p. 69.

Edwin Sutherland defined white-collar crime as crimes committed by an honorable person with social and professional prestige,[3] which may explain why this type of criminal conduct generates little in the way of social reaction.

Perhaps this phenomenon is due to the perception of minimal dangerousness of the criminal in the absence of direct violence or confrontation with the victim, or even because no physical harm is even contemplated. This brings us to the idea advanced by Thomas Lynch, that serious crime is more ink-stained than blood-stained.[4] Hence, perhaps, it involves a certain moral neutrality.

According to Dr. José Ángel Brandariz Garcia, imprisoning financial criminals would not even result in the negative social stigma typically expected for those identified as criminals, given their personal and socioeconomic characteristics.[5]

Yet it is by no means common knowledge that financial crime is more harmful to society than ordinary crime, given its penetration of our institutions and social organization. In truth, it ends up fostering ordinary criminality (corruption, unfair competition, fraud, etc.). This hampers enforcement efforts, due to widespread ignorance as to the harmful effects on society that result from the drain on already scarce financial resources.

Financial criminals do, in fact, have great potential for engendering crime. They are highly adaptable within society, and often enjoy considerable tolerance within the community, which leads to their increasingly daring and dangerous criminal behavior. Furthermore, financial criminals actually run a sort of cost-benefit analysis on the gains to be had from unlawful conduct and possible sanctions (sentences) imposed by the legal system. By running a utilitarian calculation,[6] one could easily conclude that getting caught involves little or no consequence, given the tolerance and only formally rigorous nature of our criminal justice system. This technical sophistication is not found in ordinary criminals.

Cláudia Cruz Santos argues that "theories of rational choice and situational prevention seem to fit them like a glove. Their assessment of the costs and benefits associated with misconduct might dissuade them from engaging in it, should the opportunities decrease and the possibility of detection and punishment increase."[7]

The deciding factor is not will, but rather the impracticability of the behavior prohibited by law. No longer can we afford the luxury of complex theorizing over

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[3] In CAVERO, Percy García. *Derecho Penal Económico – Parte General.* Lima, Peru: Grijley, 2nd ed., 2007, pp. 276–277.

[4] *Apud* José Ricardo Sanches Mir and Vicente Garrido Genovês (in *Delincuencia de cuella blanco.* Madrid: Instituto de Estudos de Política, 1987, p. 71).

[5] In *El delito de defraudación a la seguridad social.* Valencia: Tirand lo Blanch, 2000, pp. 80–81.

[6] FISCHER, Douglas. *Inovações no Direito Penal Econômico: contribuições criminológicas, político-criminais e dogmáticas.* Organizer: Artur de Brito Gueiros Souza. Brasília: Escola Superior do Ministério Público da União, 2011, p. 37.

[7] Cf. *O crime de colarinho branco* (da origem do conceito e sua relevância criminológica à questão da desigualdade na administração da justiça penal), 2001, p. 175.

abstract hazards and social harm. Categories of financial crime have to do with increasingly complex regulatory situations, and conduct that is legally intolerable, irrespective of the intentions of the criminal. Those intentions would only come out afterward, after the decision was made to break the rules of conduct binding upon us all.

Financial crime, given its scope and potential for damage, is consigned to the jurisdiction of the Federal Government—at least in countries such as Brazil and the United States, which rely on a dual justice system.

> A good portion of this jurisdiction is brought to bear upon crimes that are complex, sometimes on account of the suspects or defendants involved—people of great economic or political power who, as a rule, operate within a network having international ramifications—and other times because of the type of financial crime involved, be it corruption, influence-peddling, money laundering, etc. Its seriousness, its harm to society and the threat it poses to institutions which safeguard the Rule of Law require a different balance between the rights of the accused and other procedural requirements of speedy trials and the duty of the State to prosecute and punish unlawful conduct.[8]

This harmful and unlawful behavior under federal jurisdiction requires recognition of financial criminal conduct as a violation of a negative legal duty, namely, that of refraining from illegitimately harming others or the public order, and of a positive legal duty, that one's behavior be conducive to the greater good of society. This progressive view of legality is increasingly accepted.

It does, however, require more complex analysis, involving the said legal duties (both negative and positive) upon whose foundation a specific legal and criminal appraisal is constructed.

The reintegration of financial criminals into society must therefore center on making them rethink their behavior. If there is indeed any reasoning behind unlawful conduct involving cost-benefit analyses of the outcomes to the offender, a given crime will be committed if and only if the expected penalty is outweighed by the advantages to be had from committing the act.[9]

Some rethinking is therefore in order on the application or restriction of monetary penalties. Inasmuch as their intimidating effect is quite low, they amount to little in the overhead of unlawful behavior. The exigencies of proportionality (gravity of the crime plus guilt) and the need for general deterrence require a response that is a better fit for serious financial crimes.

Penalties should seek to elicit preventive outcomes in both special and general cases because, if correct, timely, and inhibitory, they will be effective at the individual and societal levels, a point too obvious for society to ignore.

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[8] OLIVEIRA, Eugênio Pacelli de. Direito e processo penal na justiça federal: doutrina e jurisprudência. São Paulo: Atlas, 2011, p. 71.

[9] For more on this, see Jesús-María Silva Sánchez (in *Eficiência e direito penal.* Coleção Estudos de Direito Penal. São Paulo: Manole, 2004, No. 11, p. 11) and Anabela Miranda Rodrigues (in *Contributo para a fundamentação de um discurso punitivo em matéria fiscal. Direito Penal Económico e Europeu: textos doutrinários.* Coimbra: Coimbra Ed., 1999, pp. 484–485).

Citing K. Polk, S.R.M. Mackenzie asserts that a fourth requirement ought to be added to the list to deter financial criminals. To the certainty, severity and swiftness of punishment, one might add the calculation that they make between the probability of punishment and the misconduct itself.[10]

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[10] In *Going, Going, Gone: Regulating the Market in Illicit Antiquities*, p. 231.

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Chapter 4
Investigating and Preventing Crime in the Art World

4.1 The Art World: Its Actors, Crime Investigation and Crime Prevention

Art shapes society and gives it its character. Art defines humans. Art is both heritage and history. Art is difficult to conceptualize, for it involves esthetics, feelings, utility and imagination. Certain knowledge is required to understand the art world, but this does not mean that one has to take a course in art history. A basic foundational understanding of the art world is sufficient to analyze cases involving robbery, theft, and forgery of artworks, and even money laundering through art.

Yet this is no small task, for artistic production, like the production of foodstuffs, clothing, etc., is the result of vast and ongoing human endeavor. Like agricultural production, the production of artworks can vary in both quantity and quality at different times.

We must not lose sight of what is often understood as persistent discrimination, primarily in favor of Europe and the United States, where quantity and quality are less important than the location and time period that the artwork belongs to. According to Robert Spiel, Jr., "collectors, dealers, and museums discriminate in favor of certain periods and geographical regions and have excluded others, to at least a significant extent."[1]

The following art, by time period and geographic region, are the most favored[2]

(1) 3000 B.C.–1000 B.C.

Europe	Greek art and Greek and Roman writings
Africa	Egyptian art
Asia	Chinese pottery, Art of Babylon (Iraq) and Troy (Turkey) and the beginnings of Hinduism (India)

[1] In *Art Theft and Forgery Investigations,* p. 16.

[2] Based on the work of Robert Spiel, Jr. (*Art Theft and Forgery Investigations,* pp. 16–20), augmented here by the author.

F. M. De Sanctis, *Money Laundering Through Art*, DOI: 10.1007/978-3-319-00173-9_4,

America Olmec art (Mexico)

(2) 1000 B.C.–500 A.D.:

Europe Roman art, Etruscan art (Italy), Greek and Roman coins and Greek art made of gold
Africa Pottery and sculpture (Nigeria), scientific instruments (Alexandria, Egypt) and iron sculptures
Asia Assyrian art (Iraq), Buddha (India 550–480 B.C.), development of Chinese calligraphy and early prophets
America Mayan art (Mexico and Central America) and art of the Moche civilization (Peru)

(3) 500 A.D.–1000 A.D.:

Europe Byzantine art, cathedral architecture and decoration, tapestries, glazed pottery, Russian sculptures and icons, manuscripts and Venetian glass
Asia Islamic paintings, mosque architecture, Buddhist temples, Chinese and Japanese porcelain, Indian and Japanese sculptures, art of the Khmer civilization (Cambodia) and the Táng Dynasty of China
America Incan art (Peru) and Pueblo art (New Mexico and Arizona)

(4) 1000 A.D.–1400 A.D.:

Europe Clocks, scientific instruments, stained glass and Venetian glass
Africa Early Western kingdoms
Asia Ming Dynasty (China, 1350–1650) and Samurai swords (Japan)
America Aztec art (Mexico, 1000–1500) and Anasazi art (Arizona, New Mexico and Utah)

(5) 1400 A.D.–1500 A.D.:

Europe Italy—Botticelli (Quattrocento), Brunelleschi, da Vinci, Donatello, Fra Angelico, Masaccio, Michelangelo, and Titian. Elsewhere—Bosch, Durer, Gutenberg and the Van Eyck family
Asia Sikhism (India)
America Pre-Columbian Period

(6) 1500 A.D.–1600 A.D.:

Europe Italy—Caravaggio, Cellini, Giorgione, Michelangelo, Raphael, Tintoretto, Vasari, and Violins: Elsewhere—Brueghel Family, Cranach, El Greco, Grunewald, Hals, Holbein and Rubens
Africa Sculptures in bronze and ivory (Nigeria)
Asia Oriental rugs and paintings, especially Persian (Iran), Ottoman culture (Turkey) and Ukiyoe paintings (Japan)

(7) 1600 A.D.–1700 A.D.:

Europe Bernini, Borromini, Murillo, Poussin, Rembrandt, Stradivari, van Dyck, Velasquez, Vermeer, Watteau, Zurbarán, silverware and fine porcelain

Asia	Imperial Chinese engravings and artwork
America	Last of the Mayan civilization (Mexico)

(8) 1700 A.D.–1800 A.D.:

Europe	Antique furniture (Louis XIV and XV), elegant glassware (Baccarat and Waterford), fine porcelain (Dresden, Limoges, Meissen and Sèvres), vintage wines, Canaletto, Constable, David, Fragonard, Gainsborough, Goya, Guardi, Hogarth, Reynolds, Turner, Tiepolo and Wedgwood
Asia	Hokusai and Utamaro (Japanese painters)
America	Copley, Gilbert Stuart and Benjamin West

(9) 1800 A.D.–1900 A.D.:

Europe	Art museums (ca 1890), art nouveau, Cézanne, Degas, Dufy Family, Fabergé, Gauguin, Manet, Matisse, Monet, Pissarro, Renoir, Rodin, Seurat, Toulouse-Lautrec, van Gogh, the development of photography and the industrial revolution
Asia	Hiroshige (Japan)
America	Bierstadt, Carousels, Cassatt, Homer, Innes, Sargent, Remington, Russell, Stieglitz and Whistler

(10) 1900 A.D.–1945 A.D.:

Europe	Art deco, cubism, constructivism, expressionism and surrealism. Braque, Brancusi, Calder, Chagall, Dalí, Hummer, Kandinsky, Klée, Léger, Matisse, Miró, Modigliani, Mondrian, Moore, Munch, Picasso and Utrillo
America	Bellows, Benton, Calder, Cassatt, O'Keeffe, Pollock, Rivera, Rockwell, Tiffany, Wood, Wright, Di Cavalcanti, Portinari, Tarsila do Amaral, Anita Malfatti and Galileo Emendabili

(11) 1945 A.D. to present:

Europe	Picasso, Damien Hirst and Anish Kapoor
Asia	Takashi Murakami
America	Ansel Adams, Botero, Calder, Edward Curtis, Johns, Lichtenstein, Rauchenberg, Rockwell, Rothko, Warhol, Di Cavalcanti, Portinari, Tarsila do Amaral, Anita Malfatti, Galileo Emendabili and Romero Brito.

Ordinarily, when we think of artworks, we immediately think of these and of museums. Museums, however, are but a part of the world of art—one of the most commonly accessed, much like libraries. Both collect and maintain works, rare books and manuscripts that are valuable and draw the interest of collectors and specialized dealers. Oftentimes they regard their establishments as more of a museum than a business. This is partly true, if we take into account the people who frequent these spaces for purposes of observing rather than acquiring art, in an informal way that is more intimate and less institutional than in a museum. Then again, everything a gallery owner has to offer is *placed on exhibit* rather than *put up for sale*.

There is a widespread belief that only the well-off can afford art. Some can, but a surprising number of persons and collectors from the middle class passionately devote their time and money to the arts. Collectors also make donations to one another, much like an exchange of gifts.

Furthermore, large companies or corporations routinely take an interest in acquiring works of art, encountering no resistance from their stockholders. Such acquisitions often turn out to be important investments.

Investors in art are collectors who often care little about the asset collected. Those investors who frequently engage in acquisitions and sales are considered art dealers.

Artworks are fragile and intolerant of temperature and humidity extremes, and therefore require proper transportation by specialized companies.

Mere examination by a specialist[3] is no assurance of authenticity, although the specialist may, in many cases, be capable of authentication. Authentication requires special expertise in specific areas. Anyone who claims knowledge of everything, rather than of fine art, of arms and armor, or of stamps, for example, is unlikely to be a good appraiser or authenticator.

Preservation of a work of art requires diligent care to minimize all hazards, even when strict security measures are put in place. To that end, a proper insurance policy is in order to protect against incidental damage. One would normally expect protection against loss of the work, a drop in its market value, and assumption of liability.

As a general rule, insurance policies are based on contracts. Yet in the case of artworks, special consignment arrangements are often used when the parties would normally be disinclined to rely on standard agreements. Insurance companies and their clients are free to negotiate any contractual clauses that do not violate public policy or preestablished rules.

A number of ethical questions might be raised. One of these might be, for instance, whether a dealer may also be an appraiser. Conflicts could arise as to whether an appraisal was intentionally low so that the appraiser might himself acquire the property through someone else. This would be artificially lowering the price for illegitimate gain. An appraiser for a given class of art ought not to be able to buy or sell it.

Countless variables go into determining the price of a work of art. Diva Benevides Pinho illustrates this complexity by explaining that "people present at the sale of a piece also play a role in determining its price through the operation of supply and demand. If famous buyers compete for a work of art, they bid up the price and their interest lends it an aura of quality. Conversely, if important buyers stay away in droves, the price of the piece tends to fall." Citing Howard Becker's observations, she adduces: "It is more important to know who is buying or bidding

[3] There are website that specialize in appraisals. In Brazil, for instance, we have www.catalogodasartes.com.br, accessed June 3, 2012, which offers price consultation on art and antiques, with photos, specifics, values in both reals and dollars, data, and sources of research.

for the work of a given artist than to have precise knowledge of the quality of that work."[4]

Academia plays an important role in the scientific study of artworks, placing historical, geographic and sociological aspects of art before the public—especially with regard to those works more recently discovered or held for years by collectors.

For legal issues, there are specialized professionals (such as attorneys) who deal with consignments, auctions, charity institutions, gifts, and copyrights.

In any discussion of the world of art, we would do well to take note of its underworld. Indeed, there is always a need to be aware of the underworld (in the pejorative sense) as an ecosystem apart, one that permeates the artistic environment.

Along similar lines, Robert Spiel, Jr., states that currently, "criminals who are comfortable functioning in the art world far outnumber their police or law enforcement counterparts."[5]

There are reports of crimes committed by employees of museums and specialized companies, usually from collectors and dealers. Investigations in the United States, for instance, show that most (80–90%) of the crimes committed in this field are perpetrated by participants in the market, which includes curators, collectors, volunteers, dealers, appraisers and even professors. The small remainder is attributable to ordinary criminals who know practically nothing about the object of their crimes—other than what they have heard in the media about how easy they are to steal and how much they are worth. Forgers and distributors of fakes, on the other hand, require knowledge and connections in the art world, and sometimes emerge from the artistic milieu or are themselves professionals in restoration.

Business practices in the art world are different from many other industries. It is not uncommon for collectors or dealers to simply make an exchange, without a penny ever changing hands. Furthermore, museums make acquisitions by payment, barter or on loan from other museums, dependent as they are on donations or government subsidies.

Acquisitions are ordinarily recorded, whether by the seller or the buyer, in the case of museums and auctions. The amounts involved require that the parties keep a record, and that often facilitates investigation. Still, among private collectors or investors, wealthy or not, records are not kept, and proof of legitimate ownership hinges on finding a receipt, petty records or even photographs. There have been cases in which the press revealed the existence of works of art based on photographs taken at the home of a person being investigated.

Inventories gather together many descriptions by collectors, yet partial records of artworks have also been assembled by private collectors, notably of the more important artworks, relying on memory as a form of concealment, to the detriment of searches conducted afterward.

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[4] See *A Arte como Investimento. A Dimensão Econômica da Pintura.* São Paulo: Nobel and Universidade de São Paulo—Edusp (joint publication), 1989, p. 100.

[5] Cf. *Art Theft and Forgery Investigation*, p. 25.

An important consideration is the confidentiality surrounding dealings in art, except, of course, where dealers are concerned. Buyers and sellers do not seek exposure. Sellers are often embarrassed at having to part with their treasures, and buyers, mindful of this, will avoid adding to their displeasure. Dealers, in turn, are protective of their margins, and prefer not to disclose them.

A general lack of transparency as to how prices are arrived at is a characteristic of this market. We often do not know, for instance, the true worth of museum pieces. Art dealers are by no means consistent, either. Some will cut prices to attract customers, while others will categorize or label their items with little regard for market niceties.

World War II and drug trafficking were important events affecting the theft of artworks. During the war, art was stolen by civil and military authorities. Soldiers engaged in this theft throughout the conflict, and the art taken has ended up on the market because the generation that took it is dying out. This has resulted in claims being brought by the victims (governments, institutions or descendants).

With regard to drugs, there are theories to explain this underworld's connection to the world of art. Art can finance the acquisition of drugs or be coveted by drug dealers or their associates, now engaged in its *legitimate* acquisition—a phenomenon heretofore unknown. One theory is that, as in the case of rich gangsters of yore, the purchase of paintings, engravings, and rare books will, it is hoped, bring them a measure of respectability—a doubtful prospect given the low esteem in which drug traffickers are held.

Manus Brinkman believes that the underlying causes for the international traffic in cultural property are similar to those underlying the traffic in drugs. "On the one hand, there is a demand from wealthy consumers, and, on the other, there is a huge supply in regions where poverty reigns. It is rather strange that the collection of cultural objects of unknown provenance by wealthy private individuals is still widely considered to be socially acceptable. Nobody has to collect illicit material."[6]

Constant forgery of works of art has decreased the interest of serious buyers. They are increasingly skeptical of an artwork's authenticity and disinclined to blindly trust many dealers, whether because of the quality of the forgery or misgivings about their intentions.

Fences or forgers engaged in selling the proceeds of crime to an unsuspecting public have also played an important role. Criminals pass forged or stolen items along to fences who in turn sell them to the unwary.

The use of fake identification documents is an added complication. A fence with a fake ID can ask a buyer to call the bank to have a payment order made out to the seller's fake name; that way the seller is able to skirt bank security procedures.

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[6] In Reflections on the Causes of Illicit Traffic in Cultural Property and Some Potential Cures. *Art and Cultural Heritage: Law, Policy, and Practice*, p. 64.

Authentic provenance papers may also be stolen, or even forged from museum or auction house catalogs. The crime against property can occur before or after the forging of provenance papers. The fact that, for example, Sotheby's or Christie's[7] may once have sold a piece is no clear assurance of its authenticity. Provenance may have been legitimately acquired for fraudulent purposes using the family of the artist or even the artist for authenticity, thereby engendering an irrefutable presumption of authenticity even in a court of law. That would happen if an artist or relative were hired to certify new provenance for a third party, causing a conflict of interest between the original buyer of the work and whoever hired the second provenance.

Finally, unlike museums and art dealers, ordinary people rarely have documentation for artworks in their possession. Seldom do they have a bill of sale, proof of payments, provenance, or any trace of original or subsequent documentation. This is normally because the piece has been in the family for generations, providing fertile ground for criminals to commit a vast array of crimes based on advantages deriving from this overly common situation.

Nowadays, with the use of computers, it is easy to verify stolen or recovered artworks, especially in archives containing inventories of pieces in the hands of collectors under investigation or indictment. These also facilitate rapid transmission of information on disappearances, with complete descriptions, often including photographic records.

We know that the commission of ordinary crimes (larceny, robbery and possession of forged works, not to mention fencing) is common in the world of art. This is relevant to calculations involving statutes of limitation. For example, there are large differences among these types of crimes when it comes to statutes of limitation. The issue is to know when the crimes were perfected—that is, when their commission was complete. Theft or robbery is consummated by possession, i.e., once the criminal acquisition is complete or, where violence is involved (robbery), once the deed is done and the thing is taken into the peaceful possession of the perpetrator. It would be easy to calculate the statute of limitations from that moment, but in the case of forged items (receiving), note that the statute of limitations begins to run at the time the perpetrator is in peaceful possession of the work *and* conscious of the forgery having been committed in an earlier crime against the property. As in the case of artworks that have been handed down for generations, only the last person in possession of the work can be held liable as of the moment that person—aware of the illegitimacy of the thing—acts as though he or she is the owner. The statute of limitations would begin to run at that moment.

[7] According to Sarah Thornton, Christie's and Sotheby's between them "control 98% of the world market for art auctions. The word *sale* is suggestive of discounts or bargains, but an auction is always after the highest possible price. Indeed, it is precisely these extraordinary sums that have transformed auctions into high society sporting events." In *Sete dias no mundo da arte. Bastidores, tramas, intrigas de um mercado milionário.* Translation: Alexandre Martins. Rio de Janeiro: Agir, 2010, p. 26.

There are large databases listing stolen or missing works of art. They may be found at museums, international agencies (International Criminal Police Organization—INTERPOL[8]), governmental agencies (Federal Bureau of Investigation—FBI[9]), nongovernmental organizations (*The Art Loss Register*[10]) and International Forums (UNESCO[11] and the International Council of Museums—ICOM[12]).

The issue we face today is that both stolen and legitimate artworks may attract criminals seeking to launder dirty money by exploiting a market that is little known, hard to understand, easily manipulated (by its own actors, such as collectors and dealers), and fraught with problems (theft, robbery, forgery and laundering).

Although traditional money laundering methods, such as the purchase of commodities and real property through the financial system (especially parallel or clandestine financing), through third parties (stooges), and through offshore banks or hawala systems, to drive a wedge between the money and its origins, have long served organized crime, it has moved into other areas, less closely watched and with fewer rules.

As explained by Fletcher Baldwin, Jr., a "novel way is through the use of art. Although it sounds strange to think of drug traffickers and arms dealers purchasing famous Renoirs and Picassos, the use of art to launder money is not as strange as it seems; and in fact, it is extremely effective."[13]

Dealers can help in detecting crimes against property (theft, robbery and fencing) or even financial crimes (money laundering). When a tender is made, they can promptly and anonymously access the websites involved (an informal cautionary investigative technique) and disallow or allow the deal. They might also notify the police, the Attorney General's Office or the Financial Intelligence Unit for their country (Financial CrimesEnforcement Network – FinCEN, and Council for Financial ActivitiesControl – COAF), in which case they might not remain anonymous (for the records would identify the source). If they do accept the operation while notifying the authorities, they risk future civil or even criminal liability, including prosecution for money laundering (given suspicious activity reporting requirements, should the omission be deemed significant, in view of prior behavior, if there was any risk of an untoward outcome). Here we would have a potential

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[8] Headquartered in Lyon, France, http://www.interpol.int/. Accessed May 21, 2012.

[9] Art and Cultural Property Crime, which includes theft, fraud, looting and national or international trafficking, generates $6 billion in annual losses, and the FBI has a specialized department (the Art Crime Team) made up of fourteen special agents with a computerized index of artworks stolen worldwide. (See http://www.fbi.gov/about-us/investigate/vc_majorthefts/arttheft. Accessed May 21, 2012.)

[10] A private database available for recording, searching and recovery of artworks. See http://www.artloss.com/en. Accessed May 21, 2012.

[11] See http://whc.unesco.org/en/list. Accessed May 21, 2012.

[12] See http://icom.museum/programmes/fighting-illicit-traffic. Accessed May 21, 2012.

[13] Cf. *Art Theft Perfecting the Art of Money Laundering*, p. 2.

criminal offense, a special mode of participation, and a confluence of agents, where the primary act was negligence on the part of the individual who should have taken proper precautions given their prominent position in the market.

In that case there would be no room to allege violation of the principle of legality. The principle does indeed bar curtailment of rights through criminal sanctions provided by law in both the formal and practical senses, already expressly and precisely set forth in great detail. When a crime does not specify the requisite level of intent, it opens the door to subjective interpretation as to whether a crime has occurred, even though the perpetrator may deny having had any intention to commit the crime.[14]

One might invoke the "conscious avoidance doctrine"—that is, a traditional rule in the United States whereby knowledge is imputed to anyone who engages in willful blindness.[15]

Dealers may simply prefer to decline a purchase, in which case they would report nothing and avoid involvement with the authorities. That would make it more difficult to uncover the crime and recover the item for delivery to the victim; this is why their behavior is so important in fighting the kind of crime that pervades the art world.

An unwary or negligent dealer might, in hopes of acquiring some important work, prefer not to select the private method of investigation and simply make the acquisition without notifying the authorities, thereby increasing the separation between the victim and the property (here again we have the possible case of prior behavior having given rise to the outcome).

It might happen that out of panic some dealers, faced with persistent investigation, might destroy the purloined, stolen, forged or laundered item, or simply drive it underground, dodging the investigation and evading their duty to notify the authorities or even protect potential buyers. The intensity of the investigation could have a double effect: It might frighten or provide assurance that the item will be recovered and that perpetrators will eventually face charges. Faced with strenuous enforcement efforts, more and more participants in the market will likely pitch in to cut down on its utilization by criminals.

The dealers could, in effect, act something like informants—that is, those who, by virtue of their confidential contacts (among, perhaps, their former underworld cronies), their contacts in the world of art, or both, either know or are in a position to find out things that would not otherwise be discoverable. These are persons whom criminals are inclined to trust, even though that does not necessarily mean they are themselves current or former criminals. Directly or indirectly, they end up receiving pertinent information about past, present and future criminal activity.

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[14] Second Report on the Situation of Human Rights Defenders in the Americas. Inter-American Commission on Human Rights. Published by the Organization of American States (OAS), December 31, 2011, p. 33, item 91.

[15] Cf. John K. Villa (in *Banking Crimes: Fraud, Money Laundering and Embezzlement*, vol. I, 2011–2012 Supplement, § 4:11).

In the United States, undercover agents are essential to solving such crimes. They are government law-enforcement agents, professional officers who pass themselves off as criminals. Unlike informers or dealers, they are highly resistant to retaliation, easily controlled or directed, and capable of reacting very capably in an emergency. They are, in addition, able to come off as highly credible witnesses. They would be relatively unexposed to liability in the event of some accident—unlike informers or dealers.[16]

That approach might, together with others, result in the apprehension or recovery of purloined, stolen, forged or genuine works of art procured with the proceeds of earlier crimes. In most legal systems, whenever an arrest is made, it is possible to seize things pertinent to the crime (in the case of money laundering, things relating to the current crime or some antecedent crime). These provide important evidence, both as to the purpose of the crime (the thing or person the unlawful behavior is about) or whom it benefits.

4.2 The Art of Money Laundering and the Roles of Those Who Combat It

The romantic view of art (utility, historical record, expression, imagination and beauty) has no parallel in current practices, especially in a world in which unlawful conduct, including the proceeds of drug trafficking, once restricted to certain industries, now makes inroads in the field. To make matters worse, criminal methods have changed radically in pernicious crimes, such as money laundering.

Art has been highly valued by mankind since ancient times. However, its current business sophistication, unprecedented international market, the huge sums of money involved and its use as an investment by persons indifferent to it and even by criminals, would once have been unthinkable.

University of Florida professor Fletcher Baldwin, Jr.,[17] and University of Ohio professor Hanna Purkey,[18] draw an important parallel between real estate and art. Real estate offers some of the best-known methods for money laundering because the properties involved are themselves relatively high in value, are often the subject of speculation, and can even be paid for in cash. There are other similarities between real estate and art. Both are classed as non-financial, and therefore lack the regulation and rigid, standardized controls in place for the financial sector.

One important difference is that art may be transported, appraisers or dealers are easily bought or even made up—insofar as no license or qualification is required of them (reputation and experience being sufficient)—and no authorization is even required for dealing in art.

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16 Cf. Robert E. Spiel, Jr. *Art Theft and Forgery Investigation*, p. 213.

17 In *Art Theft, Perfecting The Art of Money Laundering*, p. 8.

18 Cf. *The Art of Money Laundering*, pp. 112–113 and 128–134.

In turn, regulatory agencies pay little attention to the art world.

In the United States, the Patriot Act has properly regulated the real estate market to exclude all criminality, and requires real estate agents to report cash operations of $10,000 or more.[19] Although it does impose reporting requirements on non-financial sectors, Section 365 places no such requirement upon art dealers, as it does for banks, casinos, car dealers and currency exchanges.

In Brazil, the obligation to report suspicious operations is just as incumbent upon "individuals or companies engaged in real estate promotion or the purchase and sale of real property" as it is for "individuals or companies dealing in jewelry, precious stones and precious metals, art objects and antiques" (Article 9, Subsections X and XI respectively, of the Money-Laundering Law, Law No. 9613 of 03/03/1998, amended by Law No. 12683 of 2012). The new language did amend Subsection X to also include individuals, and added Subsection XIII, placing similar obligations "upon business syndicates and depositories of public records." These amendments are welcome, but ought to be accompanied by more stringent controls on communications, which have traditionally been lacking in the art industry. Another problem is self-regulation, which could lead dealers to accept cash payments without any concern for future liability.

For example, the two largest auction houses in the world, Sotheby's[20] and Christie's,[21] are self-regulated and required to act in good faith in the interest of their clients or consignors.[22] Both have accepted cash payment and are not under any specific obligation to report suspicious operations. Sotheby's does not prohibit cash payments, but does subject them to unspecified legal restrictions, whereas

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[19] See United States v. Campbell, 977 F.2d 854 (4th Cir. 1992). In that case, an agent, Ellen Campbell, was convicted of money laundering for selling a piece of property to a drug dealer, Mark Lawing, who claimed to be in the business of customizing automobiles, at a lower price for cash payment (bundled bills), which contributed toward concealing illegal money from the authorities. See also United States v. Massac, 867 F.2d. 174, 177–78 (3d Cir. 1989), knowledge that the funds were associated with drugs sufficed for imputation of criminal liability. See also United States v. Isabel, 945 F.2d 1193, 1202–03 (1st Cir. 1991).

[20] Cf. http://www.sothebys.com/en/buysell/buy.html: "You can pay with cash (subject to certain restrictions and legal limits), check, money order or wire transfer. Certain credit cards are accepted at Sotheby's London, Amsterdam, Paris, Switzerland and Hong Kong salerooms and you may contact these sale locations directly for specific information. Successful bidders can pay immediately following an auction, otherwise an invoice will be sent to you." http://selectsothebysrealty.com/page/make_a_payment: "Make a Payment. Thank you for your business. We are grateful for your relationship with us! Please note that payments are preferred by certified check, personal check or money order. For your convenience, we can also accept credit cards. If you would like to pay with credit card, please submit your payment below. Additional charges may apply for processing." Accessed May 14, 2012.

[21] In http://www.christies.com/features/guides/buying/pay-ship.aspx: "We accept wire transfers, bank drafts or cashier's orders, cash or checks. Under certain circumstances, some Christie's salerooms may accept payment by credit card (check with your saleroom for details)." Accessed May 14, 2012.

[22] See Hannah Purkey (in *The Art of Money Laundering*, p. 134).

Christie's does not even mention any limitations on cash payments, which may be made by electronic transfer, payment order, cash or check.

Manus Brinkman explains that "although reputable auction houses and dealers act within the parameters of the law, previously their trade associations did not support initiatives to actively restrict the free trade in cultural objects on the theory that the black market thrives from overly retentive trade in cultural objects: as the demand for antiquities grows, the supply is cut off."[23]

These auction houses foster demand for objects from supplier countries, and they are aggressive trendsetters. Brinkman illustrates: "In 1996, the strong demand for Southeast Asian paintings among an increasingly affluent Asian middle class became apparent when Christie's withdrew five Indonesian paintings from its Singapore sale after the National Museum in Jakarta saw them and identified them as stolen."[24]

International auction houses in the United States all follow the Uniform Commercial Code, which does not restrict the use of cash as a form of payment. They may therefore accept cash payments, irrespective of knowledge of illegality or whether the money comes from unlawful activity—this despite the requirement that they act in the best of good faith.

Because they are self-regulated, it is easy to shift responsibility to the consignor and assume no obligation toward the international community.

Note that according to Erin Thompson, traditional confidentiality has allowed dealers and auction houses to omit information about prior owners. A research paper on Sotheby's and Christie's showed that from World War II until 2000, some 95% of the objects handled in London came with no indication of where they were found, and 89% listed no historical information. Similarly, less than 1% of Mayan objects auctioned by Sotheby's between 1971 and 1999 were listed with any indication of where they were found. It concludes by stating that "the great majority of antiquities sold to private collectors in the last 50 years have no provenance."[25]

It must be pointed out that the lack of provenance means that the piece is not accompanied by documentation on where it was found or a paper trail showing past ownership (to say nothing of the money flow involved). Still, it cannot be categorically stated that the object was necessarily illegally exported from its country of origin.

Lack of proper rules, monitoring, or even interest has caused many launderers to look to this market as a means of cleaning their dirty money, since prices may be established, manipulated and altered at any time.

It is true that dirty money gradually and on a large scale began discovering art and real estate. Increasing the flow of illegal money allowed organized crime to move in, followed by harmful consequences given the increased danger of fraud,

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[23] Reflections on the Causes of Illicit Traffic in Cultural Property and Some Potential Cures. *Art and Cultural Heritage: Law, Policy, and Practice*, p. 64.

[24] *Id.*

[25] In *The Relationship between Tax Deductions and the Market for Unprovenanced Antiquities.* 33 Colum. J.L. & Arts 241, 2010.

tax evasion and corruption. Art thus became a natural channel for the laundering of illegal money.

Authorities have become aware of problems surrounding the world of art, such as its vulnerability on a whole series of issues and threats (for there are terrorist organizations stealing cultural assets to finance their activities). The large amounts of money involved and the lack of transparency in their negotiations require greater control by the authorities, whose inaction provides unprecedented opportunities for organized crime to launder dirty money. All of this leaves out the hunger for profits of private investors, who view art as just another business whose first principle would be "Business is not built on the Beatitudes."

Actual economic impacts are felt whenever a large volume of illegal money is channeled. In the case of art, in the name of the transmission of cultural values, its actors appear to have paid little attention to a number of unlawful practices—most notably, tax evasion, money laundering, and even corruption.

In an important observation, Misha Glenny explains that "the shadow economy has become such an important economic force in our world, and yet it is surprising that we devote so little effort to a systematic understanding of how it works, and how it connects with the licit economy. This shadow world is by no means distinct from its partner in the light which is itself often far less transparent than one might suspect or desire."[26]

Questionable practices on the part of its participants have been permitted in the name of the independence of the industry and its necessary secrecy. All the while, court cases, reports in the international press and several studies have suggested that there might be international, organized, illegal conduct behind it.

Neither could the emergence of visible links between organized crime and art be viewed with equanimity, for it could soon spell the end of its market—known as it is for forgeries rather than good practices—and add to this the risk of fostering and perpetuating serious criminal behavior (terrorism) against a backdrop of institutionalized inertia.

There appears to be a generalized perplexity acting against all efforts at government control, dependent, as it is, on confidential information doled out in dribs and drabs and not easily understood. This realization has surprised scholars and confronted orthodox management practices. The industry is surrounded by an aura of mystery that cannot be boiled down to a simple prognosis of unlawful behavior, but instead, more of an unevenly-distributed criminal prognosis.

That sophisticated methods and techniques are used to wipe out all vestiges of crime—methods that mutate in response to changes in crime-fighting techniques—calls for nimble, flexible legislation, focused on the harm done by antecedent crimes, and on the greater harm occasioned to the economy by the mixing of licit and illicit money.

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[26] In *Mcmáfia: crime sem fronteiras.* Translated by Lucia Boldrini. São Paulo: Companhia das Letras, 2008, p. 14.

Hence the need to reflect on the role of each participant in the industry, so that necessary measures may be adopted to obtain the desired results in a reasonable time—all of this, of course, without prejudice to fundamental rights.

Despite the appearance of regulatory control, the use of art in the laundering of money has attracted organized crime, inasmuch as the authorities lack the training required to spot a potential suspect. Drug cartels—mindful of the inattention or even lack of knowledge on the part of many authorities as to the considerable growth in the use of art as a means of laundering money—have made considerable use of this industry.

Examples abound worldwide, even in Brazil,[27] showing that artworks are transferred into or out of the country for use in the international market, with little apparent regard for the origin of the funds used to acquire the pieces, but concerned entirely with the art itself as its sole qualification.

Citing Marianne James, Hannah Purkey shows that groups as different as Americans, Italians, the Russian Mafia, the IRA and Colombian cartels are believed to have laundered illegal money through the use of art because of its facility of transport, its high value and its lack of regulation or control.[28]

Other typologies have been detected. One of these, smurfing, consists of dividing up illegal funds among many institutions. It is a spreading out of financial investments designed to make it more difficult for the authorities to fight money laundering. Because it has come under effective control, that approach is no longer so popular among criminals, who have moved on to non-financial vehicles, such as real estate, in order to sidetrack government enforcement efforts. The Financial Action Task Force (FATF) is working on the problem, and has proposed greater control over non-financial activity. It is also looking into techniques whereby prices are artificially raised or lowered to create bogus invoices.

As in real estate, art makes it possible to appraise an asset so as to facilitate laundering, through the resulting substantial increase in insurance (or the mortgage, in the case of real property). Fake documentation makes it possible to obtain an incorrect property appraisal to secure hefty financing.

Laundering through artworks is accomplished by incorrectly stating prices, quantity and quality, and by overseas transportation, all in an effort to convey some legitimacy to illegal money.

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[27] Take, for instance, a case involving a Colombian national, Juan Carlos Ramires Abadia, convicted with several others of money laundering, upheld on appeal (record No. 2007.61.81.0011245-7/SP, convictions in 2008, upheld in 2012 by the Region Three Federal Court, which extends to the states of São Paulo and Mato Grosso do Sul, Criminal Appeal No. 0001234-26.2007.04.03.6181/SP, tried 06/03/2012, Rapporteur, Federal High Court Justice Johonsom di Salvo). Then there was the case known as Banco Santos, in which Edemar Cid Ferreira, former owner of the financial institution, was also convicted of financial crimes and money laundering in the lower court in 2006 (criminal action No. 2004.61.81.008954-9). Both were heard before the Federal Criminal Court of Justice in São Paulo (Federal Criminal Court No. 6, specializing in Money Laundering and Financial Crimes).

[28] See *The Art of Money Laundering*, p. 123.

4.3 The International Council of Museums

Established in France in 1946, the International Council of Museums (ICOM) has been granted consultative status by the United Nations Economic and Social Council. Specifically with regard to museums, it has prepared a Code of Ethics for Museums,[29] unanimously adopted by the 15th General Assembly held in Buenos Aires, Argentina, on November 4, 1986, and revised by the 21st General Assembly held in Seoul, South Korea, on October 8, 2004.

The Code constitutes a minimum standard for museums. It provides, for example, a clear statement of institutional standing for museums (1.1), public access to its collections (1.4), proper safety standards (1.5), sufficient funding (1.9), and income-generating policy (1.10). It requires that every effort be made to ensure that each item purchased, donated, loaned, placed in trust or exchanged was not acquired illegally in its country of origin, nor illegally exported therefrom, nor from any country through which it transited, where clear ownership title might exist, including the country in which the museum is located. To this end, there is a due diligence requirement to establish the complete history of the item in question, back to its discovery or creation (2.3). It bans the acquisition of an object where there is reasonable cause to believe that recovery involved unauthorized or unscientific fieldwork or intentional destruction of or damage to monuments, archaeological or geological sites, or species and natural habitats (2.4). Museums likewise should not acquire biological or geological specimens that have been collected, sold, or otherwise transferred in contravention of local, national, regional or international law (2.6). In the case of disposal, the legal or other requirements and procedures must be complied with fully (2.12).

4.4 Cultural Entities and Incentives for the Diffusion of Art

There is no central federal agency in the United States charged with cultural policy—a Ministry of Culture, for example—as there is in Brazil. Cultural policy in the United States is spread out through different institutions, among them the Smithsonian Institution. Regulation of museums is handled through local legislative bodies (on the state, city or county level) and not by federal institutions. Public policies are therefore not easily coordinated.

According to James Reap, amendments made since 1980 to the National Historic Preservation Act (NHPA) have charged the Secretary of the Interior with the responsibility of directing and coordinating North American activities based on

[29] *ICOM Code of Ethics for Museums* (English-language version). The French and Spanish versions are titled, respectively, *Code de déontologie pour les musées* and *Codigo de Deontologia del ICOM para los museos*. See http://icom.museum/who-we-are/the-vision/code-of-ethics.html. Accessed June 20, 2012.

the UNESCO Convention of 1972, in coordination with the Secretary of State, the Smithsonian Institution and the Advisory Council on Historic Preservation.[30]

The Smithsonian Institution (the world's largest network of museums and research centers), which brings together some 19 museums and galleries, in addition to the National Zoological Park, and nine research centers,[31] is a respectable American institution and receives donations from foundations, corporations and individuals. This happens, according to Judith Leonard, General Counsel for the Smithsonian Institute,[32] as a self-regulated gift authority and a nonprofit organization. Its funding is separate from the Treasury Department. On its website, one sees that money can be donated, yet there is not much information on how such donations or payments are made.[33] Counsel made it clear that the Institution makes careful examination of provenance, and always checks the authenticity of artworks. Both she and Bonnie Magness-Gardiner, FBI agent and member of the Art Crime Team, categorically assert that the Institute has ethical restrictions in place that are stricter than those drawn up by ICOM.

Bonnie Magness-Gardiner added that many crimes were discovered because of illegal transportation, or when suspicious banking activity occurred, in which case alone there would be reason to report a suspicious operation. She also disclosed that all possible information, including the use of Google searches, is obtained by FBI agents, and does include published notices. Finally, she stated that the Archives have suffered considerably from the illegal acts of their countless visitors, because of the sheer quantity and fragile condition of the papers consulted.

The U.S. Congress has, since 1917, allowed deduction of donations to religious, educational and charitable entities organized as nonprofits (NGOs). We cite

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[30] Public Law 96–515, December 12, 1980, 94 Stat. 3000 (in The United States and the World Heritage Convention. *Art and Cultural Heritage: Law, Policy, and Practice*, p. 234).

[31] Cf. http://www.si.edu/Museums. Accessed May 22, 2012.

[32] She hosted a meeting with the author and Bonnie Magness-Gardiner, an FBI agent and member of the Art Crime Team, at 10 AM on 05/21/2012 at the Smithsonian Institution (1000 Jefferson Dr. SW, Room 302, Smithsonian Castle). She said they were under no obligation to list their donors, or to report suspicious activity. Precautions are nevertheless taken, such as not accepting donations in the form of cash, stored value cards or prepaid cards.

[33] "Your Gift Truly Makes a Difference. It's as powerful as the visionary gift by the Smithsonian's founding benefactor, James Smithson—because your generosity enables the Smithsonian to educate, inspire, and bring people together. Federal appropriations only provide about 70 cents of every dollar needed: To keep the Smithsonian's museum doors open to everyone, free of charge, to conduct ground-breaking scientific and scholarly research, to expose visitors of all ages to new ideas and new worlds, the rest is up to you. There are so many ways to give to the Smithsonian—from cash donations, to planned gifts, to support from your family foundation or your business. If you participate in the workplace giving program the Combined Federal Campaign (CFC), contributing to the Smithsonian is easy—simply use our CFC number, 10782. Make a gift to the Smithsonian today. It takes just a few minutes, and helps us bring alive our nation's history, culture, art and science for people around the world." In http://si.edu/giving/. Accessed May 22, 2012.

a 1938 report from the House Committee on Ways and Means in which Aaron Thompson explains that tax revenue losses due to charitable donations are offset by lessening the financial burden, which, through the resulting benefits, promotes the general welfare.[34]

The correctness of granting large tax deductions has been the subject of frequent assessment of its effectiveness, purpose and potential for abuse. The Internal Revenue Service has only allowed deductions of up to the market value, in the case of art donations, in order to prevent the artificial inflation of appraisals and the corresponding undue increase in the tax deduction.[35] In order to preclude deductions of illegally imported items, only those donations based on provenance should be allowed. This would shift buyers' interest in acquiring fraudulent or stolen objects.

Deductions are also allowed in Brazil. The best-known cultural incentive legislation is the so-called Rouanet Law (Law No. 8313 of 12/23/1991),[36] which

[34] In *The Relationship between Tax Deductions and the Market for Unprovenanced Antiquities.* 33 Colum. J.L. & Arts 241, 2010.

[35] *Id.* p. 243.

[36] *CHAPTER 1, Preliminary Considerations, Art. 1 The National Cultural Support Program (Pronac) is hereby instituted, for purposes of raising and channeling funds to the sector in order to: I – Help facilitate the means for general free access to the sources of culture and full exercise of cultural rights; II – Promote and foster regional cultural and artistic production in Brazil, and the valuation of local content and human resources; III – Support, elevate and disseminate cultural manifestations and their respective creators as a whole; IV – Protect the cultural expression of Brazilian society's formative groups, they being responsible for the pluralism in our national culture; V – Safeguard the survival and flourishing of ways of creating, doing and living in Brazilian society; VI – Preserve the tangible and intangible assets that are Brazil's cultural and historical heritage; VII – Raise international awareness of and respect for the cultural values of other peoples or nations; VIII – Foster the production and dissemination of universally valuable cultural goods which shape and guide our knowledge, culture and memories; IX – Prioritize Brazil's native cultural creations. Art. 2 – Pronac shall be implemented by means of the following mechanisms: I – National Culture Fund (FNC); II – Cultural and Artistic Investment Funds (Ficart); III – Incentive to cultural projects. § 1 Incentives created by this Law shall only be granted to those cultural projects whose exhibition, use and circulation of cultural asset holdings are open to all persons with no distinctions whatsoever, if free, and to the paying public if admission is charged. (Renumbered from the original standalone paragraph by Law No. 11646 of 2008) § 2 The granting of incentives to works, products, events or other things resulting from, intended for or circumscribed to private collections or circuits which place limitations on access is prohibited. (Included by Law No. 11646 of 2008) Art. 3 In furtherance of the purposes set forth in Art. 1 of this law, all cultural projects for which Pronac funds are raised or earmarked must attend to at least one of the following purposes: I – Furtherance of artistic and cultural education through: a) granting scholarships and fellowships in Brazil or abroad to writers, artists and technicians who are Brazilian or foreign nationals residing in Brazil; b) Granting of prizes to producers, authors, artists and actors, and technicians and their works, films, musicals and performing arts in contests and festivals held in Brazil; c) Startup and maintenance of cultural or artistic curricula intended for the education, specialization and betterment of cultural personnel, at nonprofit teaching establishments; II – Fostering of cultural and artistic production through: a) production of CDs, videos, short and medium length cinematographic and documentary films,*

(Footnote 36 continued)
preservation of cinematographic archives and of other cultural works on sound or image media; (New language given by Provisional Measure No. 2228-1 of 2001) b) Publication of works in the field fields? of humanities, art and literature; c) Organization of exhibits, art festivals, and music, folklore and performing arts shows; d) Covering of expenses for transportation and insurance of culturally valuable objects on road to public exhibitions in Brazil and abroad; e) Holding of expositions, art festivals and shows in the performing arts or others similar in kind; III – Preservation and popularization of artistic, cultural and historical heritage through: a) Construction, instruction, organization, maintenance, expansion and equipment of museums, libraries, archives and other cultural organizations, their collections and holdings; b) Preservation and restoration of buildings, monuments, public areas, sites and other spaces, including those that are natural, once declared a national heritage by the Government; c) Restoration of works of art and real and chattel property recognized as having cultural value; d) protection of popular national folklore, handicrafts and traditions; IV – Foster familiarity with cultural assets and values through: a) Free and public distribution of tickets to cultural and artistic events; b) Surveys, studies and research in the fields of art and culture, and their various branches; c) Providing of resources to the FNC and to specific-purpose cultural foundations, or to museums, libraries, archives and other cultural entities; V – Support of other cultural and artistic works through: a) Organization of cultural missions in Brazil and abroad, to include the provision of tickets for transportation; b) Hiring of services for putting together cultural projects; c) Actions not provided in the preceding subsections yet considered relevant by the State Ministry of Culture following consultation with the National Council for Culture. (New language added by Law No. 9874 of 1999). CHAPTER II – The National Culture Fund (FNC) Art. 4 The Cultural Promotion Fund created by Law No. 7505 of July 2, 1986, hereinafter simply the National Culture Fund (FNC), is hereby ratified and given a mandate to raise and allocate resources for cultural projects compatible with the purposes of Pronac, namely: I – To foster the equitable regional distribution of resources to be invested in cultural and artistic projects; II – To project an interstate vision, and provide support for projects that put together joint cultural proposals, regional in scope; III – To support projects having cultural content emphasizing the professional and artistic improvement of human resources in Brazil in the fields of culture, creativity and cultural diversity. IV – To contribute toward the preservation and protection of Brazil's cultural and historical heritage; V – To further projects that meet cultural production requirements and further the interests of society, to include all qualitative and quantitative levels of satisfaction of existing cultural demands, the multiplier effects produced by projects through their social and cultural aspects and the organization of projects into priority categories of artistic and cultural areas less capable of development with their own resources. § 1 The FNC shall be administered by the Ministry of Culture and managed by the Minister for the completion of the Annual Works Program, following the principles established in Articles 1 and 3. (New language added by Law No. 9874 of 1999). § 2 FNC resources may only be invested in cultural projects once these have been approved, following a finding from the technical agency having jurisdiction, by the Minister of Culture. (New language added by Law No. 9874 of 1999) § 3 Once approved, all projects must be monitored and given technical evaluations by supervisory bodies, with all finances handled by the Presidential Office of the Secretariat of Culture (SEC/PR). § 4 Supervised entities shall, whenever needed, engage experts for analyses and opinions on projects, with allowance for reimbursement of travel expenses, if any, and corresponding fees for services and help with expenses, as set forth in regulations. § 5 The Presidential Office of the Secretariat of Culture shall decide on its own basic unitary structure, to act as Executive Secretary for the FNC. § 6 FNC resources may not be used for Ministry of Culture administrative maintenance expenses, except for the acquisition or leasing of goods and equipment necessary to affect the purposes of the Fund. (New language added by Law No. 9874 of 1999). § 7 Upon completion of the project, the SEC/PR shall conduct a final evaluation to verify the proper use of resources in accordance with standards and procedures to be set forth in regulations for this law and in current legislation. § 8 All public or private institutions receiving FNC funding to carry out cultural projects the final evaluation of which failed of approval by the SEC/PR pursuant to the preceding paragraph, shall be barred for

(Footnote 36 continued)
a period of three years from receiving new funding, or for so long as the SEC/PR shall postpone reevaluation of the initial finding. Art. 5 The FNC is an accounting fund set up for an indeterminate period, with a mandate to provide support at a loss or by reimbursable loans, as set forth in regulations, and composed of the following resources: I – National Treasury resources; II – Donations, pursuant to current legislation; III – Legacies; IV – Subsidies and assistance from entities of all types, including international agencies; V – Unused balances from the execution of projects referenced in Chapter IV and this chapter of this law; VI – Return of resources from projects provided for in Chapter IV and here, but were never begun or later interrupted with or without cause; VII – One percent of the gross proceeds from the Regional Investment Funds referenced in Law No. 8167 of January 16, 1991, with due regard in the investment to the corresponding regional origin; VIII – Three percent of the gross proceeds from contests, federal lotteries and the like, provided they be under federal control, and deducting that amount from the amount earmarked as prize money; (New language added by Law No. 9999 of 2000); IX – Reimbursement of loan operations carried out through the fund, as reimbursable financing, with due observance of all repayment criteria which must at least preserve their value in real terms; X – Proceeds from investments in federal securities, with due observance of all current legislation thereto appertaining; XI – Conversion of foreign debt owed to foreign entities and agencies, exclusively through donations, up to a limit to be established by the Minister of Finance, Revenue and Planning, with due observance of all Brazilian Central Bank codes and procedures; XII – Balances from previous fiscal years; XIII Resources from other sources. Art. 6 The FNC shall finance up to 80% of the total cost of each project, once it is shown by the proponent, even if a corporation, that a surplus is being disposed of or that the entity is qualified to obtain the corresponding financing from some other duly identified source, except with regard to resources specifically earmarked at the source. § 1 (Vetoed). § 2 For purposes of tallying up the remaining amount, goods and services offered by the proponent may be taken into consideration for implementation of the project, they being duly evaluated by the SEC/PR. Art. 7 The SEC/PR operating through the FNC shall encourage financial institutions to put together portfolios to finance cultural projects which take into account the social nature of the initiative, in accordance with standards, codes, guarantees and special-interest rights to be approved by the Brazilian Central Bank. III – Cultural and Artistic Investment Funds (Ficart) Art. 8 Authority is granted for the organization of Cultural and Artistic Investment Funds (Ficart) under a joint-ownership agreement with no corporate charter, as a pool of resources earmarked for investment in cultural and artistic projects. Art. 9 For purposes of investing FICART resources and other funds possibly declared by the Ministry of Culture, the following shall be considered cultural and artistic projects: (New language added by Law No. 9874 of 1999) I – Commercial manufacture of musical instruments, and of records, tapes, videos, films and other forms of sound and image reproduction; II – Commercial production of plays and shows featuring dance, music, singing, circus performance and similar activities; III – Commercial publications relating to the sciences, arts and letters, as well as reference works and others of a cultural nature; IV – Construction, restoration, repairs to or equipping of rooms and other environments intended for cultural purposes, and owned by for-profit companies; V – Other commercial or industrial activities of cultural interest, so considered by the Ministry of Culture. (New language added by Law No. 9874 of 1999). Art. 10. Brazil's Securities Division shall, after hearing from the SEC/PR, regulate the organization, workings and administration of all Ficarts, with due observance of the provisions contained in this law and general standards for investment funds. Art. 11. Ficart stock, issued as book-entry stock or registered shares or securities subject to the regulatory provisions of Law No. 6385 of September 7, 1976. Art. 12. Holders of Ficart stock: I – May not exercise any real rights over the assets and securities comprising the equity of the fund; II – Shall not be personally subject to liability for any legal or contractual obligations with regard to the undertakings of the fund or its administering institution, aside from the obligation to pay in the full amount of the capital stock subscribed. Art. 13. The institution administering Ficart shall: I – File and answer lawsuits and claims on its behalf in or out of court; II – Be accountable for loss by breach of seller's warranty of title, if same is liquidated. Art. 14. All revenue and capital gains accruing to the Ficart shall be

(Footnote 36 continued)
exempt from taxes on credit, foreign exchange and insurance operations, and also from taxes on income of whatever type. (See Law No. 8894 of 1994). Art. 15. Revenue and capital gains distributed by the Ficart in whatever form shall be subject to assessment of income tax withholding at the rate of 25%. Sole paragraph. Excluded from the withholding requirements in this article are all earnings distributed to corporate beneficiaries taxed based on real profits, which must be calculated on annual tax returns. Art. 16. Capital gains received by individuals or corporations not taxed on real profits, including those exempt, whether arising from alienation or redemption of Ficart shares are subject to income tax at the same rate provided for taxing income derived from the alienation or redemption of mutual fund shares. § 1 Any positive difference between the assignment or redemption value of a share and the current average cost of the investment, calculated from the dates on which the investment, redemption or assignment took place is considered capital gains pursuant to pertinent legislation. § 2 Capital gains shall be calculated for each redemption or assignment, with allowance for offsetting of losses from one operation by profits from another, alike or different in kind, provided the securities be variable yield, within the same fiscal year. § 3 The tax must be paid no later than the last workday of the first fortnight of the month following that in which the capital gains were obtained. § 4 The yields and capital gains referred to in the header of this article and the preceding article are subject to income tax when gained by investors residing or domiciled abroad, pursuant to pertinent legislation affecting that class of taxpayers. Art. 17. The fiscal treatment provided in the preceding articles shall only be assessed on yields deriving from investments in Ficarts and meeting all of the requirements provided in this law and in corresponding regulations to be passed by the Securities Division. Sole paragraph. Yields and capital gains from Ficart investments which do not meet the specific requirements for this type of fund shall be subject to taxation as provided in Article 43 of Law No. 7713 of December 22, 1988. CHAPTER IV Cultural Projects Stimulus. Art. 18. To encourage cultural activities, the Federal Government shall allow individuals and companies the option of investing portions of their Income Tax—in the form of donations or sponsorships—both in direct support to cultural projects offered by individuals or companies of cultural bent, and through contributions to the FNC pursuant to Art. 5, subsection II of this Law, provided these projects meet all requirements established in Art. 1 of this Law. (New language added by Law No. 9874 of 1999). § 1 Taxpayers may deduct from income tax owed all amounts actually spent on projects listed in Paragraph 3, if approved in advance by the Ministry of Culture, within the limitations and subject to the conditions set forth in current income tax legislation: (Included by Law No. 9874 of 1999) a) donations; and sponsorships. (Included by Law No. 9874 of 1999). § 2 Individuals taxed on real profits may not deduct donation or sponsorship amounts referred to in the previous paragraph as occupational expenses. (Included by Law No. 9874 of 1999). § 3 Donations and sponsorships of cultural productions, which are the subject of Paragraph 1, shall only apply to the following segments: (New language added by Provisional Measure No. 2228-1 of 2001) a) performing arts; (New language added by Provisional Measure No. 2228-1 of 2001); b) books having artistic, literary or humanities-related value; (New language added by Provisional Measure No. 2228-1 of 2001) c) classical or instrumental music; (New language added by Provisional Measure No. 2228-1 of 2001); d) visual arts exhibits; (New language added by Provisional Measure No. 2228-1 of 2001) e) Donations of holdings to public libraries, museums, public archives and cinematheques, and for training of personnel and acquisition of equipment for the maintenance of these holdings; (New language added by Provisional Measure No. 2228-1 of 2001) f) Reduction of short and featurette-length audiovisual and cinematographic works, and preservation and popularization of holdings; and (Included by Provisional Measure No. 2228-1 of 2001) g) Preservation of tangible and intangible cultural patrimony. (Included by Provisional Measure No. 2228-1 of 2001) h) Construction and maintenance of movie auditoriums and theaters able to also function as community cultural centers in towns having populations of less than 100,000. (Included by Law No. 11646 of 2008) Art. 19. Cultural projects provided by this Law shall be presented to the Ministry of Culture or its appointed delegate, together with an analytical budget, for approval of its fit with the purposes of the PRONAC. (New language added by Law No. 9874 of 1999) § 1 Proponent shall be notified of the reasons for any decision adverse

(Footnote 36 continued)
to the project within a timeframe not to exceed five days. (New language added by Law No. 9874 of 1999) § 2 The notice referred to in the preceding paragraph may be reconsidered upon request presented to the Minister of Culture, to be ruled on in 60 days. (New language added by Law No. 9874 of 1999) § 3 (Vetoed) § 4 (Vetoed) § 5 (Vetoed) § 6 Approval shall only become effective following publication of an official act containing the title of the project gaining approval and the institution responsible for same, the amount authorized for raising of donations or sponsorship and the duration of the authorization. § 7 The Ministry of Culture shall publish annually, by February 28, the amount of resources authorized by the Treasury Ministry for tax benefits for the previous fiscal year, duly itemized by the beneficiary. (New language added by Law No. 9874 of 1999) § 8 Approval of projects shall be based on the principle of non-concentration by segment and by beneficiary, to be checked by the amount of resources, by the number of projects, their capacity for fulfillment and by the availability of absolute tax benefit amounts. (Included by Law No. 9874 of 1999) Art. 20. All projects approved pursuant to the preceding Article shall be monitored and evaluated throughout their execution by the SEC/PR or whomever is assigned that duty. § 1 The SEC/PR shall, following conclusion of the projects provided in this article and within no more than six months, proceed with a final evaluation of the correctness of investment of all funds received, and may bar those in charge for a period not to exceed three years. § 2 Application may be made to the Minister of Culture to reconsider the decision referenced in the preceding paragraph, which reconsideration shall be decided upon within 60 days. (New language added by Law No. 9874 of 1999) § 3 The Federal Court of Auditors shall include in its preliminary findings on the accounts of the Office of the President an analysis on the evaluation dealt with in this article. Art. 21. Entities encouraging and raising funds addressed in this Chapter shall give notice as may be decided by the Ministry of Finance, Revenue and Planning and the SEC/PR of all funding raised and received, and on the entities engaged in raising said funding in order to verify its investment. Art. 22. Projects that satisfy the purposes of this law shall not be subject to subjective evaluations as to their artistic and cultural merits. Art. 23. The following shall hold for purposes of this Law: I – (Vetoed); II – Sponsorship: Transfer of cash for promotional or coverage purposes, by the taxpayer, of tax on income and earnings of any nature, of expenses, or use of real or chattel property owned by same, without transfer of ownership, for some other individual or company to hold or put on some cultural or nonprofit works provided in Art. 3 of this law. § 1 The receiving of any financial or material advantage by a sponsor as a result of sponsorship shall constitute an infraction of this law. § 2 Transfers set forth in this article shall not be subject to withholding of income tax. Art. 24. For purposes of this Chapter, the following donations shall, pursuant to regulations, be considered alike: I – Free distribution of tickets to artistic or cultural events by a company to its employees and legal dependents; II – Expenditures made by individuals or companies for purposes of conserving, preserving or restoring property they own or have legitimate dominion over, declared monuments by the Federal Government, provided the following provisions are complied with: a) preliminary determination by the Brazilian Cultural Heritage Institute (IBPC) of technical standards to govern all projects and budgets addressed in this subsection; b) prior IBPC approval of all projects and corresponding budgets for execution of works; c) subsequent certification by the said agency of all expenses actually incurred and of all circumstances to verify that the work performed was done in accordance with approved plans. Art. 25. Cultural projects to be presented by individuals or companies for purposes of obtaining stimulus subsidies must seek to develop forms of expression, methods of making and doing, processes for preservation and protection of Brazil's cultural heritage and studies and methods for interpreting actual culture, as well as contribute to foster the means, to the general population, to afford them knowledge of artistic and cultural benefits and values, to include, among others, the following segments: I – Theater, dance, circus, opera, histrionics and the like; II – Cinematographic, video, photographic or record production, and the like; III – Literature, including reference works; IV – Music; V – Creative arts, graphic arts, engravings, posters, philately and the like; VI – Folklore and handicrafts; and VII – Cultural patrimony, to include history, architecture, archaeology, libraries, museums, archives and other holdings; VIII – Humanities; and IX – Radio and television, noncommercial, educational and cultural. Sole

(Footnote 36 continued)
paragraph. Cultural projects related to the segments in subsection II of this article may only benefit independent productions, and noncommercial cultural educational productions organized and put on by radio and television companies. (New language added by Law No. 9874 of 1999) Art. 26. Donors or sponsors may reduce their income tax liability by the amounts actually contributed to cultural projects approved in accordance with the provisions of this Law, based on the following percentages: (See Arts. 5 and 6, Subsection II of Law No. 9532 of 1997) I – For individuals, 80% of donations and 60% of sponsorships; II – for companies taxed on real profits, 40% of donations and 30% of sponsorships. § 1 Companies taxed based on real profit may take income tax credit for donations and sponsorships as operational expenses. § 2 The maximum amount for deductions mentioned in the header of this article shall be annually established by the President of the Republic, based on a percentage of the taxable income of individuals and of the tax code by companies taxed based on real profits. § 3 Benefits addressed in this article shall not exclude or reduce other current benefits, rebates and deductions, in particular donations to public utility entities made by individuals or companies. § 4 (Vetoed) § 5 The Executive Branch shall establish mechanisms for preserving the real value of contributions made to cultural projects under this Chapter. Art. 27. No donation or sponsorship may be made by persons or institutions having ties to the agent. § 1 The following are considered to have ties to the donor or sponsor: a) companies of which the donor or sponsor is an owner, manager, administrator, stockholder or partner, on the date of the operation or during the preceding 12 months; b) spouses, relatives up to the third degree, including relatives by affinity, and dependents of the donor or sponsor or of owners, administrators, stockholders or partners in a company having ties to the donor or sponsor, pursuant to the preceding subsection; c) any other company in which the donor or sponsor holds an interest. § 2 Nonprofit cultural institutions created by the donor or sponsor are not considered to have ties to said donor or sponsor, provided they be duly constituted and operating in accordance with current law. (New language added by Law No. 9874 of 1999) Art. 28. No investment of resources provided by this Law may be accomplished through any type of intermediation. Sole paragraph. Hiring of services necessary to the organization of projects intended to raise donations, sponsorship or investment, as well as do the raising of resources or its operation by a cultural company, shall not qualify as intermediation as referenced in this article. (New language added by Law No. 9874 of 1999) Art. 29. Resources from donations or sponsorships must be deposited and held in a specific bank account, bearing the name of the beneficiary, and all rendering of accounts must be made pursuant to regulations under this Law. Sole paragraph. For purposes of verifying the stimulus, no consideration will be given to contributions for which this determination is not observed. Art. 30. Violation of the provisions of this chapter shall render the donor or sponsor subject to payment of the indexed income tax amount owed for each fiscal year, without prejudice to possible criminal liability, in addition to all penalties and increases provided in legislation governing such matters. Paragraph 1 For purposes of this article, the individual or company which proposed the project shall be deemed jointly liable for nonperformance or irregularities discovered. (Renumbered from the standalone paragraph by Law No. 9874 of 1999) § 2 Any unresolved issues or irregularities in the execution of proponent's projects placed before the Ministry of Culture shall work to suspend analysis of or granting of new incentives until such time as they are cleared up. (Included by Law No. 9874 of 1999) § 3 Without prejudice to the preceding paragraph, the provisions contained in articles 38 et. seq. of this Law shall, where possible, be applied cumulatively. (Included by Law No. 9874 of 1999) CHAPTER V, GENERAL AND TRANSITORY PROVISIONS Art. 31. To ensure community participation, and representation of artists and creators in official treatment of subjects involving culture and systemic national organization of the area, the Federal Government shall provide stimulus to the institutionalization of Culture Councils in the Federal District, the States and the Municipalities. Art. 31-A. For purposes of this law, gospel music and events related to same shall be recognized as cultural manifestations, except when conducted by churches. (Included by Law No. 12590 of 2011) Art. 32 The National Cultural Promotion Committee (CNIC) is hereby instituted, composed of the following: I – The Presidential Office of the Secretariat of Culture; II – Presidents of all entities supervised by the SEC/PR; III – The President of the national entity bringing together the

instituted the National Cultural Support Program (PRONAC). There is also a law in support of audiovisual work (Law No. 8685 of 07/20/1993), as well as other similar provisions,[37] as well as exemptions from assessment of the Excise Tax on Goods and Services (ICMS), and a state tax on sales of items imported into Brazil in the states of Rio de Janeiro and São Paulo.

(Footnote 36 continued)

Culture Secretariats of the Several States; IV – A representative from among Brazil's corporate executives; V – Six representatives of associated entities from the cultural and artistic sectors, national in scope. § 1 The CNIC shall be presided over by the authority referenced in subsection I of this article, who shall vote in the event of a tie. § 2 Terms of office, appointment and choice of representatives to which reference is made in subsections IV and V of this article, and the powers of the CNIC shall be stipulated and spelled out in regulations accompanying this Law. Art. 33. In order to encourage and increase appreciation of art and culture, the SEC/PR shall establish an annual system for granting prizes in recognition of the most significant contributions to the area: I – To artists or groups of Brazilian artists or resident alien artists, for their collective or individual work; II – To professionals in the field of cultural patrimony; III – To scholars and writers on the critical interpretation of Brazilian culture, through essays, studies and surveys. Art. 34. The Cultural Order of Merit is hereby instituted, and its bylaws shall be passed upon by Executive Order, and all recognition shall be granted by the President of the Republic, in solemn ceremony, to persons who, through their exercise of their profession, or as exemplars of art and culture, do merit recognition. (Regulation) Art. 35. All resources earmarked for the then extant National Culture Fund, pursuant to Art. 1, Paragraph 6 of Law No. 7505 of July 2, 1986, shall be paid into the National Treasury for investment by the FNC, with due observance of their intended purpose. Art. 36. The Ministry of Finance, Revenue and Planning's Federal Revenue Department shall, in the exercise of its specific duties, see to the effective enforcement of this Law, insofar as investment of fiscal incentives therein provided are concerned. Art. 37. The Executive Branch shall, in order to comply with the provisions of Art. 26, Paragraph 2 of this Law, and bringing in harmony with the provisions of the Budget Directives Law shall, within 30 days, send a message to the National Congress setting forth the total of the tax relief offered and corresponding cancellation of budget expenditures. Art. 38. In the event of malice, fraud or deception, including diversion of purpose, a fine will be assessed to both donor and beneficiary in the amount of twice the undue advantage received. Art. 39. All forms of political discrimination in violation of freedom of expression, of intellectual and artistic endeavors, or of convictions or beliefs during the execution of projects subsumed under this Law shall constitute criminal activity punishable by confinement of two to six months plus a fine in the amount of 20% of the project total. Art. 40. Fraudulent exploitation of any benefit under this Law to obtain a reduction of income tax is a crime punishable by confinement of two to six months plus a fine in the amount of 20% of the project total. § 1 In the case of a company, the stockholder having controlling interest and all administrators participating in the offense shall be subject to criminal liability. § 2 Anyone receiving resources, goods or monetary amounts as a function of this Law and who without just cause fails to carry out or execute the cultural activity for which the incentive was granted shall be subject to the same penalty. Art. 41. The Executive Branch shall, within 60 days, issue Regulations under the present law. Art. 42. This Law shall go into effect as of the date of its publication. Art. 43. All provisions to the contrary are hereby repealed. Brasilia, December 23, 1991; the 170th year of independence and the 103rd of the Republic. Fernando Collor, Jarbas Passarinho.

[37] MinC Regulatory Directive No. 2 of April 26, 2012—Amending and adding provisions to Regulatory Directive No. 1 of February 9, 2012, establishing procedures for presentation, receiving, analysis, approval, execution, monitoring and rendering of accounts for cultural proposals relating to the Fiscal Incentives mechanism within the National Cultural Support Program (Pronac), and making other provisions; MinC Regulatory Directive No. 1 of February 9,

(Footnote 37 continued)

2012—Establishing procedures for presentation, receiving, analysis, approval, execution, monitoring and rendering of accounts for cultural proposals relating to the Fiscal Incentives mechanism within the National Cultural Support Program (Pronac), and making other provisions; Law No. 12590 of January 9, 2012—Amends Law No. 8313 of December 23, 1991, the Rouanet Law, to recognize gospel music and gospel-music-related events as cultural manifestations; MinC Finding No. 140 of December 28, 2011—Passes the Annual Fiscal Incentives Working Plan for fiscal year 2012; MinC Finding No. 131 of December 21, 2011—Institutes Internal Regulations for the National Commission on the National Culture Fund (CFNC), and makes provisions on artistic language and cultural segments for allocation of FNC resources, and makes other provisions; MinC Finding No. 130 of December 21, 2011—Passes the Annual Fiscal Incentives Working Plan for fiscal year 2012; MinC Finding No. 129 of 21 December 2011—Passes the Annual Fiscal Incentives Working Plan for fiscal year 2011; MinC Finding No. 116 of November 29, 2011—Regulates all cultural segments provided in Para 3 of Article 18 and Article 25 of Law No. 8313 of December 23, 1991; MinC Finding No. 83 of September 8, 2011—Establishes rules for classification and distribution of cultural products or projects among experts, and also related procedures and powers relating to the implementation of the Accreditation System within the scope of the MinC System, and makes other provisions; MinC Finding No. 50 of May 24, 2011—Passes the Ministry of Culture Annual Fiscal Incentives Working Plan for fiscal year 2011; ANCINE Regulatory Directive No. 93 of May 3, 2011—Changes provisions of Regulatory Directive No. 23 of December 30, 2003, Regulating the preparation, presentation and monitoring of audiovisual projects, from Regulatory Directive No. 21 of December 30, 2003, which in turn regulates procedures to be adopted for preparation and presentation of the statement of accounts, and of Regulatory Directive No. 54 of May 2, 2006, setting standards for inclusion of independent Brazilian producers of audiovisual works, and making other provisions; ANCINE Resolution No.39 of May 2, 2011—Establishes parameters within ANCINE for assigning priority to project analyses and requests for fundraising extension deadlines, and for resizing and reassigning sources of funding; Finding No. 34 of April 26, 2011—Approves the Ministry of Culture Style Guide to be used in drawing up the Basic Publicity Plan for cultural proposals presented to the National Cultural Support Program (Pronac), and makes other provisions; Finding No. 43 of July 9, 2009—Passes regulations for the implementation of the experts Accreditation System within the MinC System; Finding No. 29 of May 21, 2009—Provides for the preparation and management of public selection notices of openings in support of cultural projects and for granting of prizes to cultural initiatives within the framework of the Ministry of Culture; Finding No. 8 of March 18, 2008—Provides for the invitation of art and culture-oriented membership associations and representatives of the business community, on a national level, to participate in the choice of institutions to comprise the National Cultural Promotion Committee (CNIC) for the 2008–2010 biennium; Law No. 11646 of March 10, 2008—Changes provisions of Law No. 8313 of December 23, 1991, to extend fiscal benefits for donations and sponsorships earmarked for construction of movie auditoriums in townships having populations of less than 100,000, and other provisions; Decree 6170 of July 25, 2007—Provides standards for the transfer of Federal funding through onlending agreements, and makes other provisions; Decree No. 5761 of April 27, 2006—Regulates Law No. 8313 of December 23, 1991, sets up a working system for the National Cultural Support Program (PRONAC) and makes other provisions; Law No. 9874 of November 23, 1999—Changes provisions of Law No. 8313 of December 23, 1991, and makes other provisions; Law No. 9532 of December 10, 1997—Changes federal tax legislation and makes other provisions; Joint MINC/MF Regulatory Directive No. 1 of June 13, 1995—Provides procedures for monitoring, control and evaluation of fiscal benefits to be instituted by Law No. 8313 of 1991, as amended by Law No. 8981 of 1995, and Provisional Measures Nos. 8981 of 1995, and Provisional Measures Nos. 998 and 1003 of 1995; Law No. 8313 of December 23, 1991—Reestablishes the principles of Law No. 7505 of July 2, 1986, institutes the National Cultural Support Program, and makes other provisions. (New language added by Laws No. 9874 of November 23, 1999 and No. 11646 of March 10, 2008).

The Museum of Contemporary Art of the University of São Paulo (MAC-USP),[38] for example, has been guided by rules established by the ICOM Code of Ethics for Museums, where acquisition takes place by purchase or donation from artists, collectors, institutions, private companies and the Friends of MAC-USP (with or without reliance on cultural stimulus laws). To that end, evaluations are conducted on the merits and documentation by museum professionals, who in turn issue specific findings to be deliberated upon by the MAC-USP Council. Informality between artists and the art market is still prevalent.[39]

Institutions should take note. For example, New York's Metropolitan Museum of Art was publicly criticized for its policy of acquisitions. This is an example of the sort of problems arising from secrecy in acquisitions. In 1972, Dietrich von Bothmer, curator of Greek and Roman Art at the Met, saw a vase in Zurich, which was presented and represented by Robert Hecht, Jr., an American living in Italy and involved in the arts—albeit in several questionable transactions. Dietrich von Bothmer acquired the piece and put it on exhibit in November of that year. A later investigation, however, found that a Lebanese exchange broker took part in the negotiations, and had initially introduced himself as a Swiss collector, then as an Armenian collector and finally as an art dealer. This individual claimed to have received the vase from his father, and to have owned it for 50 years. Subsequent investigation by the Italian police revealed that the piece had in fact been illegally excavated from an Etruscan tomb in 1971.[40]

Museums have grown and developed while changing many of their functions and broadening their scope. They have taken on newfound positions within a globalized and highly competitive society that includes tourism, the Internet and technology among its many features.

As Yani Herreman explains, "[o]ne of the most important and permanent changes in the development of the contemporary museum has been to become more audience-conscious and to be more in step with modern social processes."[41] This also holds for auction houses, galleries, libraries and fairs,[42] included as they are in this new global context characterized by sustainable development and cultural tourism.

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[38] Turns 50 in 2013 and its collections include art from such segments as International Modern Art, Brazilian Modern Art, International Contemporary Art, and Contemporary Brazilian Art.

[39] Information given to the author by Prof. Ana Farinha, a member of MAC-USP (received 05/20/2012 by institutional e-mails between TRF3 and USP).

[40] Cf. Leonard DuBoff, Michael Murray and Christy King. *The Deskbook of Art Law.* New York: Oceana, Second Edition, Booklet B (*International Movement of Art*), Release 2010–1, Issued November 2010, B-94.

[41] Cf. The Role of Museums Today: Tourism and Cultural Heritage. *Art and Cultural Heritage: Law, Policy, and Practice*, p. 419.

[42] These have attracted armies of gallery owners and collectors, and among them we cite *The Armony Show* and *Frieze Art Fair* (New York), *Frieze Art Fair* (London), *Art HK 12* (Hong Kong), *Art Basel* (Basil, Switzerland), FIAC (Paris), *Art Basel* (Miami), *Arco* (Madrid), *Zona Marco* (Mexico), *ArtRio* (Rio de Janeiro), *SP-Arte* (São Paulo) and *Parte* (Universidade de São Paulo, SP). Cf. Bienal vende tudo. Brazil's most important arts fair, SP-Arte, has turned seven in a booming industry. São Paulo, p. 34. Folha de São Paulo newsmagazine, May 6–12, 2012.

Sarah Thornton tells us that although many students enrolled in colleges of fine arts do not feel comfortable with the title of artist, they are often in need of endorsement from an art dealer, an exhibition in a museum or a teaching job.[43]

We thus arrive at the close of the twentieth century and start of the twenty-first century in what is turning into a veritable cultural boom. Never before have so many institutions of culture been turning up under construction, undergoing restoration or being added onto in the midst of important economic and social change.

Auction houses or art galleries may acquire an item by one of two methods—that is, by consignment or by acquisition. They may also enter into combined consignment and acquisition agreements. The first possibility (consignment) is very common because it dispenses with the cost of purchase and, if no sales are forthcoming, simply returns the item to the artist. Because artworks are relatively expensive, auction houses and galleries have opted for that approach coupled with an exposition agreement with the artist, whereby each gets 50% of the sales revenue. This all depends on the agreement, which may arrive at a 70–30% split favoring the artist. The percentage varies, depending on the artist and cost of production of the item, which is good for artists who are still living. Auction houses or galleries in turn undertake to sell the work of the artist, pay to have it published in specialized catalogs (if not their own) and bear the costs of opening up the exposition. Some auction houses specialize in certain types of works or have a knack for making unknown artists popular.

Auction houses are today one of the most popular venues for the sale of artworks and account for 50% of annual sales in the United States. Ninety percent of the multi-billion-dollar global market and almost three-quarters of all sales are handled by Sotheby's and Christie's.[44]

The public—observers and buyers alike—have flocked to auctions. A similar phenomenon has taken place in Brazil and "demanded of art dealers a more organized approach to the product and to the clientele. Larger rooms were sought out in 'nicer' locations (…). Innumerable works by unknown or little-known artists were added to the catalogs, increasing the number of sales. The cost-to-invoicing ratio became a subject of great concern with the scarcity of higher-priced works by known artists, and this was aggravated by criticisms to the effect that auctions had become 'fire sales' liquidating gallery 'overstocks.'"[45]

Auction houses play an important and complex role as agents for both seller and buyer, while also representing themselves. Hence their broad range of important responsibilities, including that of obtaining a license for their location, making

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[43] In *Sete dias no mundo da arte. Bastidores, tramas, intrigas de um mercado milionário.* Translation: Alexandre Martins. Rio de Janeiro: Agir, 2010, p. 71.

[44] See Leonard DuBoff, Michael Murray and Christy King. *The Deskbook of Art Law.* Booklet M (*Auctions*). New York: Oceana, Second Edition, Release 2010–12, Issued December 2010, p. M-1.

[45] For more on this, see José Carlos Duran (in *Arte, Privilégio e Distinção. Artes Plásticas, Arquitetura e Classe Dirigente no Brasil, 1855-1985.* Estudos. Sociologia da Arte. São Paulo: Perspectiva and Universidade de São Paulo—Edusp/joint publication, 1989, pp. 198–199).

strategic efforts to maximize their offerings of goods, providing relevant information as to the nature and price of goods on the market, accepting payment and providing assurance of safely shipping all orders to the buyer. However, they make the seller liable to the buyer for any defect in the item.[46]

To see the profit they make, one must consider the cost of goods sold, their stock of items (inventory and consignment), and their accounting and sales figures. It is not easy to verify the dealings between auction houses or galleries and artists since there is no requirement that they inform the authorities of their revenue from consignment sales. Some artists pay their own personal expenses in cash and prefer that form of payment from auction houses or galleries for their works sold on consignment.

An auction house may offer financial facilities and options. There are cases of loans given to buyers using the item itself as a guarantee for the loan, but this was criticized on the grounds that exaggerated appraisals of the work would serve to facilitate its acquisition.[47]

On inspection of a consignment document, one can see that it contains the name, address and telephone number of the consigning artist, a description of the item or items, the price set by the artist, the date negotiated, the percentage agreed upon between artist and consignee and their signatures. Nothing is said about the form of payment. Then again, in Information Document Requests for the IRS, there is a requirement that all art received on consignment be individually recorded, along with the profit and the amount of items, on a yearly basis.[48] This happens because gross revenue must be understood as all revenue, irrespective of the source—whether money, property, services rendered or even payments in kind (meals, lodging, inventory, etc.), unless prohibited by law.

Once items are sold, auctioneers and their employees carefully examine and appraise them. Experts may be consulted to identify or authenticate an unknown work. In the event of disagreement, the auction house must notify the consignor of its internal disagreement, even though the seller normally sees the auction house as a specialized technical market, relying on its recommendations as to what constitutes a good price.[49] They should therefore provide reliable opinions on prices and make good recommendations as to what to do with an item once consigned.

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[46] See Leonard DuBoff, Michael Murray and Christy King. *The Deskbook of Art Law.* Booklet M (*Auctions*). New York: Oceana, Second Edition, Release 2010–2012, issued December 2010, pp. M-36–37.

[47] For more on this see Leonard DuBoff, Michael Murray and Christy King (in *The Deskbook of Art Law*. Booklet M (*Auctions*). New York: Oceana, Second Edition, Release 2010–2012, issued December 2010, p. M-43).

[48] See Artists and Art Galleries. Publication by *Internal Revenue Service. Department of the Treasury. Market Segment Specialization Program*. www.artchain.com/resources/art_audit_guide.pdf. Accessed May 23, 2012. Chapter 3, pp. 6–7 and 13–17.

[49] For more on this, see Leonard DuBoff, Michael Murray and Christy King (in *The Deskbook of Art Law*. Booklet M (*Auctions*). New York: Oceana, Second Edition, Release 2010–2012, Issued December 2010, p. M-69).

As an example, examination of the Conditions of Sale for an auction of antique paintings held at Christie's in New York on June 6, 2012, turned up the following[50]:

01. The Conditions of Sale set forth all of the terms on which Christie's, as the seller's agent, shall deal with the buyer (Para 1). Christie's is allowed to make amendments to the terms during the auction, and the buyer in making his bids is bound by the terms (Introduction), with no time for actual discussion of the conditions *imposed*.
02. Christie's allows advance examination of the work to be auctioned, and even recommends it, but provides no guarantee, and nor does the seller, as to the nature of the item [Para 2(a)]. However, for the five years following the auction, Christie's warrants any property described in headings printed in upper case type in the catalogue, but only that the work is of the stated author or authorship (period, culture, course, or origin), is authentic and not a forgery. The warranty does not apply to any supplemental material which appears below the upper case heading for the works in the catalogue. [Paras 2(a) and 6].
03. The guarantee in question is only valid for the original buyer, and not to any future third-party buyer [Para 6(iii)].
04. In the event the buyer wants to make a warranty claim, Christie's may request written verification by two, mutually acceptable, recognized specialists [Para 6(v)].
05. The buyer must return the item to the same saleroom at which it was purchased, and in the same condition it was at the time of the sale [Para 6(vi)].
06. The auction house may, at its discretion, reject offers and refuse participants [Para 6(a)].
07. To participate in an auction one must first register as a buyer (online or 30 minutes before the scheduled start of the sale), identify oneself and sign a registration form; bank or other financial references may sometimes be required [Para 3(b)].
08. In making bids, the buyer agrees to pay the purchase price, including the buyer's premium and all applicable taxes, plus any and all applicable fees [Para 3(c)].
09. Christie's assumes no liability for currency converters supplied at the auctions, nor for any videos or images depicting the work [Para 3(f) and (g)].
10. Unless otherwise indicated, all works are offered subject to a reserve, that is, a minimum price below which the item will not be sold [Para 3(h)].
11. The auctioneer is empowered to refuse a bid, increase the pace of an auction, divide any lots and—in the event of uncertainty or error—determine the successful bidder [Para 3(i)].
12. The striking of the hammer marks the closing of the deal, and all risk and responsibility for the item and its condition passes to the buyer seven days after the date of the auction [Para 3(j)].
13. In addition to the hammer price, the buyer must pay Christie's buyer's premium (25% of the hammer price, if less than or equal to US$50,000; 20%

[50] See CHRISTIE'S CATALOGUE. *New York, Old Master Paintings. Wednesday 6 June 2012.* London: Christie, Manson & Woods Ltd., 2012, pp. 118–119.

from $50,000 to $1 million; and 12% if over $1 million) in addition to all applicable taxes [Para 4(a)].

14. Following the sale, the buyer must provide a name and permanent address, and, if requested, details of the bank from which the payment will be made. The buyer must pay the full amount due (hammer price, buyer's premium and taxes) no later than 4:30 PM on the seventh calendar day following the date of the auction, a deadline which still holds even if an export license must be obtained. The buyer will not acquire title to the piece until all amounts are paid in full [Para 4(b)]. The auction house may retain the items until all amounts have been received in full in good clear funds, under penalty of cancellation (in which case the piece may be sold to outside parties), and all anti-money laundering and anti-terrorism financing checks have been completed to the auction house's satisfaction [Para 4(c)].

The Christie's Catalogue makes it clear that payment will only be accepted from the person named on the invoice.[51]

Because of its inhomogeneous nature, art requires some specialization, and agencies monitoring the industry must likewise be specialized.

These entities have become centers for cultural diffusion and attractions for any number of multidisciplinary activities intended to draw people in, entertain them, and educate them.

These roles underscore the undeniably cultural quality of these eminently social institutions.

Hence, certainly more delicate situations ought to warrant public scrutiny (by and for the public), even if, outwardly, they appear quite private.

4.5 Insurance Companies

Insurance companies are invariably hired in the case of high-value artworks, which are themselves treated differently than ordinary personal property.

For purposes of coverage, the insurance policy should identify each piece, together with its value, and the underwriter normally would ensure full liability for the amounts declared on the insurance application, for those provide the basis for issuing the policy and calculating the premium. The policy should show that they are not insuring goods without irrefutable proof of ownership or existence preceding the onset of the policy period, and furthermore that the items are not smuggled, stolen, purloined, forged, illegally traded or used in money laundering.

Such companies therefore require a proper appraisal because in case of an accident, the amounts paid must match a statement of worth previously agreed upon. They have required a detailed description to better recover the item in the case of loss or diversion. There must, in addition, be periodic updates on the item

[51] CHRISTIE'S CATALOGUE. *New York, Old Master Paintings. Wednesday 6 June 2012.* London: Christie, Manson & Woods Ltd., 2012, p. 129.

appraised in order to adjust its value proportionally between the previous evaluation and market value, for one of the difficulties involving art is precisely how to arrive at a value in case of loss. Insurance companies often request appraisal of each item insured, which does not mean that they will be bound by that figure, inasmuch as it is considered merely a suggested value.[52]

The insurance agreement should state that the policy does not cover vitiated claims, or acts by enforcement authorities, such as searches, seizures and forfeitures, or hazards arising from theft, robbery, smuggling, illegal transportation, illegal sale and money laundering.

4.6 Financial Crimes Enforcement Network (FinCEN) and the Council for Financial Activities Control (COAF), Suspicious Activity Reports and Banking Risks

The confidentiality of Suspicious Activity Reports is protected in the United States. There was some question as to whether this protection was restricted to the Report itself or extended to supporting documentation. At first, only the Report was confidential, but afterward, the Office of the Comptroller of the Currency (OCC)[53] at the Treasury Department decided that supporting documentation was also confidential. This secrecy is so indispensable that even when subpoenas are issued ordering disclosure of Reports or supporting documentation in several cases, the OCC held that it must be notified by the banking institution so that it might take part in the proceedings and that the disclosure must comply with the Federal Rules of Civil Procedure. There was a suggestion that information be shared among financial institutions to better detect new fraudulent schemes. Through FinCEN and other agencies, the Treasury Department decided to provide information so that they might keep abreast of the trends in that class of crimes, issue statements and hold meetings and seminars. In no event could the Report be disclosed to anyone supposedly involved, excepting only FinCEN or other appropriate government agencies.

Note that there is a deadline for Suspicious Activity Reports—30 days from the time the facts are known—but if the suspect cannot be identified, this timeframe extends for another 30 days. No more than 60 days may elapse, however, once the facts become known.

Proper vigilance and Suspicious Activity Reports are deemed essential to ensure that the financial institution has an effective compliance program. Appropriate policies and procedures must be put in place to monitor and identify

[52] See DUBOFF, Leonard D., MURRAY, Michael D., CHRISTY A., King. *The Deskbook of Art Law.* Booklet L (Insurance). New York: Oceana, Second Edition, Release 2010–2, Issued December 2010, L-21, 36 and 52.

[53] http://icom.museum/programmes/fighting-illicit-traffic. Accessed June 20, 2012.

unusual occurrences by time and place. Reporting systems must include unusual event identifications or alerts (identifying the employee and giving all necessary search information), management alerts (awareness of all methods of identification and evaluation in all business areas), the Report itself and its generation, regardless of size. Monitoring system sophistication must be understood as part of banking risk, with emphasis on what goes into high-risk products, services, account holders and entities. Financial institutions must therefore have adequate personnel to identify, research and report on suspicious activities, with due account taken of the general risk level and volume of transactions.

The Financial Crimes Enforcement Network does not have specific instructions to require auction houses, galleries, museums or art dealers to report suspicious activity. They are, however, under general obligation to report cash payments in transactions of $10,000 or more.

The Brazilian Council for Financial Activities Control Resolution No. 008 of September 15, 1999, with the aim of preventing the use of art objects or antiquities for the laundering of money, requires the completion of Suspicious Activity Reports by individuals or companies that sell, import, export, or intermediate a sale—whether on a permanent or temporary basis, in a principal or accessory role, and cumulatively or otherwise.

It requires that a record be kept of an individual customer for at least five years, to include name, complete address, identification number, issuer and date of issue, passport or photo ID if a foreign national, and Individual Taxpayer Register (CPF) number. For businesses, the company or corporate name, corporate taxpayer number (CNPJ), complete address, telephone number, primary business and name of parent corporation(s), daughter company(-ies) or affiliate(s) (Article 3). The record must contain a detailed description of each piece, the date and amount of the transaction and form of payment (cash, check, credit card, financing, etc.) (Article 5).

The requirement extends to museums, art galleries and libraries, given their nature and language contained in the Money-Laundering Law, but is not, however, limited to only those individuals or companies permanently engaged in the business (such as galleries). Yet this is poorly understood, despite the clarity of the written law.

Furthermore, according to statistical data compiled by the COAF, the number of Suspicious Activity Reports has been very low - only two in 2009, five in 2010, three in 2011 and nineteen in 2012. Since its inception (1999), the COAF has received only thirty-six reports, which shows that the law in Brazil is not being taken seriously.[54]

We have a situation in Brazil in which lack of monitoring activity on the part of the Financial Intelligence Unit and the belief that money laundering through artistic media is a relatively small risk (highly specialized market, highly visible, with low liquidity and high premiums) compared to other industries combine to make the law a dead letter, a sort of institutionalized make-believe that does not properly merit the attention one would expect from enforcement authorities.

[54] See https://www.coaf.fazenda.gov.br/conteudo/estatisticas/comunicacoes-recebidas-por-segmento/. Accessed May 10, 2013.

Furthermore, COAF Resolution No. 10 of November 19, 2001, places the same requirements on nonfinancial sector companies engaged in domestic or international cash transfer services, obliging them to record the amounts transferred, form of payment, transaction date, purpose of the wire transfer, name, individual or corporate taxpayer ID, where applicable, of both sender and receiver and addresses for both.

These requirements give a false impression that any money laundering occurring in that sector could actually be detected. There is also a need to require dealers (in the broadest sense of the word) to turn in Suspicious Activity Reports upon acceptance of such illegal funds as may be detected (applying the willful blindness doctrine).

In addition, institutions that have become aware of art being acquired for laundering purposes ought to monitor all corresponding interbank transactions.

4.7 Agencies Involved in Investigating Tax Fraud

Internal Revenue Agents should have, at the very least, the specific knowledge required for a basic understanding of the art market in order to check on declared prices. They should, therefore, be given educational training.

There is a tendency to consider artworks to be duty-free, where the accompanying fiscal document should contain the name of the creative artist, if known, and declare whether they are originals, replicas, reproductions or copies, and evidence may be required that they prove the same as on the import declaration.

U.S. customs law has been organized into a "harmonized system," requiring uniform descriptions of goods bought and sold in world trade. A classification system is now proposed for transporters, importers, exporters, customs, and record-keeping for a high level of uniformity in fees and statistical data.[55]

The resulting more objective descriptions will allow better measurement and observation on the part of Internal Revenue Service authorities, reducing the chances of defective descriptions in import and export documentation, and improving the exchange of information among customs authorities, with more reliable figures, to track all movement of goods across national boundaries.

Regulatory Directive No. 874 for Brazil's Federal Revenue Service, dated September 8, 2008,[56] providing customs clearance procedures for temporary admission and exportation of cultural goods, considers such goods to be artworks: literary, historical, phonographic and audiovisual works, musical instruments and equipment, sets, costumes and other goods necessary for putting on dance, theater or opera performances, concerts or similar clearly cultural events (Article 1, sole paragraph).

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[55] See Leonard DuBoff, Michael Murray and Christy King. See *The Deskbook of Art Law*. Booklet A (*Art: The Customs Definition*). New York: Oceana, Second Edition, Release 2010–2, issued December 2010, pp. A-38 and A-40-41.

[56] Published in the Federal Official Gazette on 09/09/2008, and again on 09/23/2008.

It requires that the simplified temporary importation clearance papers for cultural goods referenced in Article 4 of Federal Revenue Secretariat Regulatory Instruction No. 611 of January 18, 2006, be presented by the individual or company responsible for their entry into Brazil and their return abroad (Article 2, heading). Where such goods are brought in by a nonresident traveler, the granting of simplified clearance shall be formally set forth on the Accompanied Baggage Declaration, or DBA. The Simplified Import Declaration (DSI) must be filed before the goods arrive in Brazil (§§ 1 and 2).

Article 3 waives completion of DSI fields reserved for import tax amounts and corresponding calculations, as well as for gross weights of each of the items imported. The applicant must specify the purpose of the temporary admission under cultural goods, and enter into the appropriate field all supplementary information for the DSI, including name, location and timeframe for each event occurring in Brazil (Sole paragraph).[57]

Physical inspections may be waived for artworks and historical items submitted for clearance by: (a) a museum, theater, library or cinémathèque; (b) any entity operating an event supported by the government; (c) any entity promoting a well-recognized event; or (d) any permanent diplomatic mission or consular department (Article 6, heading). In such case, authorization is required, but shall only be granted at the request of the interested party, by the chief of Brazil's Federal Revenue Service for custom dispatch to the institution that (§ 1): I—Has been listed with the National Corporations Register (CNPJ) for over three years; and II—Meets all requirements for fiscal compliance with the National Treasury, for providing a joint certificate of no arrears or positive clearance certificate, containing information on standing on all taxes administered by Brazil's Federal Revenue Secretariat, and Amounts Payable to the Government (DAU), administered by the Finance Ministry Prosecutor's Office (PGFN). The filing must be accompanied by images, designs, plans or such other resources as will allow full identification of all works listed in the heading (§ 2).[58]

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[57] Both the DSI and DBA forms must be accompanied by a Liability Agreement (TR), where applicable, as set forth in specific legislation (Article 4, heading). No indication of suspended import tariff amounts shall be required on the Liability Agreement (§ 1). For nonresident travelers, para 2 establishes that the Liability Agreement shall be: I—Required only for goods valued at more than R$ 3000.00; II—Signed by the person responsible for the event in Brazil. Failure to comply with simplified regime requirements will result in the tariff amount being assessed by customs authorities, based on information contained in the declaration and corresponding additional documents, and entered in the appropriate field in the TR. (Article 5, heading). Absent documentary proof of the value of the goods in question, the values set forth on the insurance policy may be used for purposes of completing and filing the TR (Sole paragraph).

[58] Cultural items not included in Article 6 of the Regulatory Directive must have their physical examinations obviated by means of an Executive Declaration issued by the Regional Superintendent of the RFB having local jurisdiction over the event being held, to apply specifically to the goods which, by their nature as antiquities, rarities or fragile items require special handling or preservation. (Article 7, heading). Should the event be spread out over different places, over which more than one Fiscal Region exercises jurisdiction, the Executive Declaration

Physical inspection for temporary admission of goods, when not waived or conducted at the event location, may be done by sampling the shipping unit (Article 9). All goods regulated under the Regulatory Directive are subject to specific legislation providing the special temporary admission customs regime (Article 10): I—Requirements for granting of the regime; II—Timeframe for remaining in Brazil; III—Enforcement of the Liability Agreement; IV—Closing out of procedure; and V—Right of appeal.

Should the goods remain permanently in Brazil, the beneficiary must, during the effective term of the temporary entry permit, file for final customs clearance in accordance with applicable law (Article 11, heading). Art objects listed under Common Mercosul Nomenclature (NCM) customs codes 9701, 9702, 9703 or 9706 and received as donations from a museum instituted or maintained by the government or some other cultural entity recognized as a public utility, shall be exempted from import tariffs pursuant to Law No. 8961 of December 23, 1994 (Sole paragraph).

Simplified temporary exportation clearance papers for cultural goods shall be processed based on the Simplified Export Declaration (DSE) referred to in Part. 31 of Federal Revenue Secretariat Regulatory Instruction No. 611 of 2006, filed by the individual or company responsible for their entry into Brazil (Article 12, heading). Should the goods be taken abroad as accompanied baggage (§ 1): I—The interested party may turn in the DSE for recording purposes, with the proper notation in the field intended for supplementary information, accompanied by the traveler's ticket, documentation from consenting agencies, if applicable, prior to embarkation, during normal business hours of the RFB when leaving the country; or II—The traveler must list all goods on the Temporary Exit of Goods Declaration (DST) and file it, prior to boarding, with customs officials, for proper monitoring of goods leaving Brazil. In the case of item I of § 1, upon embarking, the traveler must be in possession of a copy of the DSE, duly cleared (§ 2).[59]

(Footnote 58 continued)
must be issued by the General Customs Administration Office (Coana) (Sole paragraph). If the importer so wishes, cultural goods may be made available for physical inspection at the event location (Article 8, heading). To that end, the interested parties should file for temporary admission with the unit having jurisdiction over the event location or, for itinerant events, over the first event location (§ 1). The said goods may be taken to the event location under summary authorized transit through customs as stated on the copy of the dispatch by the agency authorizing the transit (§ 2). Seals may be placed on volumes or cargo units so that these may be promptly and properly stored at the event location, while awaiting the arrival of inspectors. (§ 3) Transit through customs is concluded upon issuance of Simplified Clearance papers (§ 4).

[59] Completion of DSI fields reserved for import tax amounts and corresponding calculations, as well as for gross weights of each of the items imported is waived. (Article 13, heading). The applicant must specify the purpose of the temporary admission and enter his or her name, and the location and timeframe for each event occurring abroad in the supplementary information field on the DSE. (Sole paragraph). In the case of returning goods, customs clearance procedures for re-exportation of cultural goods shall be processed based on the DSE or DRE-E filed by the

(Footnote 59 continued)
person or company responsible for returning the goods abroad. (Article 15). The beneficiary of the special temporary customs admission procedure subject of this Regulatory Directive must state, on the DSE or on the DRE-E the number and type of declaration for clearance on admission of the goods into Brazil and, in the event of clearance for consumption of part of the goods, pursuant to Article 11, the number on the declaration that served as the basis for the definitive customs clearance (§ 1). Should the goods they returned abroad be in separate shipments, the interested party must indicate on the supplementary information field of the DSE that a partial return is being made (§ 2). Where goods return abroad as accompanied baggage, the traveler must present to customs authorities at the point of exit a copy of the DSI or DBA used for the grant of temporary entry, for notations necessary to the formalization of departure and presentation to customs authorities at the point of entry so that the corresponding Liability Agreement may be canceled, should the goods exit through some unit other than that which granted temporary entry (§ 3). Goods admitted temporarily with waiver of physical inspection, pursuant to Articles 6 and 7, may dispense with this customs formality on the occasion of their re-exportation, and may also be shipped back out of the country by courier service, in which case the interested party must produce documented evidence of the re-exportation of said goods for the benefit of the unit that granted temporary entry (§ 4). Goods admitted pursuant to Article 8 may be subjected to physical inspection at the location of the event, in which case the DSE must be recorded with the unit having jurisdiction over the location of the goods to proceed in transit through customs for re-exportation through the unit controlling the exit (§ 5). Physical inspection for reimportation or re-exportation of exported goods, when not waived or conducted at the event location, may be done by sampling the shipping unit (§ 6). Customs clearance for return to Brazil of goods exported temporarily shall be processed based on the DSI or on the Express Shipment Import Declaration (DRE-I) (Part 16 heading). The interested parties must place the number and type of declaration that served as the basis for temporary export clearance on the DSI or on the DRE-I (§ 1). Goods exported temporarily with waiver of customs inspection may be exempted from physical inspection on the occasion of their return, if return is effected within the effective term of the temporary permit (§ 2). Goods exported by customs inspection at the site of the event may—pursuant to Article 16—be subject to physical inspection outside of customs facilities in the event of their return, in which case the DSI must be registered with the unit having jurisdiction over the place of arrival of the goods (§ 3). The provisions contained in Article 8 of this regulatory directive shall apply to removal of cultural goods returning to Brazil or re-exported (§ 4). Whenever the return of goods to Brazil occurs within the effective timeframe of the temporary export permit, the completion of fields reserved for calculation of import tariffs to be assessed, and fields for showing the gross weight of each of these items, shall be waived (§ 5). Printed matter, leaflets, catalogs and other promotional material alluding to the event may be granted clearance with no formalities (Article 20). In customs clearance procedures addressed in this Regulatory Directive, no commercial or proforma invoice shall be required, but instead, a declaration containing a list of the goods, dated and signed by the person or entity exercising ownership or possession of the property (Article 21). Temporary admission or exportation of the goods in question shall only be granted by the customs authorities for the Federal Revenue Service unit of record for the declaration, and after verification of compliance of specific controls imposed, if any, by assenting agencies (Article 22). Approval is hereby granted to the model form titled Request for Physical Inspection of Cultural Goods outside of Customs Facilities, in accordance with the Sole Attachment to this Regulatory Directive (Article 23). The request must be filed in three copies, turned in as follows: 1—Top copy, to the local Revenue Service unit; II—second copy to applicant; and III—third copy to shipper. Provisions contained in the Regulatory Directive may apply to cultural goods entering or leaving MERCOSUL countries, absent the procedure provided in Federal Revenue Secretariat Regulatory Directive No. 29 of March 6, 1998 (Article 24). The high tariff on imports has made it possible to acquire clandestine art, hidden in the pages of books or disguised as everyday items, while also providing an incentive for exportation of local products, thereby facilitating the flight of art objects.

In fact, there is no evading the importance of the so-called "Third Sector," the private sector active in the promotion and preservation of cultural heritage, and engaged in promoting its development. So true is this that laws are actually written to implement financial regulations (for example, in the United Kingdom, France, Italy, Germany and Spain) providing stimulus measures and fiscal incentives,[60] as in Brazil and the United States.

Laundering through artworks is accomplished by incorrectly stating prices, quantity, quality and overseas transportation (abroad and back) in an effort to convey legitimacy to illegal money.

Artificial price setting to disguise actual value in imports and exports, a form of speculating on established prices, allows money to be transferred by over- or under-invoicing without raising the suspicion of authorities. The practice makes it difficult for customs agents to determine the true value of items. It is also not difficult to transport larger or smaller quantities in such a way as to avoid detection (in tubes, for instance), or filing descriptions that do not quite match what is being transported (by deliberate misstatement of the quantity or quality), again without alerting border agents.

According to Hannah Purkey, exports are not as strictly regulated in the United States as imports, and domestic transportation of art is duty free.[61]

What we do know is that taking the profit out of crime—preventing the use of cultural goods or assets for illegal purposes—does fight crime.

Since 1986, the Office of International Affairs at the U.S. Department of Justice has been active in the seizure, blocking and successful confiscation of goods both domestically and abroad. Its activities have been stepped up since the 9/11 attacks of 2001. However, terrorist action has gotten top priority in all its enforcement efforts, and nowhere near so much attention has been given to matters involving cultural heritage items.

We must bear in mind that money being laundered often leaves the country to circulate within the international system of payments in order to throw potential auditors off its trail. It is not at all uncommon to use large amounts of cash in the first stage of money laundering (placement, conversion or concealment).

The practice takes many forms, including cash-based negotiations involving hefty sums. This is how art, like jewelry or gold, comes in as an important means of laundering money because it brings together qualities that satisfy the demands of inherent facility—qualities such as being small in size, light in weight, free of odor and difficult to track.

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[60] The trend, according to María Rosa Suárez-Inclán Ducassi, is in keeping with guidelines contained in the European Green Book, which recognizes the need to encourage social responsibility on the part of private entrepreneurs (in Financial Regulations and Tax Incentives with the Aim to Stimulate the Protection and Preservation of Cultural Heritage in Spain. *Art and Cultural Heritage: Law, Policy, and Practice*, p. 455).

[61] In *The Art of Money Laundering*, p. 126.

Inflating and understating (when not just completely falsifying) of the value of goods and services is a well-known form of fraud used primarily in tax evasion, and is based on the juggling of prices to create added value between importers and exporters. When overpricing is resorted to, the difference received by the exporter is sent to a (secret or unknown) account belonging to the importer. Such a practice may be detected by comparing the export value with the (clearly smaller) value generally used by exporters in that market. For underpricing, used to pay less than the correct tax amount, the exporter receives the difference back through operations that are difficult to track (such as hawala or money changers). This only becomes possible when there is an agreement between the exporter and importer, and any intermediaries. In other words, it requires an agreement among persons, with more than one individual acting at several different points.

The money received often travels a tortuous path in the course of its conversion into another form of currency. Instead of a simple conversion into, for instance, dollars, being accomplished by legitimate exchange with all formal notices required for the transaction, direct payments are made by outside parties, using dirty money—payments entirely unconnected with the operation. This illegally received money is then delivered to a currency exchange or currency broker (usually with a discount off the legal exchange rate), in the absence of any economic motivation that would legitimize the operation (no goods are changing hands; only currency is being exchanged or converted). It could happen, for instance, that a company in one country issues a bill of sale to someone desirous of currency conversion and located in another country. This document would show that "purchase" of a product (perfume, furniture, books, artworks), and the currency to be converted should go to the seller. The money is then turned over to an exchange broker in the buyer's country, who then looks for a third party in need of that currency and located near the seller (often another exchange broker or a remittance company, when both engage in illegal operations) who then pays the seller, giving rise to a business advantage (a better rate). To throw off the authorities, the negotiator (the buyer) may even receive some of the product in situations where inspection or investigations are expected. It is not at all uncommon for no deal to even exist, other than as a façade, the whole idea being to obtain a better rate of exchange. The need to send the money undetected is the reason for the whole operation. Hence, no goods, products or services are changing hands—instead, only money and paperwork.

Because exports, generally speaking, are not handled with the same strictness by customs authorities seeking to establish their value, over-invoicing is more commonly practiced than under-invoicing.

Historically, policy in North America has been favorable to the free importation of art and cultural items, excluding only those that are dangerous or subject to embargo. There are laws that restrict those imports. We should mention, as Barbara Hoffman keenly points out, that the U.S. Congress has passed few laws regulating private ownership of cultural property or its interstate and international transportation: "[t]he United States is perhaps unique in that it has no export

restrictions on works of art."[62] There are, however, increasingly more limits on archaeological artifacts and American cultural objects.[63]

In the European Union, the dominant principle is basically free trade in goods. Still, to keep this idea alive while at the same time protecting cultural heritage, two measures were adopted in that region (a Regulation and a Directive). The first is the European Economic Community Council Regulation No. 3911 of 12/09/1992, which deals with the exportation of cultural goods and provides uniform export controls and licensing by the proper authorities. The license must be presented along with the export declaration at the customs offices in which export formalities are to be arranged. To implement this Regulation, Commission Regulation No. 752 of 03/30/1993 determined what types of export licenses may be used and all the formalities required for exportation. The second is Directive No. 93/7 of 03/15/1993, which established a mechanism for the return to the community of cultural goods forming a part of a nation's archaeological, historical and artistic heritage that was unlawfully removed from the territory of a Member State. One of the purposes of the Directive was to foster cooperation among Member States, particularly in the investigation of items that were illegally removed.[64]

Because arriving at prices is a complex matter, making it difficult for customs agents to arrive at the proper tariff—especially with no foreknowledge or means of accessing data—art has turned out to be a handy vehicle for fraud.

Ideally there would be unregulated international trade in works of art, so as to favor the uncontested spread of culture. But this would entail problems, the magnitude of which might be measured by the number of past incidents of looting, robbery, destruction, etc.

Besides, there is no denying the possibility of money laundering by falsely declaring quantities or quality of goods exported or imported, even if nonexistent, in order to bring about an absolutely illegal flow of money under what would appear to be ordinary transnational trade.

Surely it is now beyond cavil that art lends itself perfectly to money laundering. It is mobile, expensive and poorly regulated—and a more sophisticated means than any other traditionally resorted to for this type of crime, such as the use of financial institutions.

Hence, by fixing the price below the market value, or simply leaving out part of the amount payable, the price actually paid will surely be in cash and delivered under the table. Dirty money is thus converted into an asset that may later be sold at the market price. When prices are pegged at artificially high levels, the launderer may wish to have illicit financing of his acquisition and, to that end, will resort to bad appraisers and fake documentation.

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[62] Cf. International Art Transactions and the Resolution of Art and Cultural Property Disputes: United States Perspective. *Art and Cultural Heritage: Law, Policy, and Practice*, p. 159.

[63] NAGPRA 25 U.S.C. §§ 3002–3007, 2000.

[64] See Barbara Hoffman. European Union Legislation Pertaining to Cultural Goods. *Art and Cultural Heritage: Law, Policy, and Practice*, p. 191.

In view of all this, developing a policy to establish the role of each of these, of each actor in the system, whether museums, galleries, auction houses, libraries or government agencies, is of utmost importance in confronting the current problem, and even for the preservation of our cultural heritage.

According to Alissandra Cummins, specifically with reference to museums and the like, but as valuable guidance to all participants, managers and controllers of the art market, "[t]he role of heritage institutions in this area should be recognized and coordinated with the role of their counterparts in the legal, security, and customs professions. Initiatives ensuring enhanced dialogue and coordination between the sectors include specialized training and public information programs."[65]

Clearly, then, we see the need to join together our understandings. This may follow from an understanding of the term "globalization," as it occurs today in cooking, in lifestyles and in music. In other words, measures must be adopted based on a global discussion, aimed always at cultural preservation, which is only possible if the spaces in which humanity finds its expression are freed of crime, both ordinary and financial. The harmony will be legitimate if and only if it is joined by consensus as to the need to bring safety and sustainability to the arts market.

In order to preserve our cultural heritage, in relation to the law and the acts of interested parties, a response must arise from an analysis of the sufficiency of existing standards and regulations. We must examine the role of loyalty to national interests, held by societies as the bulwarks of cultural preservation, to override mistaken impulses on the part of those involved.

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[65] Cf. The Role of the Museum in Developing Heritage Policy. *Art and Cultural Heritage: Law, Policy, and Practice*, p. 50.

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Chapter 5
Cases in Jurisprudence and in the Press

A romantic view of art must in no way interfere with awareness of its illegal use. Many cases have come to light involving the laundering of money by this means. These occur often, and publicly.

This must surely come as no surprise to even the most innocent among us, whether we refuse to see, or lack any interest in understanding the origins of that money intended for art—to say nothing of its use for illegal purposes. It is in the long run a threat to art, and threatens to compromise our cultural heritage and even the government's ability to stem the advance of organized crime.

There is a need to rethink our methods of selling, buying and making donations in the art market. Due diligence must be brought to bear on the authenticity problems of cultural goods. Simply put, we must carefully manage all dealings involving artistic productions.

Following is a list of decisions and press coverage showing that art has indeed been used as yet another instrument in the laundering of dirty money.

5.1 Jurisprudence

5.1.1 United States v. Birbragher, 603 F.3d 478 (8th Cir. 2010)

In this case, in northern Iowa, the defendant, Orlando Birbragher, who was not a physician, was sentenced to 35 months for conspiracy to distribute controlled substances and conspiracy to launder money, to be followed by two years of supervised release. The appellant alleged that the sentence exceeded the maximum penalty provided, and was therefore null and void. The court concluded that the Controlled Substances Act (CSA) was not unconstitutionally vague, and therefore no violation of due process could be alleged.

Orlando Birbragher was alleged to have become involved with physicians and pharmacists in the illegal distribution of drugs over the Internet. He pled guilty in

F. M. De Sanctis, *Money Laundering Through Art*, DOI: 10.1007/978-3-319-00173-9_5,

court. The amount of $2,465,209.92 was forfeited, and his petition to vacate the complaint was denied.

Between January 2003 and May 2004, the defendant and others were the principal owners and managers of the *Pharmacom International Corporation* (*Pharmacom*), a company that used the Internet (www.buymeds.com) to distribute controlled drugs, allowing users to order the drugs and make payment with credit cards, without checking buyers' identities or requiring a doctor's prescription. *Pharmacom* hired drugstores to fill medical prescriptions which were then downloaded and the drugs shipped off to customers. Thus over 246,000 prescriptions for controlled substances worth more than $12.5 million were filled. The business was deemed illegal.

The money laundering involved the use of the proceeds of the crime for the payment of affiliated websites that in turn forwarded the orders to the *Pharmacom* website, where doctors or alleged doctors made up prescriptions for the company and the drugstores. Furthermore, transactions included transfers of funds to bank accounts controlled by the accused and his company, as well as to another person (an investor). That money was used to acquire jewelry, real estate, artworks and services such as charter flights, and also made it possible to rent a number of vehicles and pay off investment fees.

The first plea agreement between prosecution and defense attorneys was considered by the court to be a contract between the government and the accused, by the terms of which the latter was required to waive all rights to appeal.

The court held that both the plea agreement and the waiver of appeal rights were fully informed and voluntarily entered into, so the appeal was denied.

5.1.2 United States v. Marsh, 164 F.3d 632 (9th Cir. 1998)

Here the defendant, Violet M. Marsh, appealed the decision of the U.S. District Court for the Western District of Washington, in which she was found guilty of 22 counts of assorted criminal activities, including bankruptcy fraud, perjury in bankruptcy court and money laundering.

The court found that there had been no abuse of discretion in examination of the evidence for or against, and that the decision was in line with U.S. sentencing guidelines.[1]

Interestingly enough, the seizure of goods was also disputed, for the defendant claimed that they were incorrectly described in the search warrant. According to the court, the warrant set forth the need to search for and seize hidden goods, specifying a work of art and giving sufficient description of the type of artwork sought.

[1] U.S. Sentencing Guidelines Manual § 3B1.1(a) provides for an increase in the offense level if the defendant was the organizer or leader of a criminal activity that involved five or more participants or if the defendant's participation was otherwise extensive. Under the provision's plain language, the court need only find that there were at least five participants in the criminal activity, and the court can count the defendant among the five.

5.1.3 United States v. Amiel, 889 F. Supp. 615 (E.D.N.Y. 1995)

The three defendants were indicted on 30 counts of fraud by interstate mailing of artworks between 1988 and 1991. They were arrested on January 30, 1992. The charges stated that there was a scheme in place selling prints of works by well-known contemporary artists as if they were originals. Prior to criminal proceedings, the U.S. government filed a civil forfeiture action in which money laundering was also alleged to have taken place. Hence there were two forfeitures: in criminal and civil proceedings. Appellants claimed that there was a total lack of proportion between the seizure and the original losses through unlawful activity. Yet the court found that the duration of the fraudulent scheme, combined with the total number of works sold and their broad distribution, made it impossible to completely assess the damage. The criminal and civil forfeiture procedures were, in the view of the court, a single, coordinated prosecution effort. Allegations of double jeopardy were thus found to lack merit.

Defendants Kathryn Amiel, Joanne Amiel and Sarina Amiel were given prison sentences of 78, 46 and 33 months, respectively, to be followed by three years of supervised release, and were all assessed a fine.

On May 10, 1995, the defendants filed a malpractice action against the attorneys who had represented them in the civil forfeiture proceeding, in an effort to raise a sum equal to the civil asset forfeiture imposed ($16.5 million). The Attorney General's office was opposed to this, and argued that the court would make a mockery of justice if it were to entertain such a claim.

This case shows that asset forfeiture actions may be filed in tandem.

5.1.4 United States v. Ciarcia, 3:04CR172 AWT, 2006 WL 1801764 (D. Conn. June 28, 2006)

On May 26, 2004, a grand jury in Hartford indicted Michael Ciarcia and Luiz Santiago for conspiracy to commit money laundering. Luiz Santiago pled guilty and was given a prison sentence of 33 months, to be served after completion of his 108-month sentence for trafficking in cocaine (500 g). Michael Ciarcia appeared in court, but his bid for a new trial and reversal were denied. Evidence supporting the verdict was deemed sufficient.[2]

[2] "The jury is exclusively responsible for determining witness credibility. The trial court must be careful to avoid usurping the role of the jury, and may not substitute its own determination of credibility or relative weight of the evidence for that of the jury." *See also United States v. Black*, 2002 U.S. Dist. LEXIS 4948, 2002 WL 460063, at 1 (S.D.N.Y. March 26, 2002) (citing *United States v. Autuori*, 212 F.3d 105, 114 (2d Cir. 2000)).

The court could only overturn the conviction if it deemed that "no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[3]

The primary focus of the evidence at trial was a five-week period, from November until December of 2001, in which Ciarcia made payments to Luiz Santiago by making deposits in his mother's account. Santiago's cell phone was monitored pursuant to a court-ordered wiretap. It was revealed that Santiago made 1,800 calls during a two-week period, during the hours he should have been working for Ciarcia Construction. Their relationship was found to more closely resemble that between friends than that between employer and employee. It was shown that Luiz Santiago made a living by dealing in cocaine, 17 oz of which were seized at his residence. A receipt from Galerie Lassen was also found, which the accused said was for the purchase of a painting for $4,800 in the year 2000, while the prosecution showed that the artwork was acquired for $17,500.00.

5.1.5 Galerie Furstenberg v. Coffaro, 697 F. Supp. 1282 (S.D.N.Y. 1988)

An established art gallery (*Galerie Furstenberg*) sued art dealers for violations of the Racketeer Influenced and Corrupt Organizations Act[4] and the U.S. Criminal Code.

The plaintiff, a French company, claimed to have exclusive rights to sell artworks by Salvador Felipe Jacinto Dalí, and that the contested sales were therefore of forgeries of that artist's works, whether as reproductions—printing of photographs of an authentic artwork—or engraving Dali's name on copperplate and then making the reproductions. The defendants were also accused of having issued fraudulent certificates of authenticity. The plaintiff sought compensatory damages, pre-judgment interest, and attorneys' fees.

Defendants argued that RICO requirements had not been satisfied, and that fraud had not been demonstrated.

The court granted the defendants' motion to dismiss with respect to seven of the nine claims. It denied the defendants' motion to dismiss two RICO claims.

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[3] *United States v. Walsh*, 194 F.3d 37, 51 (2d Cir. 1999).

[4] The court explained that "the RICO enterprise is defined as 'a group of persons associated together for a common purpose of engaging in a course of conduct' and 'is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.'" Citing *United States v. Turkette,* 452 U.S. 576, 583 (1981).

5.1.6 United States v. Reiss, 186 F.3d 149 (2d Cir. 1999)

Mahir Reiss appealed part of a sentence handed down by the United States District Court for the Eastern District of New York imposing a fine of $6.3 million (the maximum permitted by the U.S. Sentencing Guidelines Manual),[5] for commission of the crime of money laundering [18 U.S.C. §§ 1956(h) and 1957(a) and (b)], following a guilty plea. The decision took into account the defendant's knowledge that drug trafficking proceeds were being laundered. The district court's imposition of the maximum fine was upheld and there was no violation of the defendant's right to object to factual assertions made in the pre-sentence report before his sentencing.[6]

Mahir Reiss was considered a sophisticated businessman, but one who used Swiss bank accounts to distribute vast sums of money all over the world. Over $16 million was deposited into his accounts and more than $19 million was withdrawn between 1994 and 1997. A joint DEA-IRS investigation discovered that much of that money was the proceeds from criminal activity.

On December 22, 1997, the defendant pled guilty and was given a 27-month sentence, three years of supervised release, and forfeiture of assets amounting to some $1 million, in addition to the maximum fine ($6.3 million).

The judge calculated the penalty based on three counts of money laundering, involving a total of $3,150,000, and then doubled that amount as proceeds of crime.

Wire transfers were found to have been used for payments and bank transfers, and the setting up of negotiations by the defendant with a Colombian drug trafficker known as Orlando.

It was ruled that it was incumbent upon the accused to demonstrate inability to pay the fine assessed, which the defendant failed to do.

The appeal was denied.

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[5] Section 5E1.2(d): In determining the appropriate fine. When imposing a fine, the court must therefore consider several factors such as: (1) the need for the combined sentence to reflect the seriousness of the offense, to promote respect for the law and to provide punishment; (2) any evidence presented as to the defendant's ability to pay the fine; (3) the burden the fine places on the defendant and his dependents relative to alternative punishments; (4) any restitution or reparation the defendant has made or is obligated to make; (5) any collateral consequences of conviction, including civil obligations arising from defendant's conduct; (6) whether the defendant has previously been fined for a similar offense; (7) expected costs of incarceration and probation; and (8) any other pertinent equitable considerations.

[6] The purpose of Rule 32(c) is to ensure that the pre-sentence report (PSR) is completely accurate in every material respect, thereby protecting a defendant from being sentenced on the basis of materially untrue statements or misinformation. A defendant is provided this opportunity, and the notice requirement of departures and adjustments is therefore satisfied, as long as a defendant is adequately warned by the PSR, by the prosecution's submissions, or by the court *sua sponte*.

5.1.7 United States v. Schultz, 333 F.3d 393 (2d Cir. 2003)

Frederick Schultz appealed his conviction from the United States District Court for the Southern District of New York for theft of a work of art, its illegal interstate transportation and illegal international sale (18 U.S.C. §§ 371 and 2315—*National Stolen Property Act*). The defendant was a successful New York art dealer before being found guilty of theft of Egyptian antiquities.

The prosecution argued that the pieces belong to the Egyptian government. In 1991, the defendant met with an Englishman named Jonathan Tokeley Parry, who showed him a photograph of the head of Pharaoh Amenhotep III, claiming to have obtained it from a construction contractor. The piece was smuggled to England, disguised in plastic as a souvenir, and the defendant proceeded to act as the agent for the sale of the sculpture. To obscure these facts, Parry and Schultz invented a fictional collection, the "Thomas Alcock Collection," and told potential buyers that the piece was from that collection. The defendant attempted to make the sale to several persons and, in 1992, a buyer was found for $1.2 million. The buyer, Robin Symes, aware that the Egyptian government was searching for the sculpture, began asking the defendant questions about its origin in 1995, but received no reply. The accused and his English partner afterward brought more Egyptian pieces to New York, but experts identified one of them as a forgery.

In 1994, Tokeley Parry was arrested in the United Kingdom. A third party was also detained, in Egypt, and likewise charged with theft of antiquities. Despite all this, the defendant kept up correspondence with his English partner (Parry) and the two planned new acquisitions.

The jury found Frederick Schultz guilty, and he was sentenced to a term of 33 months' imprisonment.

On appeal, the court received three *amicus curiae* briefs. Two were filed in support of Schultz. They were from American art dealers' associations (The National Association of Dealers in Ancient, Oriental & Primitive Art, Inc.; International Association of Professional Numismatists; The Art Dealers Association of America; The Antique Tribal Art Dealers Association; The Professional Numismatists Guild; and The American Society of Appraisers) and a group of politicians, academics, and art collectors called Citizens for a Balanced Policy with Regard to the Importation of Cultural Property. They alleged that his conviction would threaten the livelihood of legitimate American collectors and sellers of antiquities operating in the arts market.

Other entities (The Archaeological Institute of America; The American Anthropological Association; The Society for American Archaeology; The Society for Historical Archaeology; and the United States Committee for the International Council on Monuments and Sites) filed a brief in support of the United States, claiming that the conviction would help protect archaeological and cultural patrimony worldwide.

Frederick Shultz called in an expert witness, Khaled Abou El Fadl, a professor of Islamic and Middle Eastern Law at the University of California, Los Angeles, who declared that the Egyptian law was ambiguous as to whether the intent was to preserve antiquities within Egypt or to assert their ownership by that country's

government. He did, however, state that he had never practiced law in Egypt, and had no license to practice here.

The court decided that the professor's testimony did not address the letter of the law (Law No. 117[7]) and considered statements by Egyptian officials supporting the legitimacy of Egypt's claim of ownership. To the court, the law was not ambiguous, but clearly affirmed that antiquities that were the subject of this conspiracy belong to that country's government. The court understood that the piece need not have been stolen in the United States to warrant criminal action.

Hence, the defendant's appeal was denied on grounds that the jury was not required to assert that he was willfully engaged in illegal behavior, but that, beyond a reasonable doubt, he knew that the works were stolen—that is, derived from crime.

The conscious avoidance doctrine was applied, and the conviction was affirmed.

5.1.8 United States v. McClain, 545 F.2d 988 (5th Cir. 1977), Rehearing Denied, 551 F.2d 52 (5th Cir. 1977); United States v. McClain, 593 F.2d 658 (5th Cir. 1979), Cert. Denied, 444 U.S. 918 (1979) (Two Convictions and Two Appeals)

This is considered a paradigm-shifting case that allowed construction of jurisprudence for the National Stolen Property Act (NSPA) of 1948 (18 U.S.C. §§ 2314–2315).

In it, the defendants were convicted of conspiring to transport and receive pre-Columbian pieces from Mexico through interstate commerce. The theory put forth was that the objects were stolen before Mexico had asserted its ownership. The interpretation was that anyone found in possession of such a piece and selling it without government permission would be considered in illegal possession or ownership, and hence required to deliver it to its rightful owner. The court understood that the word "stolen," as used in the NSPA, did not necessarily mean that the artwork was "taken without consent" but that a broad interpretation was warranted. Thus the sentence was upheld in face of a violation of the clear and legitimate Mexican ownership, pursuant to the NSPA, despite failure to show that the goods were physically and illegally taken.

It was alleged that if indeed a crime had occurred, it would only be illegal exportation, for which there was no provision in the NSPA. The court made a distinction between illegal exportation and sovereign ownership, and noted that restrictions on exportation did not imply ownership of the goods, and that whereas the assertion of ownership is an attribute of the sovereignty of the State asserting that ownership, the illegal exportation of cultural goods was considered the equivalent of theft pursuant to the NSPA.

The court thus considered that although a declaration of ownership did not per se suffice for recognition of legitimate ownership, which had to be expressed *with*

[7] For antiquities "whose ownership or possession was already established at the time th[e] law came into effect."

sufficient clarity. The court maintained that the conviction was based on the fact that the defendants were aware that they were acting in violation of U.S. and Mexican law.

5.1.9 Record No. 2007.61.81.0011245-7/SP, Conviction in 2008 by the Sixth Federal Criminal Court Specialized in Financial Crimes and Money Laundering, Upheld by the Regional Federal Appellate Court for Region 3 (São Paulo and Mato Grosso do Sul), Criminal Appeal No. 0001234-26.2007.04.03.6181/SP, Heard on 03/06/2012, Rapporteur, Federal High Court Justice Johonsom di Salvo

On August 7, 2007, Juan Carlos Ramirez Abadia, a.k.a. Chupeta, leader of the Colombian cartel *Vale Del Norte*, was arrested in the so-called "Farrapos Operation" for international drug trafficking. He, along with others, was sentenced on 03/31/2008 (ruled by the Author of this study) to a prison term of more than thirty years, five months and fourteen days and another 758 days working off fines for a number of felonies, such as money laundering,[8] using forged documents (public documents and fake identifications), racketeering and corruption, with the help of a number of co-defendants.

The Regional Federal Appellate Court for Region 3 was unanimous in its ruling on March 6, 2012. It its decision on Juan Carlos Ramirez Abadia's appeal (No. 0011245-26.2007.4.03.6181/SP), the court asserted that "no judge is bound to accept or tolerate extralegal negotiations, the Magistrate is not bound by anything defendants and the Prosecutor's Office agree to (item 6 of the supporting summary), and declarations made by a felony codefendant who, in confessing his or her role in the crime, also mentions those who cooperated as co-perpetrators and sets forth the way in which such persons assisted in the crime, are admissible evidence (item 18 of the summary). Forfeiture of property was upheld on the understanding that in money laundering, the *lex specialis* allows reversing the burden of proof with regard to goods apprehended as material objects in laundering, as is expressly set forth in Article 4 of Law 9613/98, itself flowing from Article 5, item 7 of the Vienna Convention, and constitutionally in accord with due process, inasmuch as Article 156 of the Code of Criminal Procedure places the burden of proof on the defendant for allegations he makes (item 22 of the summary).

There was a seizure on 07/18/2008, and forfeiture of real and chattel property, including artworks appraised at more than US$3,800,000 that were being held outside Brazil by the organizations/family of the suspect for possible sale to raise financial resources (record of Police Investigation No. 2008.61.81.001248-0).

[8] The conclusion drawn was that the Colombian defendant had taken legal and illegal money (from international drug trafficking) into Brazil, and made use of third parties to keep considerable holdings in the country outside the reach of competent authorities.

The artworks located in Brazil had already been sent to museums in São Paulo. However, for those located abroad, it was not possible to recover them because Colombia and the United States, where they were located, required specific location information to be able to honor Brazil's request. INTERPOL was then formally contacted.

Although at the time there was not sufficient information in hand to identify the location of the artworks, there was specific data on each piece. It was also revealed that a cousin of the trafficker was in charge of the artworks, and that she had visited him on several occasions in Brazil, at the federal prison, beginning early in 2008.

5.1.10 Criminal Action No. 2003.71.00.054398-0 Filed at the Third Federal Criminal Court, Porto Alegre (State of Rio Grande do Sul)

Rio Grande do Sul state tax inspectors intercepted a truck, belonging to a company specializing in international transportation of art objects, containing 210 pieces, including some dating from the seventeenth, eighteenth and nineteenth centuries. Several persons were charged with smuggling or larceny.

The event resulted in an indictment charging attempted smuggling, for the material was en route to Santana do Livramento, on the border with Uruguay, where it was presumed that the goods would be taken for export to Montevideo.

One of those named in the complaint made a plea bargain in exchange for a halt to the proceedings. The artworks were placed in the custody of the person so named. At the Regional Federal Court for Region Four (including the states of Paraná, Santa Catarina and Rio Grande do Sul) a writ of *habeas corpus* was filed (No. 2006.04.00.004416-9/RS[9]) and was denied.

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[9] HABEAS CORPUS. BAR TO A CRIMINAL ACTION. IMPOSSIBILITY OF EXAMINING THE SET OF ALL PROBATIVE EVIDENCE. ATTEMPTED SMUGGLING. 17TH, 18TH AND 19TH-CENTURY PIECES OF SACRED ART. SEIZURE. RELEVANCE OF CONSTITUTIONALLY PROTECTED GOODS (ARTICLE 216, SUBSECTION III, BRAZILIAN FEDERAL CONSTITUTION). 1. The Constitutional remedy intended to safeguard the individual's freedom to come and go, pursuant to Article 5, LXVIII, is not the best approach for investigation of questions that demand the production of extensive bodies of proof. 2. The goods apprehended may be considered, in whole or in part, scientific and artistic creations, and are for that reason protected under Article 216, subsection III of the Federal Constitution, and in addition, under protection pursuant to Law 4845/65, prohibiting the removal from Brazil of art objects produced through the close of the Monarchic Era—or even foreign works depicting Brazilian personages (Article 5). 3. Impossibility of barring criminal action in view of the strong indications of attempted smuggling, without explanation and proof of how the objects were acquired, the destination being a border town, no truth having been found to the defense's claim involving the use of the objects to adorn a stage for the exhibition of horses. 4. Order denied (TRF4ªR, HC 2006.04.00.004416-9, Seventh Panel, Rapporteur for the Ruling, Salise Monteiro Sanchotene, gazetted on 05/10/2006).

5.1.11 Public Action Civil Suit in Court of Environmental, Agrarian and Waste Proceedings of Porto Alegre, Rio Grande Do Sul (No. 2006.71.00.014365-6/RS/0014365-43.2006.404.7100)

This public action civil suit was heard, by reason of the facts described in item IV.1.10, by the Office of the Federal Prosecutor against Piero Maria Ortolani (one of the defendants in the criminal action), the National Cultural and Artistic Heritage Institute (IPHAN) and the Federal Government, with discussion turning to the preservation of national historic and cultural heritage by obtaining a court order to ensure the seizure and proper redirection of artworks and antiquities dating from the seventeenth, eighteenth and nineteenth, which were involved in an attempt at illegal diversion into Uruguay by the defendant, while classified as goods barred from leaving Brazilian territory (Laws 3924/1961[10] and 4845/1965[11]).

The case was examined from the standpoint of Anticipatory Relief on 05/22/2006 (Gazetted on 05/23/2006) and the court granted the petition. Also included were the filings of appeals and rebuttals. The case was turned over to the Regional Federal Court for Region Four for conversion to digital media, and then returned to the lower court. There is at this time no record of submission to the appeals court.[12]

In the initial petition, the Office of the Public Prosecutor alleged that defendant Piero produced neither documentation nor proper transportation for artworks and antiquities barred from leaving Brazil, and identified himself as the owner of the goods apprehended and likewise as the person to whom the works were restored by a decision handed down in ongoing criminal proceedings at the Third Federal Court of Porto Alegre (file 2004.71.00.021304-2). It further alleged that

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[10] Article 20. No object of archaeological, prehistoric, numismatic or artistic interest may be transferred abroad without obtaining an express license for the purpose from Brazil's National Historic and Artistic Patrimony Directorate, entered onto a clearance form in which all objects to be transferred are duly listed. Article 21. Failure to observe the requirements of the preceding article shall result in summary seizure of the object to be transferred, without prejudice to other legal action to which the responsible party may be subject. Sole paragraph. The object seized, itself the reason for this article, shall be delivered up to the National Historic and Artistic Patrimony Directorate.

[11] Article 2. Likewise prohibited from leaving Brazil are artworks of the same type originating in Portugal and incorporated into Brazil's national milieu during the Colonial and Imperial regimes; Article 3. Likewise barred from leaving Brazil are paintings, sculptures and graphic artworks which, although produced overseas during the periods mentioned in the preceding articles, are depictions of Brazilian personalities or otherwise related to the history of Brazil, including Brazilian landscapes and customs; Article 5. Should exportation of any of the works and projects to which this Law applies be attempted, the said works or projects shall be seized by the Federal Government or the State in which found on behalf of their respective museums.

[12] Information retrieved from the website of the Regional Federal Court for Region 4. www.trf4.jus.br. Accessed June 5, 2012.

the National Cultural and Artistic Heritage Institute should have taken all proper measures to inventory and recover the works apprehended in its capacity as a government agency empowered to act on behalf of Brazil's historic and cultural patrimony. It further argued that the Federal Government has a mandate to provide the means and resources necessary to enable IPHAN to carry out its assigned job of preservation and protection of national cultural patrimony. It asserted that in the record of Criminal Proceedings No. 2003.71.00.054398-0, filed at the Third Criminal Court of Porto Alegre, it was shown that on 08/27/2003, a moving van was intercepted containing as cargo 210 art objects, among them antiquities barred from leaving Brazil, without legal documentation to show origin and including features that did not match the declarations on the bill of lading for highway transportation as cargo. The prosecution alleged that during the course of investigations, IPHAN analyzed the pieces and concluded that among the seized holdings were 129 pieces of sacred art and pieces dating from the seventeenth, eighteenth and nineteenth centuries. It was admitted that the merchandise was worth a considerable amount on the market, as discovered by the Revenue Office, Department of Public Revenues for the State of Rio Grande do Sul, totaling R$674,561 (US$377,000). The goods were en route to Uruguay, in violation of Brazilian law barring them from leaving the country (Law 4845/1965), it having become evident in the criminal action that there was an attempt to ship the goods abroad, from the way they were packed, from the declarations filed by the owner (that the goods were part of an inheritance of one of the sons of defendant Piero Maria Ortolani residing in Uruguay), from the fact that the address entered was that of a vacant building, and because the company transporting the goods itself specialized in international transportation of art objects. Taken into account was the likelihood that the goods would have ended up in Uruguay if not removed from the possession of defendant Piero. For these reasons, the Office of the Federal Prosecutor found it advisable and necessary to file the Public Action Civil Suit so that proper administrative actions would be taken to ensure the integrity and restoration of the goods to Brazil's cultural patrimony. The petition was for Anticipatory Relief to prevent damage to Brazil's cultural heritage, citing: "(a) the mandate given the National Cultural and Artistic Heritage Institute (IPHAN) to make use of its administrative police powers to take all necessary steps to ensure the protection and recovery of cultural assets listed on the Inspection Report prepared by the Institute on September 11, 2003 (Article 216, § 1, of the Brazilian Federal Constitution, Article 5 of Law 4845/65, Articles 2, 13 b and d, and 14 of Ministerial Decree 72312/73, and Articles 14 and 15 of IPHAN Finding No. 262-92); (b) following recovery of the cultural goods, stock-taking and temporary relocation in a public museum pending conclusion of proceedings now underway (Law 4845/65 and IPHAN Finding No. 262/92); (c) filing of administrative proceedings by IPHAN for a decision on the situation involving the goods subject of the present Public Civil Action Suit and identification of their origins (Article 216, § 4, of the Brazilian Federal Constitution, Article 8 of Ministerial Decree 72312/73, Article 15 of IPHAN Finding No. 262/92); (d) the Federal Government's determination to provide all means and resources necessary to the

enforcement of items (a) and (b); (e) assessment of a daily fine in the amount of one thousand reals (R$1000.00) for violation of the anticipatory injunction, and did not rule out the imposition of civil and criminal sanctions upon those who gave cause for same. It requested a provenance action for: c) forfeiture of all goods listed on the attachment and in possession of defendant, by reason of attempted smuggling, and, alternatively: c-1) restoring them back to from whence they came (once discovered by IPHAN in administrative proceedings); c-2) if the origin of the said goods cannot be identified, administrative measures to ensure their integrity and return to Brazil's cultural patrimony by prominently entrusting the pieces to national museums (Article 5 of Law 4845/65); (d) that the Federal Government be ordered to provide all necessary means and resources so that IPHAN may proceed with the recovery, inventorying and restoration of those goods to Brazil's cultural patrimony, by properly entrusting them to museums (Decree 72312/73 and Law 4845/65); and (e) imposition of a daily fine in the amount of one thousand reals (R$1000) for failure to comply."

In the decision, the court found that the facts had been sufficiently proven and discussed in the criminal action, from the record of which a sufficient number of pieces of evidence was produced, in light of cross-examination, to provide convincing evidence of the facts of the case. A moving van was stopped and apprehended at the state inland revenue station in Guaíba in 2003, and was found to be carrying an enormous quantity of historical works and pieces, which received news coverage at the time. Once pertinent criminal investigations were made, the court's sentence mentioned the search and technical forensics reports by IPHAN, which explained the historical value of many of the items seized. A police investigation report was also prepared, narrating all investigations made and culminating in the framing of a complaint against those identified by the Federal Prosecutor's Office as responsible for commission of a crime per Article 334, heading, of the Criminal Code.

Following the decision of the Third Criminal Court for Porto Alegre ordering the return of the seized items to defendant Piero Maria Ortolani, discussion continued in all other jurisdictions involved—civil, administrative and fiscal. The criminal court decision included those reservations, and limited itself to acknowledging the issues (pertinent to the restitution of items seized) within the scope of its own criminal jurisdiction. Hence, it was decided that "In view of the foregoing, I GRANT, IN PART, THE PETITION FOR RESTITUTION, to order the delivering up of the objects seized in record of Police Investigation No. 2003.71.00.054398-0 to petitioner PIERO MARIA ORTOLANI, under bailment, the said goods to remain in Brazil until a further decision by this Court, without prejudice to the maintenance in custody of the items seized by state and federal tax authorities."

The court concluded that the criminal court decision on provisional restitution of the goods seized in the police investigation (and the subsequent criminal action) is limited to the implications of that seizure to the criminal proceedings, as that court's own decision recognizes with reservations, so that neither IPHAN nor the civil courts were impeded from looking into questions relating to the administrative infraction in those proceedings, if committed by defendant Piero Maria Ortolani, and discussed in this Public Action Civil Suit.

Other information recognized the historic value of many of the objects seized, as shown by the record of search and forensic report, both conducted by IPHAN, in which the goods were described in detail, with the latter report concluding that "the pieces comprising this collection, dating from the seventeenth, eighteenth and nineteenth centuries identified in bill of goods 1, may not leave the country without prior authorization from IPHAN, pursuant to Law No. 4845 of 11/19/1965."

The special protection extended to cultural objects does not restrict itself to a ban on removal from the country, but is backed by court-ordered seizure, apprehension and redirection to Brazilian museums in the event of any attempt to export such objects from Brazil. The action taken by IPHAN was, however, held to be contrary to this, in that it awaited the conclusion of criminal action to only then take the steps that already lay within its authority, stating: "this upon our stated view that it is inadmissible that IPHAN take any action while the question is still being contested in court, which it is at this time."

Anticipatory Injunctive Relief was thus partially granted: "(I) Order respondent IPHAN to take all necessary steps to complete the inventory of all pieces and objects described, and to conclude such taking of stock within 90 days, and show compliance in the record; (II) Order that defendant Piero Maria Ortolani remain as bailee of the said goods through a bailment agreement to be entered into before this Federal Court (within 15 days following citation in this Public Civil Action Suit), with this bailee being required to inform this Court (within 15 days following citation in this Public Civil Action Suit) of the exact location of the said goods within Brazilian territory, and agreeing further to neither transport nor remove the goods from their indicated location without prior, express authorization from this Court, and further agreeing to neither remove nor attempt to remove the said goods from Brazil's national territory, and further agreeing to deliver up to the agency or authority having jurisdiction the said goods if so required by court order in this Public Civil Action Suit, or in other administrative or judicial proceedings; (III) Order that in the event that defendant Piero Maria Ortolani does not wish to act as bailee for the aforesaid goods, or does not comply with the order set forth in the preceding item (within 15 days following citation), that in such case respondent IPHAN shall do all that is necessary to recover and place the goods in question in a public museum, where they will remain, provisionally, until a final decision on the Public Action Civil Suit, thereby ensuring compliance with the provisions contained in Law 4845/1965, as well as the efficacy of orders emanating from the Public Action Civil Suit. It then required that administrative measures be adopted and shown on the record by respondent IPHAN within 30 days beginning the date of citation to so act." In addition, the injunctive relief ordered the Federal Government, a respondent, to provide and make available all means and resources necessary for respondent IPHAN to comply with the entire content of the court order.

This decision was handed down on 11/22/2010, and gazetted 11/24/2010. It held: "I reject the preliminary motion by the Federal Government and, on merits, rule in favor of this Public Civil Action Suit to: (a) Declare that defendant Piero Maria Ortolani did violate the provisions of Law 4845/65; (b) Sentence respondent

Piero Maria Ortolani to the penalty provided in Article 5 of Law 4845/65, namely permanent forfeiture of all goods apprehended and discussed in this Public Civil Action Suit, and name as beneficiary the National Museum of Fine Arts and IPHAN; (c) Order defendant Piero Maria Ortolani to deliver up to IPHAN within 30 days (following service of this decision) all goods apprehended and discussed in this Public Civil Action Suit (once this decision becomes final) to the National Museum of Fine Arts; (d) Order the Federal Government to provide all means and resources necessary in order that IPHAN may proceed to receive, recover, take stock of and restore the goods apprehended and discussed in this action to Brazil's cultural patrimony, in order to secure its proper allocation to the National Museum of Fine Arts as beneficiary; (e) Order the National Historical and Artistic Heritage Institute (IPHAN) to make use of its administrative police powers to take all necessary steps for the protection and recovery of the cultural goods apprehended and discussed in this Public Civil Action Suit, including their reception or recovery (within no more than 30 days following service of this decision) and taking all necessary steps to receive, recover and properly allocate (once the decision becomes final) all goods apprehended and discussed in this action, and to show such compliance on the record in 60 days (beginning the date of service of notice of this decision) showing all of the steps taken for immediate compliance with this order (delivery and receiving of goods), and also to show all of the steps taken following the finalization of this order (within no more than 60 days following notice that the order has become final); (f) Order the National Historical and Artistic Heritage Institute (IPHAN) to, following recovery of the goods named in this action, take inventory and see to the subsequent definitive delivery of all of these goods to the National Museum of Fine Arts; (g) Determine and establish a daily fine for failure to comply with the order of anticipatory relief, while current, and of this decision, of R$1,000.00, as set forth in the basis documents; (h) Order defendants to pay all court costs, as set forth in the basis documents."

5.1.12 Criminal Action No. 2004.61.81.008954-9 (Involving What was Banco Santos) Tried Before the Sixth Federal Criminal Court Specialized in Money Laundering and Financial Crimes, on Appeal Before the Regional Federal Appellate Court for Region 3 (São Paulo and Mato Grosso do Sul)

The case is still under appeal, but featured the seizure of works of art, their forfeiture and cooperation between the governments of Brazil and the United States in repatriating several of them back to Brazil.

Defendant Edemar Cid Ferreira was found guilty in December 2006 and sentenced to 21 years in prison and payment of the equivalent of 73 days in fines

(a total of 7,980 minimum monthly wages, which is some R$5,187,000 or US$2,594,000), for racketeering, fraudulent management of a financial institution (Banco Santos), exchange quota violations and money laundering. His wife and others were also convicted and given harsh terms in the lower court.

Their assets were confiscated (cash, computers, real estate, wine and works of art). The works of art were turned over to cultural entities (Museum of Archaeology and Ethnology at the University of São Paulo, the Paulista Museum or *Museu do Ipiranga*, the Museum of Contemporary Art at the University of São Paulo, Institute of Brazilian Studies Sacred Art Museum, the Latin America Memorial Foundation, the Navy Cultural Center in São Paulo, and the Secretariat of Culture for the State of São Paulo), to be permanently incorporated into their holdings—usually considered the beginning of the process of being declared a treasure by the São Paulo City Council for the Preservation of Historical, Cultural and Environmental Patrimony (CONPRESP).

The artworks consisted of framed art, photographs, archaeology, ethnography, sculptures, Brazilian regional literature and antiquities by renowned artists going back to the fourteenth to ninth century B.C. (Togatus Romanus) and even contemporary pieces (Basquiat, Hirst, etc.), totaling over 12,000 pieces.

The decision was made to turn the defendant's home (Rua Gália 120, borough of Morumbi), furniture and all artworks within it over to the State Secretariat of Culture as they were deemed cultural goods subject to state protection.

Artworks that had been shipped abroad were also decreed a forfeiture, and INTERPOL was formally notified, making possible the repatriation of some of the works through diligent efforts by U.S. authorities.

The understanding set forth in the decision written by the author of this study is that a work of art, whether a sculpture, painting, photograph, etc., ought not belong to any person or even to a given location, for here one is dealing with an asset of all humankind. To properly deal with this issue rather than become embroiled in economic discussions, we rely entirely upon the Convention Concerning the Protection of the World Cultural and Natural Heritage passed by the General Conference of the UN Educational, Scientific and Cultural Organization (UNESCO) held 11/16/1972, stating that works by men as well as notable places are considered cultural patrimony, and therefore protected by the Convention (Article 1), and that it is the duty of States to protect, preserve and present them for future generations (Article 4) and give them a function in the life of the community (Article 5). This was incorporated into Article 23, Subsections III and IV of Brazil's Federal Constitution, which charges the various branches of government with the protection of historic, artistic and cultural goods, so as to prevent their deterioration, and is also written into legislation under the Constitution (e.g., Legislative Decree No. 25 of 11/30/1937 in its Articles 1 and 24).

No such treatment would apply to any other goods apprehended, seized or libeled in criminal prosecution, other than works of art.

In the decision rendered, mindful of the valuation of culture and its diffusion to poorer boroughs surrounding big city centers, in confidential records of

Cooperative Debriefing, the Sixth Federal Criminal Court for São Paulo decided to turn over 1/15 of the amount as voluntary payment to culture, thus:

Pursuant to the decision uttered in these records, on this date, I FIND:

This court has allocated sums obtained as voluntary indemnity in Plea Bargaining directly to charitable entities, duly listed with the court, and required to render accounts. This has been the established rule to preclude diversion of resources while obtaining a prompt, effective and useful result from Criminal Law, provided, of course, that the accused are in fact willing to disclose the facts and circumstances in all of their magnitude, and thereby fully comply with the requirements of law.

It would be sad for a nation's government not to see in CULTURE a source of knowledge and meaning: INTELLECTUAL STIMULATION no less important. Our country possesses artists of capacity and renown, among them, Vik Muniz, Gustavo Rosa, Takashi Fukushima, Romero Brito, Tarsila do Amaral, Aldhemir Martins, Cândido Portinari, Galileo Emendabili, and Alfredo Volpi, more on account of their determination to make use of innate talent than of any government incentive.

Yet it is not uncommon to receive reports of artists who lack the necessary resources to meet the costs of producing a work of art which, albeit important, is not duly recognized.

Artistic activity ought not be burdened by lack of sponsorship, the more so if it is a valuable piece of work, oftentimes recognized only abroad.

Society's concern for CULTURE, so evidently in short supply, makes this decision more than a mere gesture of institutional support. To support and believe in humanity, and full expression, is recognition indispensable to the benefits CULTURE has to offer: it evokes a sentiment in people, notably a feeling of reflection and pleasure, or sometimes one of conciliation and generosity.

One could not, on this historic date, fail to mention the UN Universal Declaration of Human Rights of 1948, which declares the following:

Article XXVI:

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations and racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

Article XXVII:

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

Furthermore, Brazil, as a signatory to the 11/16/1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (promulgated by Ministerial Decree No. 80978 of 12/12/1977), is bound to "protect, preserve and present to future generations" cultural patrimony, including "works of man" (Articles 1 and 4). It should also give them, again, pursuant to the aforesaid Convention, "a function in the life of the community" (Article 5).

It would therefore appear that this court, by the values it espouses, could take no other course than EXCEPTIONALLY find as it has and simply cannot let such an important opportunity pass.

The presentation of an artwork that is exceptional in its magnitude and beauty, would allow all manner of persons to appreciate the beauty of it and to enjoy, albeit only fleetingly, a gratuitous moment of happiness.

It would make no sense, especially given our overriding pedagogic and cultural function, to fail to recognize, even if symbolically, in this decision the manifest public interest, likewise expressed in legislation on the subject. The decision is therefore justified, even given the realization that this is no everyday event.

Criminal Justice must exist for perpetuation of an essential Power: that of judging well, cautiously and prudently all of the questions placed before it. Nor could it shy away from making a decision, even if unprecedented. Our preoccupation ought not limit itself, pending better judgment, solely to the application of Criminal Law in its purest sense. It ought also to make of it, if possible, the best for society, without, clearly, straying from its original purpose.

Article 23 of Brazil's Federal Constitution, in its Subsections III and IV sets forth the responsibility of all Branches of Republican Government to protect artistic goods, to the point of stopping their deterioration, which itself denotes understanding on the part of the constitutional legislator of the inescapable duty to protect and present works of art because they constitute an extremely important social value.

Legislative Decree No. 25 of 11/30/1937, duly received by the Constitution, provides in its Article 1 the duty of Government to provide opportunities for access to and dissemination of CULTURE.

It is incumbent upon the State Secretariat of Culture – with the assistance of the City of São Paulo, the district enfolding the criminal liability – to make such allocation as best serves the spirit of this decision which is, I repeat, an attempt to lend weight and substance to essential constitutional values. By way of example, we have as one of the fundamental purposes of the Federative Republic of Brazil, that of "ensuring national development" (Article 3, Subsection II, Federal Constitution), which encompasses all knowledge had by people in all fields: awareness of their own existence. This is to say, knowledge acquired directly, with no intermediaries, bringing about a pure reaction or interpretation from each and every one (collective right to public access, yet also individual, both subjective, to freely appreciate and express).

One may not favor this or that artist, or reward some laudable stance. This is about reaffirming a value very dear to humanity and to our society, yet so distant from the ordinary citizen.

In view of the foregoing, and pursuant to the Universal Declaration of Human Rights, to the Federal Constitution, to the aforesaid UNESCO Convention, and to that body of laws determining that all of humanity, from its humblest member, shall have substantive access to CULTURE, I find as follows:

a) Allocation of one hundred thousand reals (R$100,000.00), that is, 1/15 of the total received or receivable, to the Government of the State of São Paulo, which shall contact the City of São Paulo, the district enfolding the criminal liability, for its use to benefit CULTURE, notably its true purpose: to recover artworks or hold cultural expositions or provide direct access of the same to needy populations, said use being AT ITS DISCRETION targeted to that end and NEVER to intermediate activities. If understood to be necessary it may, LIKEWISE at its discretion, suggest allocating such funds or part of such funds to one or more nongovernment organizations of an exclusively cultural nature, whose purpose is to put on programs for the cultural development of low income populations, it being incumbent upon them to use the funding for the purpose set forth above. The Secretariat shall notify the court in advance of the decision;
b) I also order, however, that after the decision by the State body, in cooperation with the municipality, to be given within 60 days, that a RENDERING OF ACCOUNTS be placed before this court within 30 days of all resources received by the State Secretariat of Culture;

c) One of the defendants shall set up a specific checking account, provided with the amounts established, and provide documentary proof of the fact in court within 24 h;
d) Defendants may not interfere in the decision-making by the State Government, and must comply in full once they are informed of the purpose of the funding, and must make all necessary bank transfers.

It is hereby ordered:
That notice of this decision shall be served on the State Secretariat of Culture and on the Municipal Secretariat of CULTURE for the city of São Paulo.
Serve notice to the Office of the Federal Prosecutor.
Serve all parties notice of this finding, which shall be part of today's decision.
São Paulo, December 10, 2008.
(60th anniversary of the Universal Declaration)
FAUSTO MARTIN DE SANCTIS
Federal Judge

The Second Section of the Appellate Court in Conflicts of Jurisdiction Nos. 76740/SP (record No. 2006/0280806-2, Questioner being the Office of the Public Prosecutor for the State of São Paulo) and 76861/SP (2006/0279583-9, Questioner being the No. 2 Court of Bankruptcy and Recovery for São Paulo), where the jurisdiction is, in both cases, the Sixth Federal Criminal Court, held on 05/13/2009, through Minister and Rapporteur Massami Uyeda, that the No. 2 Court of Bankruptcy and Recovery of the County of São Paulo ought to see to the recovery of the apprehended artworks, but only after the sentence handed down by the Federal Court becomes final, at which time forfeiture would be completed and it would fall to the bankruptcy judge to decide who are good-faith third parties.[13]

The imputation claimed that the accused had violated Article 1, Subsections VI and VII of Law No. 9613/1998, and also its Para 4, in addition to Law No. 9034/1995, for having agreed in advance, for a common purpose, to disguise the origin and ownership of the proceeds of crime as typified in Brazil's White-Collar Crime Law (No. 9492 of June 16, 1986), by resorting to several mechanisms including conversion of part of the sums involved into legal assets.

The managers of *Banco Santos S.A.* took pains to give the necessary appearance of legitimacy to their criminal acts, even though, in compliance with the rules of the Central Bank, they did organize a department for the prevention of money laundering, which was itself unable to detect suspicious transactions by the directors of that very institution.

It was found that money from the financial management of *Banco Santos S.A.*, sometimes from operations in Brazil, other times from operations abroad, returning afterward to Brazil, was used to benefit managers and directors (who received large bonuses from affiliated companies *Alpha* and *Maremar*), when not from their own customers, and primarily from defendant Edemar Cid Ferreira and his family members, sometimes through persons from outside of his family environment. The diverted money was used for several different purposes: maintenance of cash

[13] Similar in outcome was the holding in the Amendment of Judgment in Conflict of Jurisdiction No. 76861/SP, on 12/07/2009, that the civil loss shall only produce legal effect once the decision of the Federal Court has become final.

flow for *Banco Santos S.A.* and its nonfinancial companies listed on its organizational chart, payment of bonuses to directors and employees, and investment in real estate and works of art. Finally, sums obtained through the commission of antecedent crimes were brought back into the formal economy with no connection to their shady origins.

Brazilian companies, whose partners are offshore companies, were provided with large sums brought into Brazil, in part through exchange contracts recorded at the Central Bank under the heading of foreign investments by partners, clothing them with legitimacy which, however, gave way before the discovery that these companies were credited abroad with money deriving from crimes committed in Brazil.

There was considerable resistance to the obtaining of vital information from tax havens, and the issue was resolved with the valuable cooperation of U.S. authorities who sent Brazil a considerable amount of important banking information that made it possible to access and check the names of those responsible for offshore companies operating bank accounts in the United States.

The unlawful acts could only be carried out, in theory, thanks to the efficient and comfortably large holdings of its controller who, oddly enough, owned practically nothing in his own name (no vehicles, no artworks, just two lots and an apartment in Pompéia in São Paulo).

For this there was good reason. The evidence produced showed that the holdings of Edemar Cid Ferreira and his wife, Márcia de Maria Costa Cid Ferreira, had no legal foundation. The property owned by the couple was always involved in events related to the diversion of money from *Banco Santos S.A.*

Indeed, as of their entering into the bonds of matrimony, in anticipation of events, they decided to harden their assets—actual preparation for the crimes they had decided to commit.

Márcia revealed that her husband had decided to keep his property separate in order to protect her from the ups and downs of his business activities, and also because, should bankruptcy occur, the couple's children could keep money having to do with the Bank. When questioned as to whether the cash spent in constructing the home at Rua Gália 120 might have come from her husband's activities at *Banco Santos S.A.*, she was emphatic: "Of course. On account of the profits he had at the bank, right? All of it, I believe."

She asserted that she was included among management personnel at several companies at the request of her husband, who saw to it in order to protect her. This strategy, in the words of the accused, was certainly in his interest while seeking to engage in the laundering of money. With each of the couple's new acquisitions, Edemar signed the property over to her, with the exception of the bank and the brokerage house.

Dissimulation as to the origin and ownership of sums used for the purposes named and the deception of Brazilian authorities became discernible on account of systematically repeated organization of companies and amendment of articles of association, most notably in tax havens.

On its organizational chart, *Banco Santos S.A.* was subdivided into several committees, each managing a given area. The credit area was called upon to

approve Proposed Credit Operations (POCs) for the officers—the account managers working on the business platforms. In addition to this committee, there was an informal committee consisting of Edemar Cid Ferreira, Mário Arcangelo Martinelli, Álvaro Zucheli Cabral, Ricardo Ferreira de Souza e Silva and Rodrigo Rodrigues de Cid Ferreira.

Acting as planned then, toward a common purpose, they dissimulated the origin and ownership of the proceeds of crimes committed against the National Financial System by the criminal organization using, among other mechanisms, conversion of part of the money into legal assets.

It became clear that the controller, with the avid cooperation of others, acquired assets thanks to the commission of financial felonies by a criminal organization which garnered him a large sum of money, and real estate—especially the house at 120 Rua Gália, a veritable work of art[14]—in addition to thousands of other works of art composing one of the largest, if not *the* largest collection in Brazil, which, sadly, was the result of unlawful activity.

It was recognized that the crime characterized in the Money-Laundering Law (Article 1) involves fraud in every case, whether direct fraud in the first degree, direct fraud in the second degree (necessary results) or occasional fraud: where there was knowledge or reason to know that the goods were the proceeds of criminal behavior (Article 1, heading and § 2, Subsection I), there being no need to know precisely the particular behavior, nor to have precise knowledge that criminal activity was involved, rendering the subject liable to charges, or requiring knowledge of criminal wrongdoing, it being sufficient that a typical illegal act was committed (proceeds, or presumed proceeds, probably of occasional fraud from some antecedent crime). It does not require knowledge of the perpetrator of the antecedent crime, the circumstances of its commission, nor a personal link between perpetrators. The knowledge must exist at the time the typical act is carried out, and the so-called *dolo subsequens*, that which appears after the fact, carries no criminal import, except that the felony in every case involves *concealment* and *dissimulation*.

Many of the defendants engaged in criminal conduct, and abetted the conduct of the others—whether because they wanted to be fully trusted by their employer, or to ensure the continuity of their jobs, or to guarantee their regular and supplementary incomes or even, finally, for the illegal enrichment of Edemar Cid Ferreira.

With that, Miscellaneous Criminal Proceeding No. 2005.61.81.900396-6 was begun at the behest of the Office of the Federal Prosecutor, and the decision handed down on 02/18/2005, the basis of which was that the acquisition of assets by Edemar Cid Ferreira that had presumably been accomplished using money of illegal origin arising from crimes against the National Financial System and from money laundering. Orders were issued for seizure of real property located at Rua Gália, No. 120, Jardim Everest, Morumbi, in São Paulo; likewise, the seizure of

[14] The house cost approximately R$143,000,000 (US$72 million) to build in August 2004.

all art and decorative objects at the headquarters of *Banco Santos S.A*. and at the storage facility (technical reserve of *Cid Ferreira Collection Empreendimentos Artísticos Ltda.*).

The court order also extended to artworks not found at the defendant's residence, nor in museums and institutions in São Paulo, the district in which criminal liability was imputed (Contemporary Art Museum, the Paulista Museum, the Institute of Brazilian Studies, the Museum of Archaeology and Ethnology, the Sacred Art Museum, the Latin America Memorial Foundation, the Navy Cultural Center in São Paulo and the São Paulo State Secretariat of Culture), all of which received a number of works under bailment, once matched against the files for the *Cid Ferreira Collection Empreendimentos Artísticos Ltda.* (apprehended database) and direct examination of the controller.

A letter was sent to the Asset Recovery and International Legal Cooperation Council Department (DRCI), itself tied to the Justice Ministry, requesting that all necessary measures be taken for the seizure and repatriation of artworks not yet located, and forwarding the new list (based on information obtained by the Court Clerk from the defendant), all centering initially on the defendant's activities in the U.S. and Switzerland. INTERPOL was called in and asserted it had listed the works of art with the worldwide database available on its public domain website, and also published the list in *INTERPOL Stolen Works of Art*.

As a result of a decision handed down on 08/30/2005, the Brazilian archaeological pieces were added to the permanent holdings of the University of São Paulo Museum of Archaeology and Ethnology (MAE/USP), the acquisition of which pieces by the accused was unconstitutional because no such goods, belonging as they did to the Federal Government, could be left in the possession of any private parties. This is because the Brazilian Constitution establishes, in its Article 20, Subsection X, that all archaeological and prehistoric sites belong to the Union, and in Article 23, Subsections III and IV, that all Governing Bodies (the Union, States, Federal District and Municipalities) shall be responsible for the protection of documents, works and other items of historical, artistic or cultural value, and archaeological sites, and also "prevent the loss, destruction, or changing of the characteristics of works of art and other goods of historical, artistic and cultural value."

To conclude that the items were the property of the Federal Government, based on examinations already conducted, pertinent legislation regulating the matter was examined showing no such things could be acquired by private parties, and that further, their entry into Brazil was accomplished under the aegis of the Federal Constitution of 1988.

Despite the decision of the Superior Court of Justice, the goods ordered forfeited could not be taken to Bankruptcy Court, for once the decision became final, those assets would be restored to the Federal Government and not to the creditors of the bankrupt *Banco Santos S.A*. The court having jurisdiction was not the Bankruptcy Court, but rather the federal criminal court, for the seizures arose as a result of decisions handed down in the criminal court, long before bankruptcy was declared on 09/20/2005.

Hence, the petition for seizure of assets formulated by the Office of the Federal Prosecutor was dated 02/10/2005, and the corresponding decision affecting nearly all of the goods sequestered was made on 03/01/2005. Creditors of the bankrupt *Banco Santos S.A.* could not be regarded as injured parties or good-faith outside parties under the terms of the aforesaid Article 91, Subsection II of the Criminal Code, for the seizure was of goods belonging to companies (*Atalanta Participações e Propriedades S.A.*, *Hyles Participações e Empreendimentos Ltda.*, *Cid Ferreira Collection Empreendimentos Artísticos Ltda.* and *Brasilconnects Cultura*) that had not yet been declared bankrupt, which only occurred afterward as a consequence of the decision of the Federal Court which did not affect stakeholders in the bankruptcy.

The issuance of that decision served to confirm that the acquisition did indeed flow from criminal conduct against the National Financial System and money laundering, thereby assuring its forfeiture to the Federal Government. Both the chattel and the real property had been acquired in the names of third parties, by companies nominally headed up by the wife of the controller and other defendants to dissimulate the source of money therein invested—much of it diverted by means of illegal acts committed in the management of *Banco Santos S.A.*

Creditors were only entitled to satisfaction from assets obtained legally by *Banco Santos S.A*. Now, since the acquisition was shown in federal criminal court to have been irregular, and what was sought was restitution to the Federal Government (and not reimbursement), the bankrupt estate could not possibly have holdings there; otherwise, the entire criminal law system would be turned on its head, along with international Conventions (the Palermo and Vienna Conventions come to mind) and FATF Recommendation No. 3, indicating the necessity of forfeiture upon conviction—not as a means of indemnifying creditors, but rather to provide restitution to the injured party, which in this case is the Government.

This is not a case of future reimbursement of losses to the Government, for the Government is not a creditor of the bankrupt estate. The issue in this case is ownership of things the government is entitled to, and this is affirmed on account of the defendants' convictions. Hence, the legal nature of the Government's claims lie completely outside the jurisdiction of Bankruptcy Court, where creditors are desirous of reimbursement for losses they have suffered on account of unlawful activities. In Federal Court, judgment of merits turned up only liability for crimes imputed, which, in this case, upon conviction, would affect ownership of goods acquired using the proceeds of crime.

For this, we cite Bankruptcy, Judicial and Extrajudicial Recovery Law No. 11101 of 02/09/2005, Articles 85–93, requiring the restitution of assets that do not belong to the debtor or the bankrupt, which is precisely what was found in the case in point, and it makes it clear that this is a legal situation quite apart from claims by creditors. The old Bankruptcy Law contained similar provisions (Legislative Decree No. 7661 of 06/21/1945, Articles 76–79).

From another standpoint, Bankruptcy Court proceedings should involve all actions relating to the assets, interests and dealings of the bankrupt estate, pursuant

to Article 76 of Law No. 11101/2005 yet with the following exceptions: cases that are labor-related or tax-related, and cases not regulated by this Law, in which the bankrupt might figure as claimant or co-respondent. The said provision would not apply to any measure involving legal action seeking some sort of creditor reimbursement. If, then, the Federal Government is not a creditor of the bankrupt estate, no measures affecting the estate could affect the Government, for it is entirely uninvolved with the bankruptcy issue.

Even if the situation were to be recast into one involving obligational liability (for reimbursement), no resolution of that question could possibly favor the bankrupt estate. Remember that the seizure by the Federal Court took place long before the financial institution filed for bankruptcy, and that alone would suffice to defeat any claims made by the bankrupt estate or the court handling it. The same would hold for claims of an eviction court case filed by the owner of the property in which the technical reserve of *Cid Ferreira Collection Empreendimentos Artísticos Ltda.* is currently held.

Furthermore, nearly all of the diversions took place with the agreement of creditors, who consented to these in exchange for large sums, and cannot therefore base their demands on claims that they are themselves victims or good-faith third parties.

Hence, the federal measures affecting all assets acquired by the defendants should prevail, as set forth in Article 125 of the Brazilian Code of Criminal Procedure, even if transferred to outside parties, in this case, to defendants Márcia de Maria Costa Cid Ferreira, Edna Ferreira de Souza e Silva, Renello Parrini and Ruy Ramazini.

Note also that the aforementioned Palermo Convention on Transnational Organized Crime allows international cooperation to that end (Article 13.1). It also expressly provides that the proceeds of illegal assets be allocated to a United Nations Fund to assist State Parties to obtain the wherewithal with which to enforce the Convention [Articles 14(3)(a) and 30(2)(c)].

Hence, even in the case of alienation of seized assets, the amount raised would not go to provide restitution to the bankrupt creditors.

The São Paulo City Council for the Preservation of Historical, Cultural and Environmental Patrimony (CONPRESP) voted unanimously at a meeting held on 12/20/2005, to begin procedures to declare as works of national heritage all works and documents of artistic, historical, archaeological and cultural value included in the holdings, property or possession of the *Instituto Cultural Banco Santos* and/or *Cid Ferreira Collection Empreendimentos Artísticos Ltda.* and/or Edemar Cid Ferreira and possible relatives, including those located at the property at 120 Rua Gália and any others in the collections subject to court-ordered. Still following this reasoning, we observe that Article 22 of Law No. 10032 of 12/27/1985, as amended by Law No. 10236 of 12/16/1986, does provide that goods given protected or monument status (a situation equivalent to the matter at hand, even though the procedure is barely begun) could only leave the city for purposes of cultural interchange.

The São Paulo State Protective Counsel for Historical, Archaeological, Artistic and Touristic Patrimony (CONDEPHAAT) has also declared those assets to be of historical interest.

5.2 Cases in the Press

5.2.1 Money Laundering Charges for Art Dealers. New York Times, 06/02/01; and Laundering Drug Money with Art. In: http://forbes.com/2003/04/08/cx_0408hot_print.html

Two New York art dealers, Shirley D. Sack and Arnold K. Katzen, were accused and convicted of laundering $4.1 million in drug trafficking proceeds after they were arrested by undercover agents in Boston. There were arrested at the Ritz-Carlton Hotel while trying to sell paintings that they claimed were originals by Modigliani and Degas to an agent impersonating a drug dealer. A third art dealer was charged with complicity. The court found that Shirley D. Sack was an art and jewelry wholesaler in charge of a limited liability company named after her. The co-defendant was held to be one of the primary partners of *American European Art Associates*, as revealed by an informant who later joined the operation. The prosecution also showed that there was an attempt to sell a painting by Raphael in exchange for money raised by selling drugs.

Shirley D. Sack revealed that the amounts received were to be transferred to an offshore account, and that the buyer was to have experienced a net loss. On being told by the undercover agent that 10–15% would be charged for laundering the money, Arnold K. Katzen then stated that the works could easily be sold at a 10% discount (to offset the loss) and that the money would be transferred slowly, with the customer already standing by in Europe ready to buy the Modigliani, *whatever the circumstances*.

One of the defendants pled guilty.

5.2.2 Money Laundering Through Artworks. Philippine Daily Inquirer, Cathy Yamsuan, 9/27/10

According to an article citing *The Financial Times Limited* as a source, mindful of the limitations on transportation of cash, gambling operators decided to acquire artworks by famous Filipino artists from international collectors. These paintings were chosen because they could easily be removed from their frames, rolled into

tubes and transported by the dozens all at once. The only requirement was that there be a certificate that they are subject to auctioning, which made it possible to get them through customs.

Once auctioned, according to the article, Christie's only asks the sellers where the proceeds from the sale ought to be deposited prior to being sent back to the Philippines. To attorney and collector Fernando Topacio, cited in the article, who would question money deposited as proceeds from an international auction house?

He believes the practice could explain the rapid increase in the price of artworks by a young Filipino artist.

5.2.3 Knoedler Gallery Seeks Dismissal of Fraud Suit. New York Times, Patricia Cohen, 05/16/12

Ann Freedman, former president of Knoedler & Company, filed motions in a U.S. court to dismiss a $17 million lawsuit from a customer alleging that the Knoedler Gallery, for years an established art dealer, sold a forged Jackson Pollock painting. The gallery and Ms. Freedman maintained that the painting is authentic, and tried to back that claim with declarations by two experts in an attempt to defeat a forensics examination that concluded that the piece was a forgery because the paint used was invented after Pollack's death. The defendant also argued that sophisticated buyers ought to look into the authenticity of works before purchasing.

5.2.4 Megaupload's Kim Dotcom Denied Bail in New Zealand. Agence France Presse English Wire, Erica Berenstain, 01/25/12

Kim Dotcom, the Internet millionaire, and six other persons, were accused of money laundering involving 175 million New Zealand dollars using fake documentation. Luxury cars and artworks were seized at his home, obtained through a vast and complex piracy network. His extradition to the United States was requested. Kim Dotcom was denied bail by Auckland Judge David McNaughton because "he had received $42 million from his Internet empire, and has passports and bank accounts under several different names." According to the judge, Mr. Dotcom's "vast wealth in no way ensures he has not hidden away money he might potentially use to flee the country."

5.2.5 Venerable Art Dealer Is Enmeshed in Lawsuits. New York Times, Doreen Carvajal and Carol Vogel, 04/19/11; Lost Art and a Mystery Vault: Billionaire French Dealer Claims His Institute Has No Record of Treasures. International Herald Tribune, Doreen Carvajal and Carol Vogel, 07/22/11

Guy Wildenstein, president of the venerable *Guy Wildenstein & Company*, which once operated in New York, Tokyo and Paris, was summoned to Paris to answer fraud investigations because French police had been to the company three times and seized a collection of art stolen by the Nazis from Jewish families that was thought to have disappeared. Thirty works of art were seized, shaking this respected French dynasty of prominent Jewish art dealers to its foundations.

According to the article, the Wildensteins were more than just dealers. For generations they were considered reliable and confidential counselors, offering discreet services and the use of their property to store valuable paintings when their customers passed away. The defendant alleges that one painting in particular (a Morisot) could have been the result of an "error or oversight under my father's operations."

He pointed out to the court that he had no inventory in his storage facility, located underground and believed to be a vault.

He is named as the respondent in several lawsuits.

5.2.6 Art Auctions 'Marred by Fakes, Cheats.' South China Morning Post, Priscilla Jiao, 06/20/11

According to the article, China's artwork auction market is marred by fake certificates of authenticity, and collusion between buyers, sellers and auctioneers in attempts to artificially boost prices, and is also used for laundering money.

There are records of officials having been bribed to over-appraise works of art, and quite a few were sold for very high prices at Hong Kong auctions.

It reports that *Poly International Auction*, a top-notch venue, earned 6.1 billion yuan. The taxes paid by this and other auction houses, such as Guardian, Hanhai and Council, were far than the profits from their annual revenues. It concluded that either there was tax evasion going on or that the reports of annual earnings were artificially inflated.

5.2.7 *Orion Group Chairman Sentenced to Prison Over Slush Funds. Yon: Yonhap News Agency of Korea, 10/21/22*

The chairman of the Orion Group, a media corporation, was sentenced to prison for fraud and embezzlement of corporate funds. Tam Cheol-gon embezzled $26.4 million from the media group and acquired valuable works of art to decorate his own home. Judge Han Chang-hun of the Seoul Central District Court said that money laundering by trading in art was a common practice among owners of huge conglomerates. The judge commented, "He is highly to blame for his crime of regarding affiliated firms as his personal assets and failing to manage the group in compliance with the law and maintain transparency."

5.2.8 *Money-Laundering: Third Directive Set to be Unveiled by Commission. European Report, 06/23/04*

There is concern to require countries to enforce Directive 2001/97/EC to identify and report suspicious transactions to the authorities. Furthermore, Directive 91/308/EEC extends this beyond financial companies, to also cover attorneys, accountants, auditors (company or outside), tax consultants, brokers, notaries, dealers in precious stones, metals, artworks and casinos.

5.2.9 *Making a Dent in the Trafficking of Stolen Art. Smithsonian, 9/1/95*

The article recognizes the work of Constance Lowenthal, executive director of the International Foundation for Art Research (IFAR), known for her police work and research in the struggle against the theft of works of art.

It shows how the modern criminal underworld sees making money with art as the best thing going, for there is no way to explain, for instance, the price differences between a Manet and a Monet. Eastern European criminals are emptying churches of their holy statues and archaeological treasures.

IFAR keeps a database of missing artworks and collaborates with the Art Loss Register (ALR).

There is always the possibility that a stolen piece might pass through the hands of dozens of buyers, increasing the price and the chain of sales at flea markets.

According to the article, the great art robbery of the 1990s was never solved. This was the burglary of the Isabella Stewart Gardner Museum in Boston by a man and woman dressed as police officers. They tied up the guards and stripped the walls of all of their Vermeers, Rembrandts, and nine other treasures.

The piece concludes with an observation that art buyers, while giving free rein to their passion for art, should take pains to make legal acquisitions. They should not, in other words, be blinded or carried away by their sentiments.

5.2.10 Laundering Drug Money with Art. In: http://forbes.com/2003/04/08/cx_0408hot_print.html

Four people, including a Saudi Prince, were indicted for drug trafficking in Miami—and one was also charged with money laundering. Two works of art (by Francisco de Goya and Tsuguharu Foujita) were seized. One of the accused was said to have conducted financial operations to disguise the illegal origin of the money involved.

The deal involved two kilos of cocaine that left Caracas, Venezuela, for Paris, in a private jet owned by Nayef Al-Shaalan. The seizure of 190 kg. of cocaine on the Spanish border led authorities to the hideout in France.

It turns out that both the Prince (with no direct ties to the throne) and the two others involved were quite familiar with the art market. As a result of the laundering, the two paintings were sent to Miami in exchange for the drugs.

The article says that the U.S. Drug Enforcement Administration (DEA) believes that paintings nowadays are the way drug traffickers launder money. It is an investment for the proceeds of drug deals.

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Chapter 6
Payments Through Illegal and Disguised Means, and Misuse of NGOs, Trusts, Associations and Foundations

There have been many initiatives in fighting the war on organized crime. In Mexico, for example, the war on drugs has had a central focus, with strategies built on the involvement of civil and military agents, setting records for cash forfeitures, drugs apprehended and extraditions. On September 10, 2007, in the Municipality of Zarzal in the northeastern part of the Department of Valle, the Colombian army captured Diego Montoya, better known as Don Diego, one of the ten most wanted criminals on the DEA, CIA and FBI lists. According to Juan Carlos Garzón, this arrest was probably the most notable achievement in the war on drugs for that year, in which over 57,000 people were arrested, with over 100 of them extradited to the United States.[1]

Eric Olson explains that there are many similarities between Italian Mafia organizations and Mexican criminal gangs. In his view, "Mexican organized crime is more market-focused, less stable, and less durable. Moreover, Mexican criminal organizations are much more willing to attack the state. Additionally, the violence they use is more gruesome and has different goals, including intimidating their rivals and terrorizing the public. Finally, they seek to shape public perceptions about organized crime by targeting the media either through violence and intimidation, or controlling the stories that are published."[2]

What was once considered extreme is now commonplace, showing the strength and tenacity of Mexican criminal organizations. *Express* Magazine, a Washington Post publication, printed news of the war between the two main drug cartels in Mexico (Sinaloa and Zetas). The cartels went so far as to display fourteen headless bodies in front of City Hall at the border town of Nuevo Laredo. They also hanged nine people, four of them women, from a bridge in that same town. They left eighteen mutilated bodies in a van near Lake Chapala, and used a garbage truck to haul another 49 bodies (with no heads, hands or feet) near Monterey, Mexico's most important industrial city. The magazine also covered the battle, considered

[1] In *Mafia & Co. The Criminal Networks in Mexico, Brazil, and Colombia,* p. 9.

[2] See *Considering New Strategies for Confronting Organized Crime in Mexico*, p. 9.

F. M. De Sanctis, *Money Laundering Through Art*, DOI: 10.1007/978-3-319-00173-9_6,

the most spectacular fought for intimidation and propaganda purposes, in front of TV cameras in May 2012, in which many headless bodies of innocent bystanders were publicly tossed about to terrorize civilians and frighten authority figures, such as President Felipe Calderon.[3]

With regard to the Italian mafia, Francesco Messineo observes how they get help from white-collar criminals: "They not only help the Mafia, but also commit crimes in their specific sector. This can be said of all crimes dealing with public bidding processes, even where the hand of the Mafia is not involved, although it generally is, or in such cases as corruption, collusion, and other well-known crimes against the public."[4]

Important initiatives in the war on transnational organized crime also occurred in Brazil. In 2007, Colombian drug lord Juan Carlos Ramirez Abadia, also known as Chupeta, was arrested in São Paulo and sentenced, with several others, to more than 30 years in prison,[5] and afterward extradited to the United States. Other important actions were taken against the First Command of the Capital (PCC), a powerful criminal organization involved in miscellaneous crimes such as robbery, extortion and drug trafficking in São Paulo. The police have stepped up their actions in the shantytowns of Rio de Janeiro.

Despite these initiatives, organized crime is still active and adapting itself to enforcement efforts—whether by moving to new territory (Rio de Janeiro) or spreading out its activities in the so-called baby cartels or micro organizations. It has kept up its strength through well-armed groups assuring its control over extensive regions and the manpower to respond to government enforcement efforts.

In June 2012, police cars were hit by gunfire on the east side of São Paulo. This occurred during a week in which a series of attacks on off-duty police officers culminated in the deaths of five agents, believed to be a reaction by the criminal gang "First Command of the Capital" (PCC) to an police operation elite squad that killed six people in late May.[6]

Organized crime has indeed defied all stability and government control, and not just in poor suburbs or rural areas. One example occurred in May 2006, when over 80 people were killed, 30 buses set on fire and a large number of private homes

[3] Cf. Two Top Cartels at War in Mexico. *Express.* Washington, DC: a publication of the *The Washington Post,* p. 6, 05/25/2012.

[4] In *Máfia e Crime de Colarinho Branco*: a new approach to analysis. *Novas tendências da criminalidade transnacional mafiosa*, p. 301.

[5] Record No. 2007.61.81.0011245-7/SP, conviction in 2008 upheld by the Regional Federal Court for Region 3 (São Paulo and Mato Grosso do Sul), Criminal Appeal No. 0001234-26.2007.04.03.6181/SP, heard on 03/06/2012, Rapporteur, Federal High Court Justice Johonsom di Salvo).

[6] Cf. André Camarante. Carro da Polícia Civil é atingido por tiros na zona leste de SP. http://www1.folha.uol.com.br/cotidiano/1109151-carro-da-policia-civil-e-atingido-por-tiros-na-zona-leste-de-sp.shtml. Published 06/22/2012. Accessed Aug 2, 2012.

attacked because the government had announced the transfer of PCC leaders to maximum-security prisons.

This happened because one of the most effective instruments for crime fighting is to cut off its financing, that is, to confiscate the proceeds of drug sales and to cut off, limit or control the flow of money across borders.

Indeed, the movement of money between states through transportation of large sums in cash or electric transfers through bank accounts, added to the possibility of completely uncontrolled transportation of prepaid access cards or stored value instruments, or even black market moneychangers, invariably made up of persons who are well-connected—despite having violated laws against money laundering—must be stopped.

Money laundering can also occur through the mechanism of fraudulent payments—by, for example, fixing the price below the market value, or simply leaving out part of the amount payable. The price actually paid will surely be in cash or some untraceable means and delivered to the seller under the table. Then again, when prices are pegged at artificially high levels, the launderer may wish to have illicit financing of his acquisition and, to that end, will resort to bad appraisers and fake documentation.

Any time such facts or possibilities are known to authorities, all of them mindful that such crime is well-financed, no crime should go unpunished because that will surely lead to increased perpetration by others, and ultimately to the financing of terrorism.

There is much intelligence work to be done, more than that involved in simply controlling one's borders. Intelligence forces need to work together, because if they are kept apart, each may, in isolation, feel that someone else is responsible for the problem.

We must therefore approach the problem from a technical angle, for in many countries there is an atmosphere that fosters the adoption of solutions that are ineffective, scattered, poorly coordinated and not cohesive, especially owing to considerable social inequality.

It is not at all uncommon for officeholders to announce, before the elections, their wish to establish strategies for taking the money back out of crime, but little is actually done other than budget cuts to the detriment of public safety. Indeed, the perception has been that money laundering is a victimless crime, and for that reason it does not claim the attention of society, politicians and journalists.

6.1 Wire Transfers and Black Market Moneychangers

When people or companies seek to send or receive money from unlawful behavior across national borders, undetected by government institutions, they have come to rely more and more on transfers known as dollar wires or Euro wires, operated by agents known as dollar-changers (*doleiros*), whose activities stretch the legal envelope.

Along these lines, Terry Goddard informs us that the Arizona Financial Crimes Task Force searches for financial anomalies, disproportionate events unconnected with economic reality. "They immediately saw that Arizona was a huge net importer of wired funds. At the top ten Arizona wired-funds locations, over $100 was coming in for every dollar wired out. Wire transfers into Arizona from other states, in amounts over $500, totaled more than $500 million per year. Since there was no apparent business reason for this imbalance, the investigators took a closer look."[7]

For example, to preclude the use of fake identities for structuring or fragmentation of operations by companies and individuals in order to keep below the regulatory daily limit of $10,000 that would justify reporting the operation to the authorities, the State of Arizona established Geographic Targeting Orders (GTOs) that require additional identification, such as fingerprints and signatures from all persons receiving wire transfers in excess of $500. Based on such information, twenty-five warrants were issued between 2001 and 2006 for the seizure of wire transfers supposedly made in payment for human smuggling or narcotics trafficking.[8]

The Financial Action Task Force recommends that participating nations obtain detailed information on all parties to wire transfers, both senders and beneficiaries, for monitoring purposes. This would enable the barring of transactions by certain people in accordance with UN Security Council Resolutions 1269/1999 and 1373/2001 on the prevention of terrorism and its financing (Recommendation No. 16).

Brazil's foreign-exchange legislation spells out a number of issues that are often unheard of, even in the United States.

Take, for example, Law No. 4131 of October 19, 1962,[9] which requires contracts for currency exchange operations in its Section 7, included by Law No. 11371/2006:

> Art. 23. Operations on the free exchange rate market shall be conducted through establishments licensed to conduct foreign-exchange operations, with the intervention of an official broker whenever the law or regulations so provide, both of entities being required to know the client's identity, and how to correctly classify information provided by said client, pursuant to regulations established by Brazil's Currency and Credit Authority.
>
> (…)
>
> § 2 False statements of identity on the form which, in number of copies and following the model established by the Brazilian Central Bank shall be required in each operation to be signed by the client and checked and initialed by the banking establishment and broker therein intervening, shall render the banking establishment subject to charges for infraction, which carry a penalty of a fine in the amount of fifty percent (50%) to three hundred percent (300%) of the amount of the operation assessed against each of the violators. (New language given by Law No. 9069 of 1995)
>
> (…)

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[7] Cf. *How to Fix a Broken Border: FOLLOW THE MONEY*, p. 3.

[8] *Id*. p. 4.

[9] In www.planalto.gov.br/ccivil_03/leis/L4131.htm. Accessed July 16, 2012.

§ 7 Completion of the form referenced in § 2 of this article is not required for foreign currency purchase and sale operations of up to three thousand dollars (US$3,000) or its equivalent in other currency. (Included by Law No. 11371 of 2006)[10]

Because of Brazil's currency exchange regulations, remittance companies are required to conduct all of their operations exclusively through financial institutions duly licensed by Brazil's Central Bank, and this also holds for international banking institutions. They must have agreements on file with accredited banks to engage in exchange operations in Brazil, under penalties provided by several regulations—in particular, Law No. 9069 of June 29, 1995 (the *Lei do Plano Real*),[11] which established the *real* as Brazil's legal tender. It is the currency used to settle all transactions in Brazil.

Its Article 65 provides:

Art. 65. The entry into and departure from Brazil of domestic and foreign currency must be processed exclusively through bank transfers, where banking establishments are required to fully establish the identity of the customer or beneficiary.

§ 1 Excepted from the provisions contained in the heading of this article is the transportation, in cash, of the following amounts:

I – When in Brazilian currency, up to ten thousand reals (R$10,000);

II – When in foreign currency, the equivalent of ten thousand reals (R$10,000);

III – When it can be shown to have entered or left Brazil in accordance with pertinent regulations.

§ 2 The National Monetary Council shall, according to the guidelines from the President of the Republic, regulate the provisions of this article and also provide limitations and conditions for entry into and exit from Brazil of national currency.

§ 3 Failure to comply with the provisions of this article shall, in addition to sanctions provided in specific legislation and following due legal process, entail forfeiture to the National Treasury of all amounts in excess of those set forth in § 1 of this article.

Legislative Decree (Decreto-lei) No. 857 of September 11, 1969,[12] requires the use of national legal tender in all domestic operations, rendering null and void all operations stipulated in foreign currency or which would, in effect, restrict or refuse Brazilian currency as legal tender, but does list several exceptions to the ban.

In this regard, it provides:

Art. 1 – All contracts, securities and documents, and bonds callable in Brazil, which stipulate payment in gold, in foreign currency, or in any way serve to restrict or refuse the cruzeiro as legal tender, are null and void by law.

Art. 2 – The provisions of the preceding article do not apply to:

I – Contracts and paper relating to the importation and exportation of goods;

II – Contracts for financing or putting up bonds or guarantees relating to the exportation of nationally-produced goods, sold abroad on credit;

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[10] The fact that the Central Bank deals more simply with amounts of up to $3,000, dispensing with the currency exchange agreement, in no way constitutes a waiver of the requirement that all debits and credits in customer accounts or through financial instruments be recorded so as to allow tracking of assets.

[11] See www.planalto.gov.br/ccivil_03/leis/L9069.htm. Accessed July 16, 2012.

[12] In www.planalto.gov.br/ccivil_03/Decreto-Lei/Del0857.htm. Accessed July 17, 2012.

> III – Foreign-exchange purchase and sale agreements in general;
>
> IV – Loans and any other obligations in which the creditor or debtor is a person residing and domiciled abroad, excepting only contracts for the lease or rental of real property within Brazilian territory;
>
> V – Contracts for purposes of assignment, transfer, delegation, assumption or modification of obligations referenced in the preceding item, even if both parties to the agreement are residents of and domiciled in Brazil.
>
> Sole Paragraph – Real property lease or rental agreements stipulating payment in foreign currency must, to be enforceable, and be registered in advance with the Brazilian Central Bank.

For its part, Decree No. 23258 of October 19, 1933,[13] provides that the purchase and sale of foreign currency shall be made exclusively in institutions authorized by the Brazilian Central Bank to engage in currency exchange operations, and establishes that:

> Art. 1. All foreign exchange operations conducted between banks, natural persons or legal persons domiciled or doing business in Brazil, with any entities abroad—whenever such operations are made other than through banks licensed to operate in foreign exchange through prior accreditation by examiners on behalf of the Brazilian Central Bank—are considered illegal exchange operations.

This set of codes (Law No. 4131/1962, Article 23; Law No. 9069/1995, Article 65, heading, and Legislative Decree No. 23258/1933, Article 1) makes foreign exchange agreements mandatory (or, for operations of up to US$3,000, more simplified forms), thereby establishing Brazilian currency (the real) as legal tender while requiring identification of customers and declaring illegal all foreign exchange operations not conducted through banks accredited by the Central Bank.[14]

By the rules of Brazil's Financial Intelligence Unit (COAF), the item Cash Transfers covers remittances and only applies to the mail and Brazilian postal money orders, both domestic and international, since everything coming from abroad and involving currency exchange operations comes under Central Bank supervision.

There is an official market in the United States which often made use of gray market operators (currency brokers) to allow transfers of money belonging to uninformed foreigners residing in Brazil. To stock its operations, Brazilian currency (reals)—usually in cash (from illegal conduct in Brazil)—was deposited by the Currency Exchange into the accounts of beneficiaries of wire transfers coming from abroad, while the dollars or euros received from the senders (easy prey) are diverted to redeem and deposit money as part of this bartering in funds. This is the so-called wire operation.

One should bear in mind that whenever the number of immigrants in a given location increases, there is a proportional increase in the gray-market transfer of

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[13] In www.planalto.gov.br/ccivil_03/decreto/1930-1949/D23258.htm. Accessed July 17, 2012.

[14] The International Capital and Foreign Exchange Market Regulations (RMCCI) consolidates Brazil's currency-exchange regulations. www.bcb.gov.br/?RMCCI. Accessed July 18, 2012. Resolution No. 3568 of 05/29/2008 is the primary regulation. http://www.bcb.gov.br/pre/normativos/busca/normativo.asp?tipo=Res&ano=2008&numero=3568. Accessed July 20, 2012.

money. Therefore, wherever there is an increase in illegal immigration,[15] it is easier to commit financial crimes.

Another topic of concern is the entry of several factoring companies, which pump money into the accounts of wire transfer beneficiaries in the receiving country, thereby contributing to the offsetting of amounts in furtherance of an illegal black market in unauthorized financial dealings. Quite apart from their main purpose, which is short-term business financing of creditors' claims for goods and services provided on credit, the factor, or invoicer, is only required to keep a record of sales and perform administrative work relating to accounts receivable, receiving no sums and guarding against debtor insolvency.

According to the 1988 Convention on International Factoring held in Ottawa,[16] a factoring contract is a contract between two parties, the client (supplier) and the factor, and the factoring company should perform at least two of the following functions: (1) provide financing for the supplier, including loans and advances on payments; (2) maintenance of accounts relating to the receivables; (3) collection of receivables; and (4) protect against default in payment by debtors. Nothing is said, therefore, about assisting remittance companies or currency brokers so as to obtain financial compensation on their balances.

Something similar to what occurs in the Black Market Peso Exchange, which has long served international drug traffic, also applies to Brazil, with the establishment of the black market in reals.

According to Resolution No. 13 of the Council forFinancial Activities Control - COAF, factoring companies should report to them (COAF). The COAF intended important to make it possible to identify the owners and directors of factoring companies, perform due diligence on customers and check whether internal controls are in place. The aforementioned Resolution was revoked because the Central Bank not accredited factoring companies as financial institutions, and so never applied for licenses or registration.

Central Bank Circular No. 3542 of March 12, 2012, establishes in its Article 1, XI, a requirement to notify the Financial Intelligence Unit if, for instance: the customer does not provide justification for the origin of the money, or where the amount is incompatible with the customer's financial strength (item f); upon the realization of *resources from abroad*, there is financial incompatibility or absence of proper grounds (item g); or payments occur abroad after deposit of credit in reals into accounts held by persons named in the currency exchange operations, absent any business or financial links (item j). The U.S. Financial Crimes Enforcement Network (FinCEN) requires banks to perform due diligence on wire transfers to foreign agents or counterparties (31 CFR § 103).

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[15] For more on the influx of new immigrants who wire money back to their countries of origin, and their profiles, see *Briefing explores the factors that have influenced increases in remitting.* A publication of the Inter-American Dialogue, 03/20/2012, p. 1.

[16] See http://www.unidroit.org/english/conventions/1988factoring/main.htm. Accessed July 10, 2012.

This is why irregular deposits show up in the accounts of recipients of wire transfers with no identification of the depositor, cash transfers to a beneficiary account from a company not authorized by the Central Bank to operate in the currency exchange market, or cash transfers to beneficiary accounts from individuals, for only financial institutions are eligible to receive Central Bank authorization to operate in currency exchange markets.

An occasional operation of this kind may be deemed acceptable if it has, in addition to an investigation as to the origin of funds, proof of deposit through a financial institution accredited by the Central Bank (such as a letter from the bank responsible for settling the operation).

Note that due diligence is not called for when the sending company has its home office in the United States (where that is the source of the dollars).

Cases have been observed of payments for drugs through the use of remittances from the United States in a triangle involving Colombia, the United States and Europe. Euros were brought in by mules (or smurfs) to Colombian currency exchanges, which shipped them to the United States, where they were packaged and sent to Europe, where the receiving company exchanged them for dollars that were then wired to the United States. These operations usually involve immigrants, and with the arrival of greater numbers of immigrants in any country, the number of transfers from one person to another increases annually.

6.2 Prepaid Access Cards, Stored Value Instruments and Bitcoins

Credit cards that allow access to an account through magnetic media and a password are quite common. However, there are prepayment vehicles that may be transferred and recharged, and quite possibly put to use by money launderers. Very low identification requirements on the part of financial institutions encourage such criminal practices. They do not themselves store value, but do provide access to an account.

It is difficult to distinguish between traditional credit cards and the network of prepaid access cards. Stored value cards should be clearly classified for the elucidation of government agencies and to facilitate identification of suspicious cards.

Such cards are usually not listed among monetary instruments, nor are they otherwise subject to customs declarations, although they often exceed the limit established for a Suspicious Activity Report. Authorities appear oblivious to the need to monitor these. These innocent cards or instruments can be worth millions, yet authorities are not concerned about them.

The cards closely resemble traditional credit cards, but provide access not to credit at a financial institution, rather to a sum of money stored on the card, on a chip, or simply in an account accessible using the card (which sometimes even

dispenses with the chip). Increasingly, particularly in the United States,[17] payments are made by this means. There are many different kinds.

The least sophisticated are good for a fixed amount and are activated by a sales clerk. As purchases are made, those amounts are deducted from the card balance until it is exhausted. Such cards are not rechargeable. Typically referred to as gift cards, they are sold at checkouts in U.S. supermarkets. Such instruments make it possible, when they are carried in hundreds, to send millions of dollars.

Others may be reloaded using a computer or ATM. In these cases, they would represent small bank accounts and the balance does not even show up without proper software and hardware. Large sums can be stored, and easily passed from one person to another, making them absolutely anonymous.

These types of cards are often not subject to daily withdrawal limits, but only to the total stored value.

In both the United States and Brazil, no traveler is permitted to carry more than 10,000 dollars or reals in cash or cash equivalents (called monetary instruments, such as travelers checks, credit cards, negotiable bills of exchange, bearer checks or other documents convertible to cash) without declaring them to customs authorities. We should mention here that such stored value instruments are not classified, in either country, as monetary instruments for that purpose.

This legal loophole allows organized crime a great opportunity to circumvent controls on money laundering, especially across borders or simply through the mail.

The Financial Action Task Force establishes transparency requirements for beneficiaries of companies, with countries required to obtain reliable and timely information (Recommendation No. 24), including information on trusts, settlors, trustees and beneficiaries (Recommendation No. 25). Financial Intelligence Units (FIUs) must have timely access to financial and administrative information, either directly or indirectly, as well as information from law enforcement authorities in order to fully perform their functions, including analysis of suspicious statements on operations (Recommendations Nos. 26, 27, 29 and 31).

It recommends restricting or banning the physical transportation of currency (Recommendation No. 32), but says nothing about the cards and forms of payment mentioned here.

Bitcoins are digital money issued and transmitted over the Bitcoin Network, a network among friends that allows payment by any party to another. These transactions are connected to the Internet, and therefore communicate with other equipment, picking up or transferring signals from different regions. The signals are recorded in a public history listing (called a block chain) once they are validated by the system.

The Bitcoin network began on January 3, 2009, with the issuance of the first bitcoins by Satoshi Nakamoto. Owners transfer bitcoins by sending them to another Bitcoin address using a client program or website for the purpose. The

[17] From a volume of just $6.2 million ten years ago, the use of prepaid cards has skyrocketed to over $800 billion in 2008, and is projected to increase to $1.3 trillion in 2009 (according to Terry Goddard, in *How to Fix a Broken Border*: *FOLLOW THE MONEY,* p. 9).

transfer is accomplished by digital signature and connected to the public encryption key of the next owner. Bitcoin records all data necessary to make the transaction valid in the block chain.

A Bitcoin customer uses a wallet of Bitcoin addresses, and is free to create any number of Bitcoin addresses. Hence, if user "A" wishes to transfer bitcoins to user "B," he will create a transaction message with instructions to send part of his balance to "B," and the transaction will be validated by "A" by using a wallet key. Because of its asymmetric cryptographic method, only owners of a private key can create a valid signature to enable bitcoins to be sent from their wallets.

Using Bitcoins Exchange Services, one can buy or sell gift cards and exchange them for bitcoins.[18]

That amounts to the creation of a virtual database for issuing electronic money, in which users may check the coins once they are issued. So instead of withdrawing an amount in bills from a bank, a financial institution could be asked to coin (renew) a block of records identified by a hash value, which can be used for identification and integrity verification, and occasional returns to the bank.

This currency, according to Alaric Snell-Pym, runs into two difficulties. The coins are traceable using their unique serial numbers (much handier than the series of numbers printed on bills) and it is not easy to spot someone using the same coin twice since, consisting as they do of numbers, one could make as many copies as he wished. A number of systems have developed cryptographic techniques to prevent such duplication, complicating the transfer of funds to the point of making it difficult to ensure security.[19]

Problems surface once you notice that it is possible to use different addresses, with one of them used only once for a single transfer. Someone knowledgeable could create new addresses and transfer monetary amounts to a number of other addresses through several identities or pseudonyms, unless there were some tracking of Internet records to analyze the transaction from a global perspective. By checking network connections over the World Wide Web, one could verify spending on transactions and know to which addresses they were directed.

Bitcoins can be as anonymous as cash, so there has to be some method or means of breaking that anonymity and tracking the flow of money. There must be some form of electronic tracking, even easier than for cash money, which simply passes from hand to hand. Bitcoins are a transparent means of transacting compared to the existing system. But even though it features the use of fake names or nicknames, identifying its users does not seem all that impossible. Hence, if a trafficker is using a given Bitcoin address, you can download all data on the person using that address and download the entire graph of parties with whom that

[18] See, for example, http://www.bitcoinexchange.cc/aboutcompany.html. Accessed May 25, 2012.

[19] In *Bitcoin Security*. http://www.snell-pym.org.uk/archives/2011/05/12/bitcoin-security/. Accessed Mar 8, 2012.

trafficker has dealings, and it might be possible to obtain information on his entire clientele. Therefore, this medium may not be as anonymous as it appears at first.

Still, one can easily imagine, as mentioned by Jon Matonis,[20] someone creating an anonymous bitcoin structure with many branches in order to hide his transactions.

The mere fact that it is electronically traceable does not preclude its being successfully used for illegal ends. As more of these types of services become available online, the transactions become more complex and there is greater opportunity for apparently unrelated, off-the-grid value exchanges.

6.3 Using NGOs, Trusts, Associations and Foundations for Illegal Ends

Just as the work of beneficent entities has been important, scandals have stained some of their images and opened the door to an increase in judicial actions against their directors, increasing skepticism in proportion to news coverage of events.

Because their work is philanthropic, and they are generally motivated by altruism and compassion, charities have been immune to legal proceedings. They may be made answerable on account of internal management issues or even external problems (everything from labor suits to fraud, and even money laundering by reason of insolvency, negligence or poor practices). Its entire board of directors might be held liable for some failure of accounting or diversion of funds.

Nongovernmental organizations, trusts, associations and foundations tend to be as diverse as a country's population. People are increasingly becoming involved in social or charity efforts and donations to these social entities have been large.

Recent disclosures have tarnished the images of certain entities and brought the glare of publicity onto the conduct of some of their managers. A backlash of skepticism has brought about a proportional reaction affecting the volume of donations and volunteer work.

Because philanthropic work is normally motivated by generosity and empathy, charitable organizations often imagine themselves immune to legal proceedings. Liability could surface based on some poorly-handled internal activity, or some other cause occurring outside the organization, which is why the role of the manager is so important.

Since they operate from personal and institutional donations, charity organizations (often synagogues, churches, mosques, NGOs, educational associations, etc.) believe that they are not required to reveal the sources of their funds, nor to be examined for the large financial transactions they conduct.

The U.S. Congress has, since 1917, allowed deduction of donations to charitable, religious, educational and other such entities organized as nonprofit NGOs.

[20] In The Monetary Future at the Intersection of Free Banking, Cryptography, and Digital Currency. Thoughts on Bitcoin Laundering. Published May 13, 2011, http://themonetaryfuture.blogspot.com/2011/05/thoughts-on-bitcoin-laundering.html. Accessed Mar 8, 2012.

We cite a 1938 report from the House Committee on Ways and Means in which Erin Thompson explains that tax revenue losses due to charitable donations are offset by easing the financial burden, which, through the resulting benefits, promotes the general welfare.[21]

According to Andrew Cuomo, philanthropic organizations "contribute substantially to our society. They educate our children, care for the sick, preserve our literature, art and music for us and for future generations, house the homeless, protect the environment and much more."[22]

The correctness of granting large tax deductions has been the subject of frequent assessment of its effectiveness, purpose and potential for abuse. All of this has, according to the author, brought about changes in the law: statutes and regulations governing charitable deductions.

Thus, a philanthropic transfer in the United States must satisfy a complex set of rules to qualify as a tax deduction. These rules are grouped, according to the author cited,[23] into three main requirements: the transfer must be sent to a qualified addressee[24]; it must clearly state the purpose of the donation, that is, not be an exchange of goods or services[25]; and it must consist of a payment or other allowable goods.[26]

The third requirement brings us back to the question of payments.

In the State of New York, for example, in order to set up a foundation or NGO,[27] a license must be obtained to qualify for tax exemption, and returns must be filed to the State tax authorities, under penalty of being closed down, by means of Form No. 990, dated and properly signed on penalty of perjury, and containing the name and telephone number of the person who keeps books and records for the organization.

The form must be filled out to include a detailed list of all of its activities and management, its revenues, overhead and liquid assets. It must state the name and purpose of the institution; number of members; whether it has more than 25% of its liquid assets on hand; number of voting members listed within or outside the entity; number of employees; number of volunteers; revenues from unrelated businesses and taxes paid; contributions and donations; resources invested; benefits paid by and for members; total assets and obligations; basic description of all assistance programs; whether any loans or benefits are granted to or for employees,

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21 In *The Relationship between Tax Deductions and the Market for Unprovenanced Antiquities.* 33 Colum. J.L. & Arts 241, 2010.

22 Cf. Internal Controls and Financial Accountability for Not-for-Profit Boards. *Charities Bureau.* In http://www.oag.state.ny/bureaus/charities/about.html. Accessed June 20, 2012. p. 01.

23 *Id.* p. 242.

24 Cf. I.R.C. § 170 (c) (2006).

25 See McLeman v. United States (24 Cl. Ct. 109, 91-2 USTC 50, 447, 1991).

26 In I.R.C. § 170 (e) (3) (2006).

27 Provided they are also recognized as such in the U.S. tax code, also known as the Internal Revenue Code, Section 501 (c); 527; 4947 (a) (1).

directors, trustees or any other persons; the names, hours worked, and job descriptions of all employees and former employees (including directors, trustees and key personnel); their earnings, and their expenses (including travel or leisure).

For gross revenues of up to $100,000, no external audits are required. From $100,000–$250,000, the information must be entered by an outside auditor (and documentation reviewed by that professional), who does not, however, check the veracity of information obtained. In other words, it is not the auditor's job to check donor transactions (to conduct the due diligence). But NGOs with gross annual revenues in excess of $250,000 are required to turn in an outside auditor's report, and that auditor must perform the due diligence.[28]

The Foundation Center, a U.S. center for information on foundations, has published some 29 standards; Brazil, meanwhile, has six of them, all unpublished (a veritable case of living in a glass house).[29]

Management and employees of nongovernmental organizations must be answerable for their management and for the protection of the goods and services that benefit us all.

A primary responsibility is to ensure proper accounting for the social programs that they play a role in, and for funding received from their supporters (public or otherwise). This means that they must strictly comply with the law and ethical standards, be committed to the mission of the NGO they represent, protect the rights of their members and, indirectly, of those assisted, and prepare annual reports for their country's federal revenue service and regulatory authorities having jurisdiction—reports that should be available to all interested parties.

They should therefore have technical information at their fingertips to enable them to monitor and record all assets and amounts received, spent or entrusted to their care.

The website of the National Association of State Charity Officials (NASCO)[30] contains important information on the recording and reporting required of NGOs. NASCO members are employees of U.S. government agencies charged with regulating NGOs and their funds.

Marion R. Fremont-Smith, who teaches Public Policy at the John F. Kennedy School of Government, produced an important comparison for Harvard University on the bookkeeping requirements for such organizations. She showed, for instance, that most U.S. states (for example, New York, California, Arkansas, Missouri, and New Jersey) require that they have at least three directors.[31]

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[28] Cf. www.charitiesnys.com or www.charitiesnys.com/pdfs/statute_booklet.pdf. Accessed May 29, 2012.

[29] According to information provided by Patricia Lobaccaro on 05/16/2012. Ms. Lobaccaro is president and CEO of BrazilFoundation, with offices at 345 7th Ave., Suite 1401, New York City.

[30] www.nasconet.org. Accessed June 2, 2012.

[31] In *The Search for Greater Accountability of Nonprofit Organizations. Summary Charts*: *State Nonprofit Corporation Act Requirements and Audit Requirements for Charitable Organizations* (document obtained 05/16/2012 from Patrícia Lobaccaro, president and CEO of the BrazilFoundation).

FATF Recommendation No. 08, in the spirit of clearly delimiting the rights and responsibilities of directors and employees of nongovernmental organizations, encourages countries to establish a good policy whereby information on their activities, size and other important characteristics—such as transparency, integrity, openness and best practices—can be had in real time for purposes of supervision and monitoring.

It is not enough to only dimly perceive here a preoccupation with the financing of terrorism, for they could be the means of commission of any number of crimes—including terror-related crimes.

In Pakistan, for example, the Central Bank has placed much stricter controls on NGOs and benevolent societies, ordering a complete review of all their accounting before the end of 2012, under threat of making them subject to penalties. The purpose was to establish a policy and a set of rules for compliance (to strengthen due diligence) and to protect them from the risk of money laundering and terrorism financing. All of the country's financial institutions are being required to open accounts in the name of NGOs that match the documents submitted to them. In the event of an organization publicly soliciting donations or the like, accompanied by a bank account number, those financial institutions must promptly take note of and report that account if the account owner of record does not match that of the publication.[32]

Two government intelligence cells were created in India to detect sources of funding used to finance terrorist activity. Analysts there believe that terrorist attacks in India are funded by neighboring countries through NGOs and nonprofits. Up until now they had no way of checking on how funds from abroad, purportedly intended for health and education, would actually be used.[33] In 2010 there were some two million NGOs there, but of that number, only 71 had requested any reimbursement for taxes paid. In 2009 there were 38,600 registered with the government to receive donations from abroad. Some are suspected of being money laundering channels for the return of illegal cash received from Indian politicians or for terrorism financing, much of it qualifying as investments coming through Mauritius.[34]

NGOs, associations and foundations lacking proper controls are recognized today as channels for money laundering for organized crime. In fact, the Financial Action Task Force (FATF) has found that sums transferred from NGOs abroad have provided funding for the financing of terrorism on a par with counterfeiting,

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[32] Cf. Terror outfit-turned 'charity' JuD set to come under Pak Central Bank scanner. In *Asian News International,* 03/13/2012. www.lexis.com. Accessed June 19, 2012.

[33] In Prafulla Marpakwar. State forms cells to detect source of terror funds. *Times of India.* www.westlaw.com. Accessed June 19, 2012.

[34] For more on this, see John Samuel Raja, in Ten means to put an end to black money issue. Economic Times (India). Copyright 2011 Bennett, Coleman & Co., Ltd., *The Financial Times Limited*. 11/18/2011.

drug trafficking, extortion and corruption. This has prompted India, for example, to assemble an umbrella database listing them all.[35]

Money laundering is usually carried out using a layered structure to give the appearance of legality. One such method is to establish trust companies through which the company manages business for its clients, the beneficiary being one or more holding companies, or a series of companies in several tax havens, to create a separation between the aforesaid holding companies and their ultimate beneficiary. Moreover, the discovery of the real beneficiary would require considerable cooperation on the part of authorities in those tax havens. Some means would have to be established to require the trust to provide its beneficiaries' names whenever requested by the authorities.

It is not even easy to establish who is in charge of the trust since there is no obligation that the name be revealed. Hence, being its legal beneficiary is an enviable business—which may explain the rather timid recovery of illegal assets.

There are efforts under way in India to publicize the names of organizations (religious NGOs or trusts) requesting tax exemptions. One of India's wealthiest trusts collects huge sums of cash. At the time of this writing, there are a number of laws and several states seeking to monitor the activities of these entities. Yet Parul Soni (of Ernst & Young Pvt. Ltd.) believes that federal legislation will be required to achieve bookkeeping transparency and to strengthen the reporting of suspicious activity in that sector.[36]

Trusts, although they may be synagogues, churches or mosques, nongovernmental organizations, or educational institutions registered as NGOs, must now reveal the sources of their funds and have their financial transactions closely scrutinized. This is because of new jurisprudence requirements under India's Prevention of Money Laundering Act of 2002.

Indian attorney Bhusham Bahal tells us that the laundering of illegal money has been largely made possible by NGOs operated by powerful businessmen and top politicians, so that this new instrument should prove to be of valuable assistance to the authorities.[37]

Pakistan has also adopted strict measures to curb money laundering and financing of terrorism by NGOs by putting in place a very broad know-your-customer policy. It requires photocopies of customer photo IDs (identification card or passport), and a copy of the assignment, if done through power of attorney. Companies

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[35] Cf. Most recent FATF report in www.gafi-fatf.org, 06/22/2012; Government plans 'umbrella law' to tighten scrutiny and regulation of religious trusts and NGOs. *Economic Times* (India). Copyright 2011. Bennett, Coleman & Co. Ltd. 05/03/2011. www.westlaw.com. Accessed June 22, 2012.

[36] Cf. Government plans 'umbrella law' to tighten scrutiny and regulation of religious trusts and NGOs. *Economic Times* (India). Copyright 2011. Bennett, Coleman & Co. Ltd. 05/03/2011. www.westlaw.com. Accessed June 22, 2012.

[37] See Palak Shah. Trusts, NGOs under ambit of money-laundering law. *Business Recorder.* Recorder Report, 09/12/2009. WLNR 17872644. www.westlaw.com. Accessed June 23, 2012.

must produce their charter and by-laws, and a list of directors. Similar documentation is required of individuals, along with audit documents required of clubs, associations or nonprofit associations.[38]

The trump card in the Indian case is the requirement that sources of funds be revealed, so that know-your-customer policies have to be in place for donations to be received by the NGOs, as is already the case for financial institutions. They must also provide detailed information on investments and donations received, and anonymous donations are henceforth barred.[39]

In Canada, nongovernmental organizations are as diverse as the population. Many Canadians are involved in charity work, with estimates running to some 36% of the population. Economically, the sector is a major player, inasmuch as two million people are employed within it, with another two billion hours voluntarily contributed. There are over 160,000 NGOs operating nationwide and 85% of the population makes financial contributions to Canadian social entities.[40]

Considerable customer due diligence is required. The donor's name or job title is no longer enough (photo ID is preferred). For instance, the donor's purposes and actual financial position must be known (preferably face-to-face), along with his signature or the signatures of those acting on his behalf. The source of funding must also be disclosed, and supported by documentation. In the case of a donor company, a copy of the by-laws is required (in order to check the list of directors) from the civil or deed registry having jurisdiction. The actual directors of the NGO must be known, again with photo ID, along with the scope of their authority, all backed by documentation to properly support the information provided.

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[38] Cf. Money Laundering, terror financing: SECP imposes more conditions. *Business Recorder.* Recorder Report, 09/12/2009. WLNR 17872644. www.westlaw.com. Accessed June 23, 2012.

[39] Again, Palak Shah (Trusts, NGOs under ambit of money-laundering law. *Business Recorder.* Recorder Report, 09/12/2009. WLNR 17872644. www.westlaw.com. Accessed June 23, 2012.).

[40] For more on this, see Rob Bickerton (in Good Cause. *Canadian Underwriter.* 01/25/2010. 2009 WLNR 26429376. www.westlaw.com. Accessed June 23, 2012).

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Chapter 7
International Legal Cooperation and Repatriation of Assets

December 2008 brought headlines that shocked the world: prominent banker Bernard Madoff had not been providing legitimate investment services, but running a fraudulent operation (a chain or "Ponzi" scheme). Over the course of several years, Madoff gulled thousands of investors who had shelled out over $65 billion. In March 2009, he pled guilty to nine counts, including financial fraud, money laundering and perjury. In June of that same year he was sentenced to over 150 years in prison.

Madoff was given more than just a custodial sentence. Prosecutors sought forfeiture of all of his revenue from the scheme, a total of some $170 billion. They are trying to recover this amount, alleging that Madoff's assets, as well as his wife's, were acquired with the proceeds of crime and should therefore be confiscated by the government. Their aim is to deprive him of four homes whose worth totals some $22 million, a Steinway piano worth $39,000, and silverware worth some $65,000.[1]

The U.S. Department of Justice confiscated some $1.737 billion in 2011, which was $191.1 million more than in 2010 ($1.545 billion). Its purpose is to deter crime by disrupting, damaging and dismantling criminal organizations through the use of the forfeiture sanction.[2]

Depriving financial criminals, such as white-collar criminals, drug and weapons traffickers, racketeers and members of other criminal syndicates of their ill-gotten proceeds and instrumentalities of their trade not only achieves important law enforcement objectives but also provides an effective means of recovering funds for victim restitution. In the case of money laundering and financing of terrorism, that victim is the Government and society as a whole.

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[1] In Diana B. Henriques, Madoff, Apologizing is Given 150 Years, *New York Times,* June, 30, 2009, A1., and Michael J. De la Merced, Prosecutors Try to Claim Madoffs's Properties, *New York Times,* March 17, 2009, B6.

[2] THE UNITED STATES DEPARTMENT OF JUSTICE, Asset Forfeiture Program, Annual Financial Statements, FY 2011 Report No. 12-12. http://www.justice.gov/jmd/afp/01programaudit/index.htm. Accessed May 25, 2012. pp. 10, 12.

F. M. De Sanctis, *Money Laundering Through Art*, DOI: 10.1007/978-3-319-00173-9_7,

The confiscation of such resources by the State also strengthens public safety in general, by allowing for federal investment in state and federal police forces, as well as in education, in order to prevent serious crime.

All of the money or assets transferred to the state will certainly result in special crime-fighting and prevention programs, as well as combined efforts on the part of the states and the federal government and its agencies, culminating in proper enforcement methods to curtail crime. The ideal is to create a safe place for freedom, security and justice, but this is no small feat, for it necessarily implies a joint effort by the police, prosecutors and the courts to obtain illegally acquired property. Forfeiture, confiscation, and repatriation require cooperation. Learning from decisions made in the searching out and seizing of the proceeds of crime will result in improvement of the work and training of public agents, and in the adoption of new measures to fight crime.

Despite the vast quantities of goods routinely seized and confiscated, the subject has not held the attention of scholars—unlike other issues, such as the length of prison terms, the growing number of inmates and the quality of penitentiaries and prisons.[3]

When assets are confiscated, the message that gets sent to organized crime is that financially, crime no longer pays, and is not in the best interests of its practitioners. It drives home the message that some types of behavior really are prohibited, and that to insist on engaging in them is to pay the price.

It would be better if confiscated assets could be put on exhibit, especially cultural assets, with a plaque explaining that each was confiscated by the Justice Department.

Efforts to benefit artists through the dissemination of culture ought to occupy the labor of the courts as well. The criminal courts from time to time encounter works of art created for public exposition in parks or city squares. These things come to light through historical studies or even disclosures by family members of the artist, sculptor or painter.

Here, despite the enormous effort it takes to convince and garner commitments from several national and international government agencies, it is incumbent upon the judge to reconcile the interest generated by the free exposure resulting from a simple exhibition, without losing sight of the duty to preserve.

The specialized Sixth Federal Criminal Court of São Paulo, by judge Fausto Martin De Sanctis, attempted to put the above proposal into practice in urging government agencies to see to the preservation of the asset, and also to direct it to a public space, even if on a provisional basis.

The understanding was that the exhibit, albeit temporary, would lend the judicial decision added cultural value, thereby allowing persons of all backgrounds—even though they may use the public mass transit system—to witness works of artistic and historical value.

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[3] Cf. Catherine McCaw (in Asset Forfeiture as a Form of Punishment: A Case for Integrating Asset Forfeiture into Criminal Sentencing. 38 *American Journal of Criminal Law* 181, 2011. p. 183).

It was in this spirit that the aforementioned judge (Sixth Federal Criminal Court/SP) engaged the daughter of artist Galileo Ugo Emendabili, Fiametta Emendabili Barros de Carvalhosa, in negotiations for some twenty months, and likewise persuaded state and municipal governments to further the public interest while reconciling it with the private interest of the author, until arriving through meetings at decisions which made all of this possible in July 2008, namely:

> The sculptures titled [Goddesses of Engineering: Muse of Engineering and Muse of Sculpture] are now under the stewardship of the State Secretariat of Culture at the Casa Brasileira Museum, pursuant to a court order making possible the public display of seized works of art.
>
> By virtue of the decision handed down on 10/03/2006 (folios 3887-3889), which ordered the removal of the sculptures from the Casa Brasileira Museum for permanent exhibit at a public park, their installation at Luís Carlos Paraná Park was suggested by the state and municipal governments, and that transfer was ordered to take place within 30 days, then later postponed on 11/22/2006 for another 60 days.
>
> Meanwhile, the sculptor's daughter (…) made clear her wish to obtain sponsorship to install the sculptures at the location indicated by the municipal government, but in accordance with a design she herself suggested.
>
> A year and five months have elapsed since that removal decision, and there has been no word of the granting of that sponsorship. To the contrary, the State Secretariat of Culture has disclosed the existence of an "impasse."
>
> She nonetheless has made it known she favors immediate transfer, pursuant to that judgment on 03/07/2008, along the lines proposed by the City, with the proviso that the installation ought to be done, if possible, as she proposed, that is, as outlined by her engineer (…), in Art Deco style (folios 5092-5121).
>
> There is no justification for further delay of free public access to these beautiful creations by the renowned sculptor Galileo Emendabili on account of a disagreement over the base upon which these works of art are to be mounted.
>
> The reader should be aware no opposition was encountered while these works of art by sculptor Galileo Emendabili stood abandoned behind closed doors, deteriorating in a private warehouse.
>
> Thus, let the word go forth to the State Secretariat of Culture, to the Department of Historic Patrimony and to the Subprefecture of the Diocese that existing resources be allocated for immediate transfer of the aforesaid sculptures to the indicated locale, in order to provide free and general public access, with such transportation to be handled so as to not damage the artworks but rather, honor the requirement of protection for those pieces. If this is forthcoming, the restoration of those sculptures should be accomplished in very little time.
>
> Without prejudice to this measure, the artist's daughter may continue to seek backing so that her petition may finally be granted, that is, the completion of her design, already approved by the public entity, and that she be permitted to supervise the transfer of the statues.
> (…)
> Serve notice to the Office of the Federal Prosecutor.
> São Paulo, March 10, 2008.
> FAUSTO MARTIN DE SANCTIS
> FEDERAL JUDGE

Transcribed here are the Minutes of the Meeting allowing the public exposition:

> On the 13th day of May of the year 2008, at 11:30 AM in the Hearings Room of the aforesaid Court, present were the Hon. Federal Judge, DR. FAUSTO MARTIN DE SANCTIS, along with the Adjunct Secretary for the State Secretariat of Culture, Mr. RONALDO BIANCHI, the Director of the Department of Historic Patrimony,

> Mr. WALTER PIRES, representative of the Secretariat of Boroughs, Mr. JOSÉ PAULO MORTARI, the architect for the Department of Historic Patrimony, Mrs. RAFAELA BERNARDES, State's Attorney, Counsel for the Culture Secretariat, Dr. JUSSARA DELFINO, and FIAMMETA EMENDABILI BARROS DE CARVALHOSA, and with regard to the sculptures [Goddesses of Engineering: Muse of Engineering and Muse of Sculpture], the following was decided BY COMMON ACCORD: a) Restoration and transportation—the Government of the State of São Paulo (State Secretariat of Culture), shall move forward within 90 days; b) Base to resemble the design presented by the daughter of sculptor GALILEO EMENDABILI and illumination—to be the responsibility of the São Paulo City Government, within 90 days. Nothing further, notice given to all in attendance.

After work was begun at the public park, it was determined that the Clerk of the Court be present for the photographic record, and the court was notified as to the absence of information under temporary protection so that the state's attorney's office motioned, and the court ordered, placement of specific plaques on both sides of the base, reading as follows: "Sculptures seized by order of the São Paulo Federal Court, Sixth Federal Criminal Court, in Record of Proceedings No. (…)."

One has to engage the public's interest, despite all the difficulties and bureaucracy surrounding the public service. Figure 7.1 shows the sculptures as they are currently—on display in a São Paulo public park.

Confiscation differs from pecuniary penalties because of the implicit perception that the violation determines the payment. But when assets are forfeited, the amount varies in accordance with the proceeds derived from criminal behavior. The greater the proceeds from crime, the larger the confiscation. Defendants in comfortable financial circumstances should be subject to forfeiture of assets not trivial to them; in other words, ill-gotten goods are taken in proportion to criminal behavior.

Pecuniary fines and confiscation are measures independent of one another, yet incorrectly distinguished by many jurists. Because they are calculated differently, they cannot be added together for purposes of establishing the penalty imposed, since that would reduce the penalty.

The system as a whole works best when confiscation is kept as one of the solutions among the several outcomes of sentencing.

The clear message sent by proceeding with such measures is that unlawful behavior is, in fact, prohibited.

In addition to criminal cases, there is also the possibility of administrative or civil confiscation. Financial Action Task Force Recommendation No. 04 makes it clear that no prior criminal conviction is required for the forfeiture of assets.

This is something that occurs frequently in the United States (actions *in rem*, that is, proceeding against the thing itself) whenever the property or its possession is related to criminal activity.[4] As these claims are framed, ownership or possession are considered illegal, in which case the interested party may intervene to prevent loss to the government. In such cases it is incumbent upon the government to prove beyond a reasonable doubt that the asset is actually subject to forfeiture, inasmuch as the thing and its possessor are both somehow connected to crime.[5]

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[4] Cf. United States v. Bajakajian, 524 U.S. 321, 330–331 (1998) and United States v. One-Sixth Share, 326 F.3d 36, 40 (1st Cir. 2003).

[5] 18 U.S.C. § 983 (c) (1) (3).

Fig. 7.1 Luís Carlos Paraná Square, São Paulo, Brazil. Artworks "Deusas da Engenharia: Musa da Engenharia e Musa da Escultura" (*Galileo Emendabili*) seized by the 6th Federal Criminal Court

In the case of fungible goods, such as cash, showing the connection between the asset and the crime is quite complicated. Thus, suppose that the Government wants to show that $100,000 is revenue from drugs, and the trafficker has the said $100,000 in an account, derived from that crime. If he were to spend $50,000 and has that same amount in another account, only in this case the money was legitimately earned, pursuant to U.S. law, that identical asset will be subject to forfeiture.[6]

In harmony with this, there is also the United Nations Conventions against Organized Crime [Art. 12(a)] and against Corruption (Article 46), which operate on the idea that the confiscation is indeed collectable, even in the event of the death of the accused or expiration of the statute of limitations.

According to Catherine McCaw, civil and criminal confiscations are not mutually exclusive. Were the government to file both actions, each on its own grounds, and lose one, this in no way precludes continuing to seek confiscation on the remaining action.[7]

The symbolism in the forfeiture of personal property is striking. People promptly perceive that the outcome is as upsetting, if not more so, when having to face, in addition to imprisonment, loss of the equivalent of the proceeds from crime.

Hence, confiscation has become a priority strategy in the fight against organized crime. However, inasmuch as criminal activity has become transnational, and criminal investments have increased incredibly outside of national boundaries, a vast network has emerged to make use of the proceeds of crime and has taken root in loopholes or legal hurdles in the way of crime-fighting efforts.

Criminals often work off of an interpretation established in case law. This is what justifies shoring up asset forfeiture even though the assets may have been transferred to some third party who nevertheless should have perceived that these were the proceeds of unlawful conduct, or had been transferred precisely to avoid confiscation (establishment of a good-faith third party).[8]

No burdens should be placed on police and state attorneys' efforts to temporarily freeze or solicit the freezing of assets liable to disappear if nothing is done, and all such measures are, to be sure, subject to consideration by the courts, nor is any such interference warranted when the assets are located abroad.

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[6] 18 U.S.C. § 984 (a) (2): Except as provided in subsection (b), any identical property found in the same place or account as the property involved in the offense that is the basis for the forfeiture shall be subject to forfeiture under this section. 18 U.S.C. § 984 (b): No action pursuant to this section to forfeit property not traceable directly to the offense that is the basis for the forfeiture may be commenced more than 1 year from the date of the offense.

[7] Catherine McCaw (in Asset Forfeiture as a Form of Punishment: A Case for Integrating Asset Forfeiture into Criminal Sentencing. 38 *American Journal of Criminal Law* 181, 2011, p. 195).

[8] See: Confiscation and Asset Recovery: Better Tools to Fight Crime. *States New Service,* Brussels, 03/12/12. www.lexis.com. Accessed May 26, 2012.

Governments should therefore allow the freezing, seizure, confiscation and repatriation of assets in order to facilitate the fight against organized crime, itself a global business, in such a manner as to force the criminals to change their ways.

Financial Action Task Force Recommendation No. 30 establishes the possibility of conducting freezing and seizure operations, even when commission of the antecedent crime may have occurred in another jurisdiction (country), and add to this the implementation of specialized multidisciplinary groups or task forces, thereby showing the importance of international cooperation to vitalize all necessary efforts to assist states in their mission to fight crime.

It is worth observing that there is a connection between art and terrorist practices: terrorists use art in an effort to tarnish the image of those who are targeted ("terror of image"). Professor Diane Apostolos-Cappadona examines the relationship between social, political and cultural confluences all fitting under the catch-all word "terrorism" in her course on terrorism and the art world. She covers a panoply of historical and contemporary examples of the meaning of the term terrorism, such as, for example, the decapitation of kings on the façade of Notre Dame Cathedral in Paris, looting of museums in Iraq, and the destruction of icons followed by the restoration of religious symbols in Russia.[9]

According to Fletcher Baldwin, Jr., in examining this ongoing fight against international money laundering, there are three dimensions involved: consistent policies between national and international efforts, an efficient legal and institutional apparatus, and close cooperation between the public and private sectors.[10]

For an effective and cohesive universal policy against money laundering, participation by and commitment of all States to international cooperation is imperative.

It has taken many years to establish international cooperation for the repatriation of objects of cultural heritage. For instance, if in 1816 a cultural work was outside its country of origin, there was little to be done—even if its whereabouts was common knowledge. Treasures thus remained in the hands of private owners. In those days, there were no local requirements to show good faith, nor international laws for the preservation of cultural heritage. Even provenance, a precaution against looting, was unknown. Then there was the difficulty of disseminating information back in the days before electronics, making it easy to acquire purloined or stolen pieces and sell them afterward.[11]

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[9] Statements obtained directly from the professor herself at a 4 PM meeting at Georgetown University on 04/19/2012, or www.georgetown.edu, accessed May 8, 2012.

[10] See *Fletcher Baldwin, Art Theft Perfecting The Art of Money Laundering.* (Jan. 2009 for the 7th Annual Hawaii International Conference on Arts & Humanities). An unpublished work, sent to the U.S. Library of Congress on 04/20/2012 by University of Florida College of Law Professor Emeritus Levin, by request of the author, pp. 47–48.

[11] Cf. Noah Charney (*The Mystic Lamb. The True Story of the World's Most Coveted Masterpiece*. New York: PublicAffairs, 1st ed., 2010, pp. 110–111).

Today, however, with legislative protection present at the national and international levels, added to the increased awareness of governments, there are ways for an owner or a nation to claim an item. Selling or loaning such an item without official approval would hardly be allowed.

Nowadays there are local due diligence or good faith requirements in place as a hedge against unlawful behavior. Absent that, the buyer of a work of art might be subject to liability for contributing to the further removal of the object from the victim (under a conscious avoidance doctrine or assumption of risk).

Due diligence means that both the buyer and the merchant must show that they have searched the official and unofficial lists of stolen items, and checked with the authorities to ensure that they are not gaining possession of any item that has an illegal origin. The buyer must show that the artwork was purchased in the honest belief that there was nothing suspicious going on.

In other words, the burden of proof is on the third party to show legitimate possession when the government alleges that the item was transferred to him in order to dodge confiscation, or in the belief that he would deliberately act without due caution. This is how repatriation has been accomplished.

Hence, confiscation and repatriation are two stages of legal proceedings in which the assets of criminals are forfeited on behalf of the victims, communities or governments. Central to this procedure is the decision that a given asset was acquired as the proceeds of unlawful conduct and may therefore be confiscated.

The first stage of repatriation is the tracking and identification of goods. This normally involves coordinated efforts on the part of prosecutors and government agencies (revenue authorities, the police and private collaborators). These efforts also require substantial expertise or skill in dealing with the financial transactions that are sometimes involved. These normally involve communication among the authorities. In the United States, for example, the Asset Recovery Office (ARO) in one state will surely provide another ARO with information as to the whereabouts of goods. But once these move into international jurisdictions, court orders are necessary to block or freeze them so that they may then be permanently confiscated. Those cases require cooperation with foreign authorities so that the items may return to their countries of origin.

7.1 International Legal Cooperation

International legal cooperation has been essential for shedding light on the activities of organized groups. It has enabled the blocking of goods and repatriation of assets which, invariably, rely on companies or institutions having their main offices in tax havens or elsewhere abroad.

One approach calls for the application of reciprocity, where governments cooperate with one another in the absence of some previous treaty or international agreement, acting through mutual commitments undertaken in dealing with a specific case.

The UN Convention against the Illegal Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 1988, Articles 6 and 7), Law No. 11343 dated 08/23/2006 (the Brazilian drug law, Article 65), the Extradition Treaty to which MERCOSUL Member States are party,[12] the UN Convention against Transnational Organized Crime (Palermo 2000, Articles 16–19), the UN Convention against Corruption (Mérida, 2003, Articles 44 and 46), the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg 1990, Articles 7–35), the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw 2005, Articles 15–45), Brazil's Money-Laundering Law (No. 9613, of 03/03/1998, Article 8, as amended by Law 12683 of 07/09/2012), and the Model Regulation promulgated by the Inter-American Drug Abuse Control Commission (CICAD/OAS, Article 20), all contain provisions for mutual reciprocity.

The Financial Action Task Force clearly emphasizes in its Recommendations the need to reinforce international cooperation through general exchange of information relating to suspicious transactions. There is the understanding that the various standards relating to the element of intent in criminal conduct should not affect the ability or the will of countries to cooperate on judicial matters. The Recommendations establish the possibility of freezing and seizure even where the antecedent crime was committed in some other jurisdiction (country), as well as the implementation of specialized multidisciplinary teams or task forces (Recommendation No. 30); international legal cooperation, pursuant to the UN Conventions of Vienna (international traffic, 1988), Palermo (transnational organized crime, 2000) and Mérida (corruption, 2003), by withdrawal of obstacles (Recommendation No. 36); direct mutual legal assistance toward a quick, constructive and effective solution (Recommendation No. 37); freezing and confiscation even where there is no prior conviction (Recommendation No. 38); extradition (Recommendation No. 39); and an attitude favoring the repression of antecedent crimes, money laundering and terrorism financing (Recommendation No. 40).

International cooperation, however, requires more than just legal cooperation. It also requires so-called administrative cooperation, not contingent upon indictments. In the latter case, all communication occurs through intelligence channels. Information is exchanged by the Financial Intelligence Units and by direct cooperation between Financial Intelligence Units, the Attorneys General Offices and police authorities, in many countries.

[12] They specifically address International Legal Cooperation and one conclusion arrived at in Rio de Janeiro on 12/10/1998 was promulgated in Brazil through Legislative Decree No. 605 of 09/11/2003, which became effective internationally on 01/01/2004 as a result of the Treaty of Asunción, creating the South American common market, MERCOSUL (signed 03/26/1991).

As Patrícia Núñez Weber explains[13]:

> International administrative cooperation is in the strictest sense not tied to any criminal demands or occurrences, but aimed at technological improvement, exchange of information, creation and maintenance of databases, and the sharing of strategies among the agencies involved. Yet the term is also used to designate cooperation among administrative authorities quite apart from court orders.

This brings us to the possibility of direct exchanges of information through the aforementioned intelligence channels. Most of the information would originate from legal cooperation, under the aegis of the Judicial Branch, most notably in cases that require measures such as seizure and lifting of bank or tax record secrecy, that is, whenever a court order is needed.

Brazil's basic institutions for judicial cooperation on criminal matters may be summed up as follows: extradition, transfer of convicts, certification of a foreign criminal sentence, letters rogatory and direct assistance. These latter two are intrinsically bound up with investigations and information on criminal activity, and for this reason are given greater weight here.

International legal cooperation, generally speaking, may be viewed as active or passive, depending on the relative position of each of the states involved. It is active if the requesting state formulates a petition that a measure be taken and passive when a requested State receives a request for cooperation.

The cooperation may, in addition, be direct or indirect. In the latter case, it is intrinsically related to the *prima facie* evaluation, as in the case of letters rogatory transmitted to Brazil. As for the direct form, this comes about "when the Court of Examination judge is fully apprised."[14]

The letter rogatory is the procedural instrument through which the legal authorities in one country request of another the enforcement of an order issued by the judicial branch of the requesting State.

Brazil's Federal Constitution of 10/05/1988 provides, in Article 105, Subsection I(i) that in order for a letter rogatory transmitted to Brazil to be executed, the Superior Court of Justice must conduct a *prima facie* evaluation before issuing an *exequatur*. After this authorization is given, federal judges would then have jurisdiction to assess and pass on enforcement of the letter rogatory, as set forth in Article 109, Subsection X of the Brazilian Constitution.

The *exequatur* is no more than the authorization given by the Superior Court of Justice to allow within Brazil the enforcement of police inquiries or procedural acts requested by the foreign legal authority.

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[13] *Apud* Carla Veríssimo De Carli (Org.). *Lavagem de dinheiro: prevenção e controle penal.* Porto Alegre: Verbo Jurídico, 2011, p. 589.

[14] Cf. Virgínia Charpinel Junges Cestri and José Antonio Dias Toffoli (in *Mecanismos de Cooperação Jurídica Internacional no Brasil*. Manual de Cooperação Jurídica Internacional e Recuperação de Ativos—Matéria Civil. Asset Recovery and the International Legal Cooperation Council Department, National Secretariat of Justice, Ministry of Justice. 2nd Ed. Brasília: 2009. p. 24).

Pursuant to Superior Court of Justice Resolution No. 09 of 05/04/2005, notably in its Articles 8 through 10, the *prima facie* evaluation must be conducted with the participation of the interested parties, as follows:

> Art. 8. The interested party shall be cited to answer the request for certification of a foreign sentence within 15 days, or summoned to impugn the letter rogatory.
>
> Sole paragraph. The measure requested through the letter rogatory may be set in motion without giving the interested party a hearing whenever such advance intimation could render the international cooperation ineffective.
>
> Art. 9. In the certification of a foreign sentence and in letters rogatory, the defense is only entitled to make a statement on the authenticity of the documents, intelligence underlying the decision, and observance of the requirements of this Resolution.
>
> § 1 Whenever certification of a foreign sentence is contested, suit shall be filed for judgment by the Special Court, and a Rapporteur appointed and responsible for all other acts relating to and informing the proceedings.
>
> § 2 In the event of impugnment of letters rogatory containing judgments, proceedings may, by order of the President, be held over for judgment by the Special Court.
>
> § 3 Should respondent abscond or be incapable, a special curator shall be named and personally served notice.
>
> Art. 10. The Office of the Public Prosecutor shall have 10 days in which to examine the record in the letters rogatory and enrollment of foreign judgments, and may also impugn these.

Bear in mind that incoming letters rogatory are received in Brazil through diplomatic channels, most notably through the Ministry of External Relations, and all active letters rogatory in Brazil lack the *exequatur.*

The bureaucratic side of processing letters rogatory has led to an increase in another mode of international cooperation: direct assistance. This allows us to get around the sending and procedural delays of letters rogatory, for it allows direct transmission. It has emerged as virtually the most effective alternative in the fight against international crime.

Through this form of cooperation, authorities other than the judiciary may avail themselves of international requests, and the procedures are much simpler than those involving traditional letters rogatory, and even dispense with the *prima facie* evaluation in Brazil.

This brings us back to the observations of Patrícia Núñez Weber, who assures us that[15]:

> Direct assistance is cooperation offered by national authorities and likely to satisfy the foreign request, in the performance of their legal duties as though it were a national procedure, when in fact it arises from a request by a foreign State channeled through Brazil's central authority.
>
> (…)
>
> Currently, the most widespread understanding is that direct assistance presupposes the existence of a treaty or agreement with the requesting State, or a promise of reciprocity. Our feeling is that that restriction arises from the relatively recent arrival of the institution on the international scene, compared to letters rogatory.

[15] *Apud* Carla Veríssimo De Carli. *Lavagem de dinheiro: prevenção e controle penal.* Porto Alegre: Verbo Jurídico, 2011, pp. 593 and 602.

In direct assistance, once the request is received by the central authority and forwarded to the judiciary authorities, the judge may then examine the facts presented by the foreign nation on their merits, much as in domestic proceedings to which current procedural rules would apply. This is something that does not happen with letters rogatory.

Requests for direct assistance are generally couched in terms of international treaties or agreements. One approach is through the application of reciprocity, according to which governments may cooperate with one another in the absence of some previous treaty or international agreement, acting through mutual commitments undertaken in dealing with a specific case.

For example, José Antônio Dias Toffoli and Virgínia Charpinel Junger Cestari,[16] explain that:

> Requests for direct assistance are, as a rule, couched in terms of bilateral treaties or agreements (the so-called Mutual Legal Assistance Treaties or MLATs). Absent any express understanding between the two States, assistance can still be provided based on the requester's assurance of reciprocity. This allows cooperation in many different tax, labor or pensions-related areas. Still, the treaties most frequently encountered in an international setting have to do with criminal and civil subject matter.

How to determine which acts require a granting of *exequatur* (in passive cooperation) and which require issuance of letters rogatory (for active cooperation) for their proper performance is a question that calls for a comprehensive analysis.

The Superior Court of Justice did shed some light on how it handles cases of international legal cooperation in its Resolution No. 9 of 05/04/2005, specifically in Article 7, which allows us to make out that the direct assistance mode of cooperation, where it calls for judicial consideration, should be brought to the judicial notice of the court of first instance.

Specifically:

> Article 7. Letters rogatory may request decisional acts or non-decisional acts.
>
> Sole paragraph. Requests for international cooperation which do not involve prima-facie evaluation by the Superior Court of Justice shall – even if classified as letters rogatory – be forwarded or returned to the Ministry of Justice so that all necessary steps may be taken to comply with them by direct assistance.

One can infer, in this provision, that in these cases the granting of *exequatur* may be waived, allowing the central authority to take all appropriate action to provide direct assistance.

The First Panel of the Supreme Federal Court has made a declarative statement as to the need for a granting of *exequatur* by the Superior Court of Justice for acting on indictments issued by foreign judicial authorities, as follows:

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[16] In *Mecanismos de Cooperação Jurídica Internacional no Brasil*. Manual de Cooperação Jurídica Internacional e Recuperação de Ativos—Matéria Civil. Asset Recovery and the International Legal Cooperation Council Department, National Secretariat of Justice, Ministry of Justice. 2nd. ed. Brasília: 2009, p. 27.

> Engaging in law enforcement actions within Brazilian national territory to enforce orders issued by foreign judicial authorities presupposes the transmission of a letter rogatory, for purposes of enforcement, to be passed on by the Superior Court of Justice, there being no proper way to bring about international cooperation at the cost of relegating to a lesser role a formality essential to the validity of the acts to be performed.
>
> (STF – Habeas Corpus No. 85.588/RJ, Rapporteur: Minister Marco Aurélio. First Panel. Daily Judicial Gazette, 12/15/2006, p. 95.)

Afterward, the Special Court of the Superior Court of Justice was able to have its say in the matter, in Complaint No. 2645/SP, reported by Minister Teori Albino Zavascki, it having been shown that the letters rogatory procedure ought only be followed for requests of a jurisdictional nature formulated by the foreign authority, and that all other solicitations ought to comply with the requirements set by international regulatory bodies.

At an opportune time, amidst allegations of usurpation of jurisdiction of the Superior Court of Justice for the granting of *exequatur* for letters rogatory, the Superior Court of Justice authorized, at the request of the Office of the Federal Prosecutor, the shipment of the hard drive, confiscated from the computer in possession of a defendant, to the Russian Federation's Attorney General's Office, in response to a request transmitted by the Russian Assistant Attorney General.[17]

[17] The Office of the Federal Prosecutor, in making the complaint, sought to assemble an exhibit with all documents (in Russian and in English) and forward it to the Attorney General for the Russian Federation, along with corresponding official translations (pages 163–165). In the opening statement of the acknowledgment of receipt of that exhibit (pages 167-168), this Court ordered that Attachments be compiled to include all documents alluded to, and they were named as follows: 'Attachments VII and VIII.' The following was granted on an item 'c' of the decision set forth on pages 169–214, the petition likewise formulated by the Attorney General's Office for forwarding copy of the hard drives to the Office of the Attorney General of the Russian Federation, as requested by that Authority. The devices in question were at the Federal Police Intelligence Bureau in Brasilia for forensic analysis and were apprehended in May 2006 in the possession of Boris Abramovich Berezovisk, pursuant to a search warrant, as well as a bench warrant naming the suspect, who was then taken to the Office of the Attorney General in this capital city to depose on facts being investigated in Brazil and theoretically related to the racketeering offense (Art. 288 of the Criminal Code), given the suspect's supposed association with other persons for the constant and ongoing purpose of engaging in illegal money laundering, by exploiting the partnership entered into between MSI and Sport Club Corinthians of São Paulo. At the time of the seizure, consideration was also given to the fact that the suspect had entered Brazil using the name Platon Ilyich Yelenin, and was also included in the Red Notice issued by Interpol requesting that the individual be located and arrested for extradition, even though at the time the warrant had not been through proceedings in Brazil for purposes of certification by the Supreme Federal Court (pages 932–934, 1052, 1057–1060, 1061, 1063–1064, 1065–1072, 1082–1084, 1092, 1094 and 1098 of record No. 2006.61.81.005118-0/Attachment VII, admitted in connection with the Criminal Action). The copies in question were forwarded through official communiqué No. 1040/2007-rba dated 09/28/2007 to his Excellency, Russia's Ambassador to Brazil Wladimir Turdenev, for forwarding to the Attorney General's Office in Russia (see page 75 of the Addendum compiled pursuant to Order No. 18/2005 of this Court). The Russian Federation, like Brazil, is a signatory to the UN Convention against Corruption known as the Mérida Convention, after the Mexican city in which it was signed. It has been signed by 150 countries, 95

(Footnote 17 continued)

of which enforce it internationally, foremost among them being Argentina, Australia, Spain, the United States, China, France and the United Kingdom. The procedure adopted by this Court in response to the request formulated by the Ministry follows the recommendations set forth in that Convention, notably in the chapter relating to International Cooperation in its Articles 43, and 46, among others, and by the 2000 UN Convention at Palermo on transnational organized crime, in particular in its Articles 18, 27 and 28. And this was accomplished with no deviation from Brazil's own legal proceedings, inasmuch as it also followed the form outlined in Article 7 of Resolution No. 09 of 05/04/2005 by the President of this Respectable Court, to wit: 'Art. 7. Letters rogatory may request decisional acts or non-decisional acts. Sole paragraph. Requests for international cooperation which do not involve *prima facie* evaluation by the Superior Court of Justice shall—even if classified as letters rogatory—be forwarded or returned to the Ministry of Justice so that all necessary steps may be taken to comply with them by direct assistance' (emphasis ours). Direct assistance, absent better options, follows from the application of the rules of procedure of the Mérida and Palermo Conventions as from the measure requested by the Office of the Federal Prosecutor, to say nothing of the policy of reciprocity which, in the absence of specific rules, underlies international relations. This is why it was unnecessary to raise the issue of the granting of exequatur as set forth in Article 105, subsection I, clause 'i' of the Federal Constitution. In fact, the Palermo Convention stipulates the duty of mutual legal assistance between the Parties when the Requesting State has reasonable grounds to suspect a transnational infraction, and hence the duty to provide all legal cooperation (Article 18, items 1 and 2), to which is added the recommendation that special investigative techniques be used, such as electronic eavesdropping (Article 20, item 1). It further provides an interchange of information to keep the State Parties apprised of trends in organized crime on their territory, of the circumstances in which it operates and of professional groups and technologies involved, and may, to that end, be shared among them (Article 28, items 1 and 2). Furthermore, and in particular, this cooperation is aimed toward detecting and tracking the proceeds of crime, transfer methods, and the dissimulating or disguising of these proceeds in the "fight against money laundering and other financial crimes" (Article 29, item 1, 'd'). The international treaty in question, now duly integrated as the law of the land, provides a basis for the investigation, but in addition urges the State Parties to effectively repress transnational criminal organizations. The UN Conventions against Organized Transnational Crime and against Corruption, it can actually be said, amount to an attempt by all sovereign states to eliminate groups rooted in a certain criminal milieu which systematically resorts to obstruction of justice—in addition to engaging in criminal behavior which affronts the rule of law, and often operates by what amounts to intimidation. What we have here are global legal guidelines. There has been no news yet of forensic analysis of the hard drives, but please note that documented proof by examination was already on the record before this Court, for it was produced on account of the search warrant issued by the Brazilian Federal Justice System in May 2006 in record of proceedings under No. 2006.61.81.005118-0/Attachment VII, as we have seen, and THIS DID NOT RESULT from any request submitted by a foreign authority, so that the *prima facie* evaluation was never an issue. This is simply a case of sharing legitimate evidence produced here. In the Complaint lodged before this Honorable Court, Plaintiff also holds that the official foreign documents were neither translated into Portuguese nor stamped with diplomatic or consular certification required to make them stand up in any court of law, and further postulates renewed application of Code of Criminal Procedure Articles 780 et. seq. [Jurisdictional Relations with Foreign Authorities], as previously submitted on occasion of filing for Habeas Corpus No. 2007.03.00.091069-0. No such argumentation would apply absent additional information, at the heart of a Complaint expostulating only about jurisdiction. In any case, in the aforementioned writ, in proceedings before the Second Panel of the Hon. Regional Federal Court for Region 3, the petition was not granted by the Eminent Rapporteuse for the Habeas Corpus, Her Excellency, Federal High Court Justice Cecília Mello. The foreign language document in question is accompanied by a certified translation, in full compliance with Code of Criminal Procedure Article 236. Hence no taint of irregularity or affront to the law may be ascribed to the admission of those documents, for what we have is a true copy duly forwarded by an agency of the Russian Government. This Court also understands that the provisions contained in Articles 780 et seq. of the Code of Criminal Procedure do not apply as claimed in the

By the understanding set forth in the decision, the constitutional requirement contained in Article 105, subsection I, item "i," contains no grant of exclusivity to the Superior Court of Justice to intermediate all international legal cooperation. There must be consideration of its operation in relations among the various judiciary agencies, and, in addition, the various forms of cooperation established in international treaties.

Hence the request for legal cooperation formulated by a foreign authority (in this case, the Office of the Attorney General for the Russian Federation, regarding the sharing of evidence during an ongoing investigation and transmitted to its Brazilian counterpart, Brazil's Office of the Attorney General), shall not be contingent upon issuance of letters rogatory by Russian judicial authorities, thereby obviating the need for an *exequatur* from the Superior Court of Justice.

For a clearer understanding, I call attention to an excerpt from the vote cast by the eminent Rapporteur, Teori Albino Zavascki:

> The international system of legal cooperation clearly does not exclude cooperative measures among agents of the judiciary brought about through the use of letters rogatory, within the scope of proceedings already within the jurisdictional sphere. But in addition to these, as pointed out, mutual cooperation encompasses a host of other provisions which may even, where applicable, give rise to future criminal prosecutions. Yet insofar as their scope is restricted to prevention and investigation, they require for their performance no prior approval or judicial intermediation. There is no such requirement in Brazil's domestic law, nor is there any reason for such a requirement in the area of international law.
>
> In Brazilian law, as in most countries, the prevention and investigation of crimes, not jurisdictional by nature, is not the purview of the Judicial Branch, but rather, of police authorities or the Office of the Public Prosecutor, under the Executive Branch.
>
> Indeed, the nature of jurisdictional questions – which as a rule are submitted to formal, public, adversarial proceedings – is neither proper nor compatible with typical police matters, such as these now under consideration, involving prevention and criminal investigation. In our system, only a few such measures require prior judicial approval,

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(Footnote 17 continued)

Complaint, for the instant case does not involve transmittal of letters rogatory. The reasons set forth in the documents comprising the record are beyond reproach, inasmuch as all provisions of the Code of Criminal Procedure which govern the matter have been fully complied with. Observe that the Claimant, in the reasons for filing the aforesaid writ acknowledged that the "… Code of Criminal Procedure contained no specific provision on admissibility of foreign documents intended as evidence in criminal proceedings…" that only being expressly required for letters rogatory (pages 952–953). The admissibility of the foreign documents is in order, in no small part for having been obtained from a foreign authority free of any imputations of illegal behavior given the absolute lack of any grounds for indicating such a thing. There is no denying that international recommendations now seek to simplify procedures and international cooperation, provided there is not, as in this case, any reason to question authenticity, and also provided there is no infringement of our national legal system. Even absent all of the above, one could still argue that the Claimant is a Russian citizen and has resided in the United Kingdom for a considerable time, circumstances that warrant the conclusion that both Counsel and Claimant ought to be familiar with the probative material. Indeed, the aforementioned Article 236 of procedural law does not even require the translation where it is patently unnecessary. Although this Court has been unable to discern any irregularity in the documentation forwarded by the Russian Authorities, it has been previously noted that if the Defense so wishes, the Defense could produce a new translation of the documents so as to clear up its misgivings. And so it did, inasmuch as it requested the translation into Portuguese of all documents contained in folios 08, 11 and 12 of Attachment No. 12, which request was met by the order issued on 11/14/2007 (pages 1392 and 1400–1414).

such as in the case of those requiring entry into an individual home, or wiretaps (CF, Art. 5, XI and XII).

Aside from these cases, there is no reason at all – even in the case of investigations or preventive measures undertaken during international cooperation efforts – to impose jurisdictional boundaries on these activities, thereby rendering them subject to intermediation or advance *prima facie* evaluation by agencies of the corresponding Judicial Branch. Because it takes account of such circumstances, the international legal cooperation system, which includes Brazil, reflects and honors the system of duties and assignments already in place in domestic law, and strictly and fully preserves all of the constitutional duties of the Judicial Branch, including those having to do with jurisdictional considerations affecting the standing of the agencies and authorities involved to take action.

(Rcl. 2.645/SP, Rapporteur Minister TEORI ALBINO ZAVASCKI, Special Court, decided on 11/18/2009, Gazetted 12/16/2009).

Moreover, the subject of actual standing to issue a letter rogatory to Brazil was quite recently raised by the First Supreme Federal Court Panel in the Clarification Requests on *habeas corpus* Declaration No. 87.759/DF, reported by Minister Marco Aurélio, in which the Clarification Requests were honored in order to state that the Italian Attorney General's Office did indeed have standing to issue them:

APPEALS REQUESTING CLARIFICATION – OMISSION. Once an omission was found in the judgment, faced with the treaty of cooperation on criminal matters entered into between Brazil and the Republic of Italy – as part of its national legal process – honoring the appeals for clarification would follow, albeit with no power to bring about change, it being recognized that the Italian Attorney General's office does have standing to issue letters rogatory.

(HC 87759 ED, Rapporteur(euse): Min. MARCO AURÉLIO, First Panel, decided 12/13/2011, UNANIMOUS PANEL RULING DJe-053 RELEASED 03/13/2012, Gazetted 03/14/2012).

Initially, at the time of the granting of *habeas corpus*, it was understood that the letter rogatory had not been issued by a judicial authority, which would have violated the provisions of Article 202, subsection I of the Code of Civil Procedure, which regulates the *indication of courts of origin*, so that nationally cooperation through letters rogatory transmitted by a foreign Attorney General's office would cease to exist.[18] In accordance with the precedent set by the Supreme Federal Court in examining the Explanatory Restatement of Decisions, account was taken of Article 784 of the Code of Criminal Procedure, which makes provisions concerning

[18] However, in examining the appeals requesting clarification, the Rapporteur noted that: There was warning of a defect, at the beginning of the voting, in that it had not been issued by a judicial authority per se, which brought up the provisions of Article 202, subsection I of the Code of Civil Procedure. It was deemed apropos to remark on not having taken proper account of the fact that Article 784 of the Code of Criminal Procedure makes reference to letters rogatory issued not from judicial authorities, but from competent foreign authorities. Moreover, consonant with item 1 of Article 1 of the Treaty on Legal Cooperation in Criminal Matters entered into between Brazil and the Republic of Italy—promulgated through Ministerial Decree No. 862 of July 9, 1993—"each of the parties shall, on request, provide to the other party, in the form set forth in this Treaty, ample cooperation for criminal proceedings conducted by the judicial authorities of the requesting party." The reference to judicial authorities by the requesting party suggests, initially, agencies clothed in judicial appointments, as in the Brazilian system. However, in Italy, the

competent foreign authorities, inasmuch as it allows a broader interpretation than *judicial authority* for purposes of transmitting letters rogatory to Brazil, in that it encompasses agencies with judicial powers.

Legislative Decree No. 501 of March 21, 2012,[19] published in the Federal Official Gazette on 03/23/2012, made provisions regarding the procedures for handling letters rogatory and requests for direct assistance, this after the Ministry

(Footnote 18 continued)

Attorney General's office is part of the judicial system, per Articles 107, 108 and 112 under the title headed "The Courts" (Italian Constitution, Part II, Title IV). The judicial branch is organized institutionally in a linear fashion, within that same Branch, its duties involving judgment or work traditionally included in the area reserved to the Office of the Public Prosecutor. Briefly, it is a blending of functions, all of them subject to the Superior Council of the Courts. As pointed out by best doctrine, the Attorney General's Office in Italy is an agency for the administration of Justice, and includes all measures that may be taken there for purposes of criminal investigations. See "O Ministério Público na Investigação Penal Preliminar," by Marcos Kac. Hence, the Supreme Court of Justice, in Letter Rogatory No. 998/IT, through a unanimous panel decision authored by Minister Humberto Gomes de Barros, concluded: "The Attorney General's Office together with the Tribunal of Parma does have standing to request Brazilian cooperation in investigations."

[19] Art. 1—This Decree establishes procedures for letters rogatory and both active and passive requests for direct assistance in criminal and civil matters in the absence of any bilateral or multilateral international legal cooperation agreement, and applies only subsidiarily to this case. Art. 2—The following considerations apply for purposes of this Decree: I. Request for passive direct assistance, the request for international legal cooperation which does not require a prima-facie evaluation by the Superior Court of Justice, pursuant to Art. 7, of Superior Court of Justice Resolution No. 9 of May 4, 2005; and II. Passive letter rogatory, a request for international legal cooperation which does require a prima-facie evaluation by the Superior Court of Justice. Sole Paragraph. Definition of the request for active direct support and an active letter rogatory is in accordance with the domestic legislation of the Requested State. Art. 3—In all cases in which the request for passive international legal cooperation does not entail the granting of exequatur by the Superior Court of Justice, and may be handled through administrative channels, not requiring intervention by the Judicial Branch, the Ministry of Justice shall, together with the competent administrative authorities, see to its granting. Art. 4—The Ministry of External Relations shall forward to the Ministry of Justice all requests for passive international legal cooperation, on criminal and civil matters, transmitted through diplomatic channels. Art. 5—In the absence of bilateral or multilateral international legal cooperation agreements, the Ministry of Justice shall forward to the Ministry of External Relations all active requests for international legal cooperation on criminal and civil matters, to be handled through diplomatic channels. Art. 6—The Ministry of Justice shall: I. Provide attachments and opinions to and coordinate the granting of requests for international legal cooperation in criminal and civil matters, by forwarding these to the competent judicial or administrative authority; II. Issue and publish understandings on international legal cooperation within the scope of its powers. Art. 7—Letters rogatory must include: I. Identification of the requesting and requested courts; II. The address of the requesting judge; III. A detailed description of the measure requested; IV. The purpose to be achieved by the requested measure; V. Complete name and address of the person to be cited, notified, served a summons or questioned in the jurisdiction of the requested court, and, if possible, full particulars, specifying the mother's name, date of birth, place of birth and passport number; VI. Closure, with the judge's signature; and VII. Any other information which might be of use to the requested court for purposes of facilitating compliance with the letter rogatory. § 1—Should a requested measure consist of interrogation of the party or questioning of a witness,

of Justice and Ministry of External Relations modernized their rules for handling requests for international cooperation, always to make the procedure move faster. This decree established that whenever the request can be granted administratively, that is, with no intervention from the judiciary, action on the part of the Superior

(Footnote 19 continued)

it is recommended, under penalty of inability to comply with the measure, that the letters rogatory further include: (a) The text of the questions to be asked by the requested court; (b) Setting up a hearing, beginning with the transmittal of the letter rogatory to the Ministry of Justice, with a lead-time of at least: (i) Ninety (90) days, for criminal matters; and (ii) One hundred eighty (180) days, for civil matters. § 2—In the event of civil cooperation, letters rogatory must also include, where appropriate, the full name and address of the person responsible, at the addressee end, for payment of court costs and procedural fees arising from performance of the letter rogatory in the requested country, except for those taken from actions: I. Handled under the auspices of free justice; II. For the sending of foodstuffs abroad, for countries bound by the New York Convention, promulgated in Brazil by Ministerial Decree No. 56826 of September 2, 1965, pursuant to Article 26 of Law No. 5478 of July 25, 1968; III. Coming under the jurisdiction of child and adolescent courts, pursuant to Law No. 8069 of June 13, 1990. Art. 8—Letters rogatory must be accompanied by the following documents: I. Initial petition, criminal information or complaint, depending on the nature of the matter; II. Background documents; III. Court order for its transmittal; IV. Original copy of the official or certified translation of the letter rogatory and all accompanying documents; V. Two original copies of the letter rogatory, of the translation and all accompanying documents; and VI. Other documents or exhibits considered indispensable by the requesting court, in accordance with the nature of the action. Sole paragraph. Where the purpose of the letter rogatory is forensic examination of a document, it is recommended that the original be sent to the requested court, the copy remaining in the record of the requesting court, otherwise the measure may not achieve fruition. Art. 9—All petitions for direct assistance must include: I. Indication of provision contained in an international bilateral or multilateral legal cooperation agreement or reciprocity agreement; II. Indication of the requesting authority; III. Indication of Central Authorities in both requesting and requested States; IV. Summary containing the number(s) of proceedings or lawsuits in their requesting State, to serve as the basis for the request for cooperation; V. Complete and accurate particulars on all persons to whom the request makes reference (name, last name, nationality, birthplace, address, birth date and, wherever possible, mother's name, profession and passport number); VI. A clear, objective, concise and complete narrative couched in the actual verbiage of the request for international legal cooperation, of the events which gave rise to it, to include: (a) Place and date; (b) Causal nexus between the ongoing proceedings, all those involved, and measures solicited in the request for assistance; and (c) All documentation attached to the request. VII. References to and full transcripts of all applicable laws and regulations, especially, on criminal matters, criminal laws; VIII. Detailed description of the assistance requested, indicating: (a) In cases of tracing or freezing of bank accounts, the account number, the name of the bank, the bank location and the endpoints of the desired timeframe, along with specific instructions as to how the documents to be obtained shall be forwarded (physical or electronic media); (b) In cases requiring notice, citation or summonses, full particulars on the person to be served notice, cited or issued a summons, and the corresponding address; (c) In cases of interrogations and questioning, the list of questions to be asked. IX. Description of the purpose of the request for international legal cooperation; X. Any other information which might prove useful to the requested authority, for purposes of facilitating the granting of the request for international legal cooperation; XI. Other information solicited by the requested State; and XII. Signature of the requesting authority, location and date. Art. 10—This Decree revokes Foreign Office/Justice Ministry (MRE/MJ) Interministerial Order No. 26 of August 14, 1990, and the MRE/MJ Interministerial Order of September 16, 2003, published in the Federal Official Gazette on September 19, 2003. Art. 11—This Order shall take effect as of the date of its publication.

Court of Justice may be dispensed with, and the Ministry of Justice shall see to the performance by the competent administrative authorities, as set forth in Article 3.

The institution of Central Authority came about to speed up and facilitate cooperation between countries. As the name itself suggests, the primary role of the Central Authority is to function as a centralizing agency, with the focus on cooperation—requests and investigations alike—whether coming from abroad or transmitted from Brazil. All letters rogatory and requests for legal assistance, whatever their purpose, shall be handled through the intermediation of central authorities.

In Brazil, as in most countries, the Central Authority lies in the Executive Branch,[20] given that it typically represents the State in international relations. The Central Authority is an idea espoused in the Hague Conventions and international conventions on public international law, arising from the need to have an agency in each country to regulate the administrative procedures for International Legal Cooperation.

Its creation was imperative, given the increase in volume and complexity of mechanisms for international cooperation. It imparts uniformity of performance, standardizes all procedures and provides the necessary specialization for handling such matters and avoiding duplication and waste in the requests.

There are countless advantages to the institution of a single Central Authority: specialization, speed, efficiency, publicity and affordability of proceedings. It is argued that placing Central Authority in the Executive Branch will also ensure neutrality, transparency and due process, inasmuch as Executive Branch agencies are subject to oversight by the Office of the Public Prosecutor, their acts subject to review by the Judicial Branch.[21]

It is important to mention that the Central Authority is by no means a *sine qua non* for making international cooperation feasible. Cooperation may take place directly between the competent authorities. However, the institution of a Central Authority brings these authorities closer together to eliminate obstacles in the way of rapid realization of shared national interests. Indeed, there is no point to demanding the establishment of a Central Authority unless it is committed to achieving efficiency, simplification and necessary speed of information and action.

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[20] According to Goal No. 02 of the National Strategy for the Fight Against Money Laundering Report (ENCLA, now the National Strategy for the Fight Against Corruption and Money Laundering) of 2004, requests for active international cooperation from the Judicial Branch or the Office of the Public Prosecutor and federal and state police authorities, regarding authorization for direct cooperation on operations (which require an international reciprocity agreement), all go through the Ministry of Justice Asset Recovery and International Legal Cooperation Council Department (DRCI) (Art. 13, IV, of Decree No. 4991 of February 18, 2004).

[21] The great challenge at this point is to further popularize the benefits of adopting a single Central Authority for all International Legal Cooperation issues, and broadening the horizon of this institution. With the assistance of the policies of Brazil's Justice Ministry, through the National Anti-Money Laundering Qualification and Training Plan (PNLD), the idea is being spread that, even in the absence of an agreement, it is possible to have requests for active or passive cooperation routed through the Central Authority.

7.2 Freezing, Confiscating and Repatriating Assets

Legal assistance has allowed the freezing and repatriation of assets, but often requires an affidavit—an internally consistent sworn statement—to enable such measures as freezing assets or bank accounts.[22]

Freezing and seizure operations require a hard sell. It is not enough to simply attach a court order. At times one has to turn over convincing documents to establish a link between assets or a bank account and illegal behavior. It also helps if the goods in question are the proceeds from criminal activity abroad or at least flow (by action or omission) from corrupt practices.

Consider the impact on U.S. asset forfeiture legislation of the case in which Brazil filed for freezing of assets belonging to a Brazilian defendant, and for keeping those assets in the United States. At issue was whether, based on 28 U.S.C. § 2467 (d) (3) Enforcement of Foreign Judgment,[23] foreign assets may only be frozen after a foreign court has definitively ruled in favor of forfeiture, or if it may be done before any final decision on confiscation has been rendered. The United States Court of Appeals for the District of Columbia Circuit, on review of two decisions by the Court in March and April 2009, decided that a final decision by Brazil regarding confiscation was required, according to its interpretation of 28 U.S.C. § 2467 (d).[24] Following this decision, the U.S. Department of Justice requested and obtained from Congress a resolution of the problem because, if upheld and followed, the decision would have compromised international cooperation efforts with other countries.

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[22] There is a bill in Brazil (No. 1982, dated September 16, 2003), written by national Congressman Eduardo Valverde, to regulate International Legal Assistance on Criminal Matters, irrespective of the transmittal of letters rogatory. It would provide for temporary administrative freezing of proceeds of crime undergoing laundering. It also provides a *Council on International Legal Assistance*, empowered to formulate directives and serve as a permanent clearinghouse for information among the various government agencies it represents (the Federal Courts, Office of the Federal Prosecutor, Ministry of External Relations, Office of the Attorney General, Brazil's Federal Revenue Secretariat, the Central Bank, the Council for Financial Activities Control (COAF), the Federal Police Department, and the Office of the Comptroller-General) to offer guidance to Brazilian authorities needing to secure international cooperation.

[23] 28 U.S.C. § 2467 (*d*) *Entry and Enforcement of Judgment.*— (*1*) *In general.— The district court shall enter such orders as may be necessary to enforce the judgment on behalf of the foreign nation unless the court finds that*— (*A*) *the judgment was rendered under a system that provides tribunals or procedures incompatible with the requirements of due process of law;* (*B*) *the foreign court lacked personal jurisdiction over the defendant;* (*C*) *the foreign court lacked jurisdiction over the subject matter;* (*D*) *the foreign nation did not take steps, in accordance with the principles of due process, to give notice of the proceedings to a person with an interest in the property of the proceedings in sufficient time to enable him or her to defend; or* (*E*) *the judgment was obtained by fraud.*

[24] United States v. Opportunity Fund and Tiger Eye Investments, Ltd. No. 1:08-mc-0087-JDB, United States District Court for the District of Columbia. Decided 07/16/2012. http://www.cadc.uscourts.gov/internet/opinions.nsf/1B9DC0B1D05DB6D5852578070070EC9C/$file/09-5065-1255619.pdf. Accessed June 14 2012.

The disposal of confiscated assets is provided for in the 1988 UN Vienna Convention against Illicit Traffic in Narcotic Drugs (Article 5, item 5, clause "b") and in the Convention at Palermo on Transnational Organized Crime (Article 30, item 2, clause "c"), and can stimulate cooperation among authorities in different countries.

By the principle of specialization, applicable to relations among states and, therefore, to international legal cooperation efforts, no information or documents obtained through legal assistance may be used with regard to crimes for which international cooperation is excluded on account of jurisdiction being regarded as an attribute of the state, for which we cite the example of Switzerland, with regard to exchange quota violations.[25]

Insistence on dual criminality, that is, the existence of criminal behavior in both of the jurisdictions involved in the request for legal assistance on criminal matters is, in principle, a common requirement in cooperation cases—with the proviso that the two criminal categories need not be exactly the same, but only similar. Indeed, the UN Convention on Corruption signed at Mérida makes it clear that "in matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both State Parties" (Article 43).

The rule cannot, however, be interpreted as an absolute. The Financial Action Task Force advocates international legal cooperation, pursuant to the UN Conventions of Vienna (international traffic, 1988), Palermo (transnational organized crime, 2000) and Mérida (corruption, 2003), by withdrawal of obstacles (Recommendation No. 36) and direct mutual assistance toward a quick, constructive and effective solution (Recommendation No. 37).

Yet not even the FATF gives the rule the proper crucial weight with regard to money laundering. Failure to honor the principle of *dual criminality*, which is no novelty in international public law, may prove devastating in future requests for cooperation, in specific cases, and completely bar new freezes or obtaining of evidence, among other diplomatic difficulties.

Brazil's Money-Laundering Law (Law No. 9613/1998, as amended by Law 12683/2012) does contain provisions on assets located abroad:

> Art. 8. The judge shall determine, given the existence of an international treaty or convention and by request of the competent foreign authority, measures to secure assets, securities or amounts proceeding from crimes described in Article 1, and committed abroad.
>
> § 1. All provisions contained in this article shall apply, irrespective of any treaty or international convention, whenever the government of the country whose authorities make the request promise reciprocity to Brazil.

[25] Pursuant to ENCLA 2005 Target No. 40, the Justice Ministry's Asset Recovery and International Legal Cooperation Council Department agreed to share *information on the need to keep within limitations on the use of documents obtained through International Legal Cooperation*, and reaffirmed the principle of specialization at the international level.

> § 2. Absent a treaty or convention, all goods, securities or amounts subject to security measures at the request of the competent foreign authority – or the proceeds from their alienation – shall be divided equally between the requesting States and Brazil, following proper provisions for injured or good-faith third parties.

With specific regard to the division of goods, as observed above, the UN Convention signed at Mérida (corruption) made no provisions; however, there was an understanding that there ought to be full restitution of assets to the injured-party-state in view of the legal assets affected (Articles 51–59).

Finally, one notes that with regard to seizure or freezing of assets, there are no obstacles in the way of their international application once the universal rule of reciprocity is in effect, and it is still possible to divide up the goods confiscated or seized, and consequently repatriate them, once the decision awarding forfeiture to the government becomes final.

It is extremely difficult to obtain repatriation of assets based only on an appealable decision, even if reciprocity is invoked.

The authorities of requested States usually wish to be informed regarding:

(a) Evidence that all owners, agents, curators or others involved with the articles in question are aware of issuance of the order that they be seized, and of its content, including a list of works;
(b) Evidence to show that the Brazilian seizure order was signed prior to the legal sale or transfer of the articles abroad;
(c) Proof of direct association between the artwork and fraud detected in Brazil that would demonstrate that its acquisition does indeed flow from criminal behavior;
(d) Unavailability of the assets (works of art) precisely because such a procedure is public knowledge and one might therefore infer that the interested parties, curators, art dealers and such had knowledge of the illegal events involving large holdings;
(e) Listing of all legal events (seizure orders, forfeitures, decisions that have become final) relating to the accused, including all corresponding dates.

At the first Judicial Roundtable Meeting between federal judges from Brazil and the United States, attended by several judges from Colombia and Mexico[26] in Washington DC, October 27–31, 2011, initial conclusions were drawn that the more the evidence, the easier the seizure/sequestering, and that where drug trafficking is concerned, it is easier to secure the granting of the request because the laws are not as difficult to understand. The purpose of this unprecedented encounter was to establish a framework of judicial decisions to render international legal cooperation feasible as quickly as possible.

A glossary was proposed to include the more important expressions encountered in matters of international cooperation, whereupon Brazil presented the following:

[26] Two judges per country, along with U.S. federal prosecutors, attended the meeting organized by the U.S. Department of Justice.

7.2.1 Important Terms and Expressions

I. Assets:

Freezing—decision need not be final, a decision of the court will suffice.

Seizure—of everything relating to evidence. A decision of the court will suffice.

Seizure—real estate, assets, securities or cash—of the proceeds of crime. A decision of the court will suffice.

Confiscation or Forfeiture—where there is a final decision. Seek restitution for the state, victim, and/or affected third party.

Instrumentalities of the crime—may only be confiscated if their manufacture, use, or possession is itself illegal (e.g., illegal weapon), except in the case of drugs, which are always confiscated.

Proceeds of the crime—economic benefits derived from criminal behavior.

II. Procedural:

Investigation—work to be done by the police.

Judicial Proceedings—a generic term for the initial work conducted in the courts by request of the police or the Office of the Public Prosecutor. These may comprise search warrants or seizure orders, attachment orders, wiretap or electronic surveillance orders, lifting of bank secrecy, etc.

Police Report—a document summarizing conclusions arrived at by police concerning a crime. Here, instead of the accused, we have subjects of an investigation.

Indictment—initial document which starts the criminal action (filed by the Office of the Public Prosecutor) and which may begin with a Police Report or from a set of informative documents (documents obtained or arising from judicial proceedings). This is the formal accusation before the court.

Parties—1. Defendant, or the accused (represented by a private attorney or state-appointed/public defender); 2. the Office of the Public Prosecutor, or prosecutor.

Judicial Proceedings or Criminal Action—set of documents that begins with the indictment and ends with sentencing if guilty or absolution if not guilty.

Final decision—a judicial decision on the merits that *can no longer be appealed.*

Citation—notice to the accused or defendant that the indictment (accusation by the Office of the Public Prosecutor) was accepted initially by the court.

Summons—notice served on the accused, the defendant or victim, or a witness, for legal proceedings.

Judicial Decision—a decision issued by a judge regarding some question (for instance, lifting of bank secrecy, wiretaps, placing an examining trial on the docket, requests for restitution of property, etc.). May be appealed.

Sentence—final and conclusive decision on the merits of the charge. May convict or absolve. May occasionally provide relief from a death sentence, statutory limitation, etc.

Appeal—attempt to overturn a decision. There are other remedies or constitutional impugnments provided against judicial decisions in general (reviews, appeals in the strictest sense, habeas corpus, writs of mandamus, etc.).

III. Criminal:

Illegal Enrichment—not a crime, but may be a fiscal offense.
Money Laundering—requires an antecedent crime.

IV. Institutional:

Federal Justice System—handles all cases in which the Union (Brazil's federal government) or its entities, have a stake, including international traffic in narcotics, international money laundering, federal tax evasion, crimes against the National Financial System, against Social Security, cybercrime, etc.
Makeup:
1st instance (federal judges);
Appeals (Regional Federal Courts—there are five in Brazil);
Appellate Court (STJ)—unifies understanding of the laws;
Supreme Federal Court (STF)—appeals and constitutional questions;
State Courts—handle everything not handled *by the federal court system (ordinary* crimes). The makeup is: 1st instance (state judges), appeals (State Courts of Appeal), STJ, and STF.

There is also the Military Justice System, the Electoral Courts and the Labor Courts.

V. International Legal Cooperation:

Direct Assistance—requires an indictment or decision in the requested country.

Rogatory—not subject to judicial review, but is merely a service to public order and sovereignty, since it amounts to enforcement of a judicial decision already made abroad.

With regard to the content of judicial decisions, Brazil made the following proposals:

7.2.2 Standardized Decisions (Content)

I. Request for Legal Assistance (direct assistance)
1. Regarding Assets, Securities or Cash:

- Identification;
- Location or request to identify the location, or notification through some national information network for purposes of future repatriation;
- Causal connection (between asset and criminal or suspected criminal behavior) or relevant information (illegal enrichment).

Record of a JUDICIAL DECISION (not necessarily final), but for REPATRIATION, A FINAL DECISION (that has become final, that is, unappealable), excepting only such crimes as corruption and the like (UN Convention, Mérida, Art. 57) or a special interest case, such as artworks.

2. Bank Secrecy:

- Identification of account holders;
- Name, address, and branch location;
- Description of requested documents (signature cards, transfers, statements);
- Dates or timeframe (delimited);
- Causal connection (between asset and criminal or suspected criminal behavior) or relevant information (illegal enrichment).

JUDICIAL DECISION (may be appealable)

3. Citation and subpoenas (defendants, victims, witnesses, affected third parties);

- Questions.

DECISION OF THE COURT

II. Legal basis for its grounding (for ease of understanding and to verify dual criminal liability):

- A clear, objective and complete narrative.

III. Literal transcription of all provisions to be able to verify a similar crime in the requested state.

The document summing up the importance of Judicial Round Table Meeting reads:

JUSTIFICATION FOR LEGAL DIALOGUE AIMED AT ESTABLISHING CASE LAW PRECEDENT
WHEREAS there is a need to facilitate International Cooperation;
AND WHEREAS the fight against organized crime must not be defeated by lack of understanding regarding the various international legal systems;
AND WHEREAS explanation of domestic legal systems has converged on the stripping away of assets from criminal organizations from small conceptual changes;
AND WHEREAS standardization of judicial decisions to facilitate cooperation among all countries involved in the fight against organized crime is important;
AND WHEREAS there is a need for States to unite behind the seizure, confiscation and repatriation of goods, securities and money,
BE IT RESOLVED THAT WE ESTABLISH THE FOLLOWING TO ENSURE BETTER UNDERSTANDING TOWARD PROPER INTERNATIONAL

COOPERATION WITH NEEDED STANDARDIZATION OF JUDICIAL DECISIONS:

1. The fight against crime is independent of the place where the crime was committed, and confiscation is indispensable;
2. Cooperation through letters rogatory is not recommended because it is slow and bureaucratic, and because analysis in the requested country is limited to checks on public policy and affronts to sovereignty;
3. Cooperation by direct assistance is a response to be followed by states because it is faster, based on mutual trust and conveys to the requested state a proper analysis of the requests;
4. The simplified Mutual Legal Assistance Treaty (MLAT) approach is recommended, and must be objectively clear;
5. Central authorities have placed no obstacles in the way of direct contact between magistrates or competent authorities, and channels of communication must be opened up to ease unnecessary bureaucratic burdens (Article 18.13 of the UN Convention against Organized Crime at Palermo does not prohibit such understandings);
6. The regular legal systems of countries involved must be respected (requesting and requested states), and it is no bar to cooperation if the request originated with or was addressed to the police, the Office of the Public Prosecutor, or the courts;
7. If extradition is refused, on grounds of citizenship, then the persons believed to be involved should be promptly submitted to authorities in their own country (Art. 16.10, Palermo). However, if extradition is accepted, it is recommended that the sentence be served out in the requested state (Art. 16.11, Palermo), otherwise require serving the sentence or part of it in the requesting State (Art. 16.12, Palermo);
8. Possibility of joint prosecution or transfer of criminal proceedings (Art. 21, Palermo) for final disposal of assets and joint measures (cooperative debriefings with effects in both countries) and to achieve better administration of Justice;
9. International Cooperation should not to be blocked while the *whereabouts* of an asset are unknown. The requested state should try all available means for tracing or seizure for future confiscation or repatriation;
10. As a condition for restitution, the requested state should require proof of the legality of the asset, security or pecuniary amount whenever the requesting state's request for seizure with an eye to confiscation or repatriation is mooted by a court decision that did not rule on the merits as to the legality of its origin;
11. Invocation of absence of dual criminality cannot justify failure to cite or subpoena defendants, victims, witnesses or affected third parties once criminal proceedings have been initiated in the requesting state;
12. Information gained for criminal proceedings may be used in other such proceedings if the requested state so authorizes, even if retroactively;

13. Assets, securities or pecuniary amounts shall be restituted for indemnification of victims or turned over to the United Nations Fund for technical assistance among countries or even for reimbursement of the state. A division might be reached to deduct only expenses, except for such crimes as corruption and the like, and also with regard to cultural goods, which should be so disposed of as to give priority to public access;
14. Reimbursement of states lies outside the reach of the statute of limitations, which does not nullify international cooperation;
15. What does negate international cooperation is invocation of a need for a court order for a mere citation, subpoena or copies, and it is incumbent upon States to simplify their legal system to make direct assistance workable;
16. Defense witnesses should be heard in the country filing charges or, otherwise by teleconference from embassies or consulates, with international cooperation not being invoked except where the evidence is accepted by the prosecution;
17. International cooperation does not require the attachment of proof, but rather a presentation of arguments leading to the decision to see that measures be taken abroad;
18. No specific Mutual Legal Assistance Treaty is required for each asset, security or pecuniary amount if the requesting State attaches to its request a list of assets and gives grounds.

What follows are works seized in the United States at the request of Brazil's Federal Courts in Criminal Action No. 2004.61.81.008954-9 (involving the former Banco Santos) filed at the Sixth Federal Criminal Court in São Paulo, specializing in Financial Crime and Money Laundering. Figure 7.2 shows paintings by Jean-Michel Basquiat *(Hannibal)*, Joaquin Torres Garcia *(Figures dans une Structure)*, Roy Lichtenstein *(Modern Painting With Yellow Interweave)* and Helen Frankenthaler *(Sea Strip)*. Figure 7.3 shows *Roman Togatus* (XIV–IX B.C.). Figure 7.4 is another image of *Modern Painting With Yellow Interweave*, and Figure 7.5 is *Figures dans une Structure*. The September 2010 signing ceremony from when the works of art were received and repatriated to Brazil is shown in Figure 7.6.

On September 17, 2010, the Federal Court announced bankruptcy proceedings and the importance of preserving public access to repatriated works of art:

> The Judge at Law for the No. 2 Special Court of Bankruptcy and Recovery for Precinct 2 of the County of São Paulo, through Communiqué No. 65/2010-DIR, received at this Court on 09/16/2010, all necessary steps having been taken (logistical planning for transporting the works, among them, inspection, crating, insurance, transportation and allocation of space at the University of São Paulo Museum of Contemporary Art) for repatriation of *Modern Painting with Yellow Interweave*, by Roy Lichtenstein, and *Figures dans une structure*, by Joaquin Torres-Garcia.
>
> These works of art were traced to the United States of America through the operation of a Request for Legal Assistance on Criminal Matters transmitted by this Court on 05/25/2006, in record No. R005.61.81.900396-6, on account of seizure ordered for artworks of unknown whereabouts belonging to defendant Edemar Cid Ferreira listed in bank records on a CD-ROM of the Cid Collection (belonging to the accused), and duly listed in the "LIST OF MISSING ARTWORKS," prepared by the staff of this Court.

Fig. 7.2 Artworks seized by American authorities at the request of 6th Federal Criminal Court, São Paulo, Brazil, in the case involving Banco Santos. *Right* to *left*, a painting by Jean-Michel Basquiat (*Hannibal*), Joaquin Torres Garcia (*Figures dans une Structure*), Roy Lichtenstein (*Modern Painting With Yellow Interweave*) and Helen Frankenthaler (*Sea Strip*)

Fig. 7.3 Artwork (*Roman Togatus*, XIV–IX B.C.) seized by American authorities at the request of 6th Federal Criminal Court, São Paulo, Brazil

Fig. 7.4 Artwork repatriated from the United States to Brazil (Roy Lichtenstein, *Modern Painting With Yellow Interweave*), custody and control for conservation by the Museum of Contemporary Art of University of São Paulo, Brazil (MAC—USP)

Fig. 7.5 Artwork repatriated from the United States to Brazil (Joaquín Torres-García—*Figures dans une Structure*), custody and control for conservation by the Museum of Contemporary Art of University of São Paulo, Brazil (MAC—USP)

Fig. 7.6 Signing and ceremony (September 21, 2010) receiving works of art for repatriation to Brazil (Attorney's Office of the Southern District of New York)

On that same occasion an order for its repatriation, if located abroad, was also transmitted to INTERPOL for full enforcement.[27]

There are times, in particular now, in which the authorities must go beyond the mere protection of capital. To the contrary, they are expected to reinforce values, primarily cultural values in harmony with universal unity.

To speak of repayment in kind will only make sense when all of us – even potential private interests – are included, and the repayment is accomplished by positive actions that allow public access to global heritage to the public-at-large (and not just to the few) that it may influence future generations. Half-measures are not consistent with this view.

If everyone comes out ahead, so do the creditors of the bankrupt estate, so that there are no losses whenever the people as a whole are the great beneficiaries.

It is also expected that judgment of the bankrupt estate, in keeping with the handling up until then of the holdings by the Federal Criminal Justice System in the sense of enforcing the Convention Concerning the Protection of the World's Cultural and Natural Heritage formulated at the UNESCO General Conference (held in Paris, 1972, and passed, in Brazil, by Legislative Decree no. 74 of 06/30/1977),[28] it is indeed incumbent upon all to preserve the cultural heritage of mankind.

It is only in this spirit, after the criminal sentence issued by this federal court became final (consonant with the findings of 06/15/2009 and of 12/07/2009 in Conflict of Jurisdiction No.76.740/SP of the Honorable Appellate Court), that Brazilian society awaits future decisions from the Bankruptcy Court quite apart from any interest which the Government may have in the acquisition of that wealth of holdings, inasmuch as it behooves all of us, as pointed out above, to bring about the conclusion of this story through our commitment to the common good.

Note that in the decision of the Hon. Superior Court of Justice the exclusion of archaeological and ethnographic works is clear. Their final disposal is up to the University of São Paulo's Museum of Archaeology and Ethnology as of 08/30/2005 (decision on pages 373-376 of record No. 2005.61.81.900396-6, not subject to appeal), in view of the constitutional and legal ban on commercial sale of the art as, indeed, was never in doubt, not least because any act in violation of fundamental provisions likewise set forth in special legislation would render it subject to immediate seizure.

I congratulate the initiative of the Bankruptcy Court in unveiling a particular view of works of art, instituting cautionary measures aimed at their safe repatriation to Brazil and provisionally placing the works in the Museum of Contemporary Art (inasmuch as prominent placement is still contingent upon the sentencing decision of this Court becoming final). All of this signals to us that that Court also recognizes the importance of the issue and the questions involved. These are no simple matters of economic satisfaction, but rather they give substantive form to the UNESCO Convention referenced above, both in Brazil and in other countries that are signatories to the Convention.

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[27] Pages 3587, 3588, 3590 of record No. 2005.61.81.900396-6.

[28] Notably, in its Articles 4 and 5. Article 4: Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage (…) and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical…

Article 5: To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage (…) each State Party to this Convention shall endeavor (…) d) to take the appropriate legal, scientific, technical, administrative and financial steps necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage….

There is confidence, then, that the magnanimous treatment that the issue requires, in the certainty that all of the commitments assumed by Brazil before the international community will prevail, indeed, to the satisfaction of deeply-held beliefs which our constituted authorities ought no longer trespass upon.

Brazil's Federal Justice System will, in the ceremony to be held next week in New York, receive all of the aforementioned works and pass them along to the failed estate of Banco Santos, making it all the more important to press forward with the criminal sentence and make that decision final. Then there is the appeal as to the bankrupt estate and the assignment of these works to the Union, and the decision of the Hon. Superior Court of Justice, which held that only this criminal court had jurisdiction to decide on measures necessary for all the situations involving repatriation of goods, whether in the simplest cases *or* in those in which the procedure for recovery of assets requires negotiations with the requested State Party.

Thus, notify the Bankruptcy Court of this decision and also inform them that the Federal Criminal Court has agreed to the measures taken, up until then, in that specific case, with regard to the works indicated above, repatriation efforts for which were accomplished through the Federal Courts, with the cooperation of the Justice Ministry's Asset Recovery, the International Legal Cooperation Council Department (DRCI/MJ) and of the Office of the Federal Prosecutor, in the hope that timely notice will be given of future measures.

Serve notice to the Office of the Federal Prosecutor and the University of São Paulo Museum of Archaeology and Ethnography (MAE/USP).

São Paulo, September 17, 2010.

FAUSTO MARTIN DE SANCTIS

FEDERAL JUDGE.

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Chapter 8
Answers to Initial Questions and Conclusions

8.1 Answers to Initial Questions

The following are answers to initial questions asked by the author at the outset of endeavoring to write this book. They will clarify ambiguities about the art market and its protection.

1. Is there such a thing as a certificate or registry document for artworks so that they may be auctioned?

Yes. When consigning a piece to an auction house, a consignment document is issued that contains the name, address and telephone number of the consigning artist, a description of the item or items, price set by the artist, date negotiated, percentage agreed upon between artist and consignee and their signatures. Yet it says nothing about forms of payment.

2. Are there any restrictions on the transportation of masterpieces out of the country?

No. The opposite is true. Because they are considered duty-free, the accompanying fiscal document should contain the name of the creative artist, if known, and declare whether they are originals, replicas, reproductions or copies, and evidence may be required that they match those on the import declaration. U.S. customs law has been organized into a "harmonized system," requiring uniform descriptions of goods bought and sold in world trade. A classification system is now proposed for transporters, importers, exporters, customs, and recordkeeping for a high level of uniformity in fees and statistical data. The resulting more objective definitions will allow better measurement and observation on the part of revenue authorities, reducing the chances of defective descriptions in import and export documentation, and improving the exchange of information among customs authorities, generating more reliable figures, to track all movement of goods across national boundaries. Regulatory Directive No. 874 for Brazil's Federal Revenue Service,

F. M. De Sanctis, *Money Laundering Through Art*, DOI: 10.1007/978-3-319-00173-9_8,

dated September 8, 2008,[1] provides customs clearance procedures for temporary admission and exportation of cultural goods, and considers such goods to be artworks, literary, historical, phonographic and audiovisual works, musical instruments and equipment, sets, costumes and other goods necessary for putting on dance, theater or opera performances, concerts or similar clearly cultural events (Article 1, sole paragraph). It requires that the simplified temporary importation clearance papers for cultural goods referenced in Art. 4 of Federal Revenue Secretariat Regulatory Instruction No. 611 of January 18, 2006, be presented by the individual or company responsible for their entry into Brazil and return abroad (Art. 2, heading). Where such goods are brought in by a nonresident traveler, the granting of simplified clearance shall be formally set forth on the Accompanied Baggage Declaration, or DBA. The Simplified Import Declaration (DSI) must be filed before the goods arrive in Brazil (Sects. 1 and 2). Article 3 waives completion of DSI fields reserved for import tax amounts and corresponding calculations, as well as for gross weights of each of the items imported. The applicant must specify the purpose of the temporary admission under cultural goods, and enter in the appropriate field all supplementary information for the DSI, including name, location and timeframe for each event occurring in Brazil. Physical inspections may be waived for artworks and historical items submitted for clearance by: (a) a museum, theater, library or cinémathèque; (b) any entity operating an event supported by the government; (c) any entity promoting a well-recognized event; or (d) any permanent diplomatic mission or consular department (Art. 6, heading). In such cases, authorization is still required, but shall only be granted at the request of the interested party, by the chief of Brazil's Federal Revenue Service for customs dispatch to an institution that (Sect. 1): I—has been listed with the National Corporations Register (CNPJ) for over 3 years; and II—meets all requirements for fiscal compliance with the National Treasury, for providing a joint certificate of no arrears or positive clearance certificate, containing information on standing on all taxes administered by Brazil's Federal Revenue Secretariat, and Amounts Payable to the Government (DAU), Administered by the Finance Ministry Prosecutor's Office (PGFN). The filing must be accompanied by images, designs, plans or such other resources as will allow full identification of all works listed in the heading (Sect. 2). Physical inspection for temporary admission of goods, when not waived or conducted at the event location, may be done by sampling the shipping unit (Art. 9). Should the goods remain permanently in Brazil, the beneficiary must, during the effective term of the temporary entry permit, file for final customs clearance in accordance with applicable law (Art. 11, heading). Art objects listed under Common Mercosul Nomenclature (NCM) customs codes 9701, 9702, 9703 or 9706 and received as donations from a museum instituted or maintained by the government or some other cultural entity recognized as a public utility, shall be exempted from import tariffs pursuant to Law No. 8961 of December 23, 1994 (sole paragraph). Simplified temporary importation clearance papers for cultural

[1] Published in the Federal Official Gazette on 09/09/2008, and again gazetted on 09/23/2008.

goods must be processed based on the Simplified Export Declaration (DSE) referred to in Art. 31 of Federal Revenue Secretariat Regulatory Instruction No. 611 of 2006, filed by the individual or company responsible for their entry into Brazil (Art. 12, heading). Should the goods be taken abroad as accompanied baggage (Sect. 1): I—The interested party may turn in the DSE for recording purposes, with the proper notation in the field intended for supplementary information, accompanied by the traveler's ticket, documentation from consenting agencies, if applicable, prior to embarkation, during normal business hours of the RFB when leaving the country; or II—The traveler must list all goods on the Temporary Exit of Goods Declaration (DST) and file it, prior to boarding, with customs officials, for proper monitoring of goods leaving Brazil. In the case of item I of Sect. 1, upon embarkation, the traveler must be in possession of a copy of the DSE, duly cleared (Sect. 2).

3. Do international auction houses (IAHs) or galleries only ask sellers where the proceeds should be deposited? And what if the reply is a tax haven?

Yes, and it is entirely up to IAHs whether to fill out a Suspicious Activity Report if they determine that a payment is not made in good cleared funds. They may require, under penalty of cancellation (in which case the piece may be sold to outside parties), evidence that no money laundering or funds for financing of terrorism are involved (Paragraph 4(c) of Christie's Standard Sale Contract). It is clear, however, that Christie's only allows payment by the person listed on the invoice—and not a third party.

4. Are any questions asked about the origin of the buyer's money once handed over or deposited?

Not necessarily, because there is no legal obligation to conduct customer due diligence.

5. Must buyers make deposits directly to the account of the IAH or gallery, or directly to the seller's account?

No, there is no obligation to pay through an IAH or gallery account.

6. As for the artwork itself, how does one check its authenticity? Do IAHs and galleries have their own experts?

Once items are sold, auctioneers and their employees carefully examine and appraise the items. Experts may be consulted to identify or authenticate an unknown work. In the event of disagreement, the auction house must notify the consignor of its internal disagreement, even though the seller normally sees the auction house as a specialized technical market, relying on its recommendations as to what constitutes a good price.[2] They should therefore provide reliable opinions

[2] For more on this, see Leonard DuBoff, Michael Murray and Christy King (in *The Deskbook of Art Law*. Booklet M (*Auctions*). New York: Oceana, Second Edition, Release 2010–2012, issued December 2010, p. M-69).

on price and make good recommendations on an item consigned to them. Because of public pressure, self-regulation, conscientiousness or changes in the legal environment, Sotheby's and Christie's, along with other international auction houses, have hired the Art Loss Register (ALR)—one of the broadest and best-known databases on lost or stolen cultural objects—to assist in checking provenance and to help keep looted or stolen works from circulating in the market. Hence, if the work is listed in ALR files, or even with INTERPOL, it will not appear in their catalogs.

7. How is the price of a work of art arrived at?

Goods taken to auction are put up for public offering in an attempt to secure the best possible price. This sometimes involves competition among individuals, and various methods have therefore been developed to foster such competition. In England's progressive auction system, the bid is made over the base price, and the auctioneer calls out to encourage additional bids. A Dutch auction is decreasing, based on traditional methods used to sell flowers in Holland. The auctioneer starts with a high price, which is gradually lowered until some bidder accepts the offer. By the Japanese (simultaneous) method, auctions are closed, unlike the other methods, and invitations are sent by dealers to dealers. Japanese law requires putting together a list of potential buyers and their items for submission to local authorities ten days prior to the auction, in order to cut down on impulse buying. Items placed on the auction block are not seen as sold on the auspices of private companies, such as Sotheby's and Christie's, but by the Tokyo Art Dealers' Association. Hence, ties among dealers are routine in closed auctions. All offers are made simultaneously, and it is up to the auctioneer to determine who made the highest bid during the small time interval allowed for bidding.[3] It should be noted that the Japanese system apparently discourages fraud (unless there is collusion among dealers).

8. How does one verify the source of funds, especially if supplied by a third party?

Christie's, for example, only takes payment from those named on the invoice. This could, however, be a third party hired by someone who would rather remain hidden.

9. Do IAHs, museums, art galleries, libraries or government agencies have databases listing artworks that are missing or sold (masterpieces), with identification of the clients and bank account information of the beneficiaries?

No, but there is frequent consultation and interaction among cultural entities and IAHs with government agencies, and—when writing up provenance or when

[3] For more on this, see Leonard DuBoff, Michael Murray and Christy King in *The Deskbook of Art Law*. Booklet M (*Auctions*). New York: Oceana, Second Edition, Release 2010–2012, issued December 2010, p. M-13.

someone offers them a piece—they do take care to check traditional databases such as INTERPOL, the Art Loss Register, etc. Moreover, there are entities that undertake to do their own identification. Public access databases do not contain clients (for confidentiality purposes), much less the bank accounts of beneficiaries.

10. Must an IAH or gallery submit a Suspicious Activity Report to a Financial Intelligence Unit (such as FinCEN in the United States or COAF in Brazil)?

The Brazilian Council for Financial Activities Control (COAF) Resolution No. 008 of September 15, 1999, with the aim of preventing the use of art objects or antiquities for the laundering of money, requires the completion of Suspicious Activity Reports by individuals or companies that sell, import, export, or intermediate a sale—whether on a permanent or temporary basis, in a principal or accessory role, and cumulatively or otherwise. The requirement extends to museums, art galleries and libraries, given their nature and the language contained in the Money Laundering Law, but is not, however, limited to only those individuals or companies permanently engaged in the business (such as galleries). Yet this is poorly understood, despite the clarity of the written law. Statistical data reveal a very small number of Suspicious Activity Reports. There were two in 2009, five in 2010, only three in 2011, and, as of May 22, 2012, none for 2012. Since its inception in 1999, the COAF has received only sixteen reports, which shows that the law in Brazil is not taken seriously.[4] There is a situation in Brazil in which lack of monitoring activity on the part of the Financial Intelligence Unit and the belief that money laundering through artistic media is a relatively small risk (highly specialized market, highly visible, with low liquidity and high premiums) compared to other industries, combine to make the law a dead letter, a sort of institutionalized make-believe that does not merit the attention one would expect from enforcement authorities. There is no parallel in the United States. So we have ineffective rules, clearly spelled out in Brazil, and none in the United States. Cases are only discovered when there is illegal transportation, or when suspicious banking activity occurs, in which case alone would there be reason to report a suspicious operation.

11. Is there any coordinated effort under way to prevent the sale of stolen or missing works of art?

One can say that in recent years there has been increased awareness of the need to better regulate this market to inhibit the laundering of dirty money, especially because drug traffickers have invested in the industry and are discovered through other channels.

12. Is there any exchange of information between government agencies and the art market?

[4] See https://www.coaf.fazenda.gov.br/conteudo/estatisticas/comunicacoes-recebidas-por-segmento/. Accessed May 22, 2012.

That would be hard to say categorically, but clearly there is an exchange of information among, for example, Christie's, the Smithsonian and government agencies such as the FBI and the Department of Justice. In Brazil there is no such interaction.

13. Is there a website accessible to the public to look up missing or stolen artworks?

There are large databases listing stolen or missing works of art. They are kept in museums, international agencies (INTERPOL),[5] government agencies (the FBI),[6] non-governmental entities (The Art Loss Register),[7] International Forums (UNESCO),[8] the International Council of Museums (ICOM)[9] and the International Police (INTERPOL).[10]

14. Is there a private database listing criminals, receivers or even people who might be giving them lessons on how to properly handle works of art?

No such database is known to exist.

15. Do people pay closer attention to portrait artwork (which is more easily recognized if stolen) and paintings of ships (which, if they show a flag, are more easily recognized)?

The question itself makes it clear that identification is easier in those cases.

16. What percentage of lost or stolen artworks is recovered?

No data is available to answer this question.

17. How many stolen pieces of art are out there?

The FBI's *Art and Cultural Property Crime* section, which covers theft, fraud, looting and national or international traffic, estimates an annual loss of $6 billion. The FBI has a specialized department, the Art Crime Team, made up of fourteen special agents and a computerized index of stolen art worldwide.[11]

18. Are the computer systems used at IAHs, art galleries, libraries and museums designed to provide only general reporting information?

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[5] See http://www.interpol.int/. Accessed May 21, 2012.

[6] See http://www.fbi.gov/about-us/investigate/vc_majorthefts/arttheft. Accessed May 21, 2012.

[7] A private database available for recording, searching and recovery of artworks: http://www.artloss.com/en. Accessed May 21, 2012.

[8] See http://www.unesco.org/en/list. Accessed May 21, 2012.

[9] See http://icom.museum/programmes/fighting-illicit-traffic. Accessed May 21, 2012.

[10] See http://www.interpol.int. Accessed May 21, 2012.

[11] See http://www.fbi.gov/about-us/investigate/vc_majorthefts/arttheft. Accessed May 21, 2012.

Clearly there is a need to selectively provide information, redacting the name and date on buyers and sellers so as to be sure that the data are restricted to art objects themselves, and possibly their provenance.

19. Do IAHs, libraries, art galleries and museums provide assistance to government enforcement agencies, the police and the Prosecutor's Office?

One could say that in an investigation, provenance already produced would certainly help and would be considered relevant.

20. Do IAHs, art galleries, libraries, museums and oversight agencies have experts able to identify a piece with reasonable certainty?

Apparently so, especially international auction houses, and the larger galleries and museums. They are known for being very knowledgeable.

21. Do IAHs, art galleries, libraries, museums and oversight agencies receive information from informants or anonymous tips on missing or stolen artworks?

We do know that they are open to receiving all kinds of information. The FBI, for instance, conducts Google searches over the Internet.

22. Inasmuch as a work of art may be passed along from buyer to buyer, how is an honest person, who wants to buy one, to know that he or she is acquiring the piece from a legitimate source?

The one piece of advice to give to any novice buyer in the business world surrounding the art market is to keep absolutely alert and exercise extreme caution, for it is a unique and peculiar world.

23. Should the buyer display the piece? Should buyers avoid mentioning the owner in magazines, notify the police or Attorney General's office, the insurance company, art dealers, or print leaflets and send out e-mails containing photographs of the stolen item and offer a reward for useful tips?

This question already opens the door to the answer.

24. Do IAHs, art galleries, libraries, museums or government agencies such as the police or Attorney General's Office actually monitor the databases?

Yes, if necessary.

25. Do IAHs, art galleries, libraries, museums or government agencies pay proper attention to catalogs and the like?

It was not possible to obtain that specific information, but we do know that they are consulted as part of the market, or when the need arises.

26. Are catalogs inspected before upcoming sales of valuable art?

There does not appear to be any advance investigation other than that done by the IAH before the sale.

27. What is the role of insurance companies?

Insurance companies are usually brought in for very expensive artworks. These are handled differently from the way ordinary personal property is handled. For purposes of coverage, the policy should identify each piece, together with its value, and the underwriter normally would ensure full liability for the amounts declared on the insurance application, for those provide the basis for issuing the policy and calculating the premium. The policy should show that they are not insuring goods without irrefutable proof of ownership or existence preceding the onset of the policy period, and furthermore that the items are not smuggled, stolen, purloined, forged, illegally traded, or used in money laundering. Such companies therefore require a proper appraisal, for in case of an accident the amounts paid must match a statement of worth previously agreed upon. They require a detailed description, to better recover the item in the case of loss or diversion. The mere fact that a specialist has appraised a piece is no assurance of authenticity, although the specialist may, in many cases, be capable of authentication. Authentication requires a special expertise in specific areas. Anyone who claims knowledge of everything, rather than of fine art, of arms and armor or of stamps, for example, is unlikely to be a good appraiser or authenticator. The insurance agreement should state that the policy does not cover vitiated claims, or acts by enforcement authorities, such as searches, seizures and forfeitures, or hazards arising from theft, robbery, smuggling, illegal transportation, illegal sale or money laundering; hence, it is another way to monitor crime.

28. Are short statutes of limitation (for instance5 years for robbery) for criminal prosecution sufficient? Are they subject to interruption or suspension?

In the United States, for example, each state stipulates the statute of limitations for civil actions. The New York law for suits filed to recover personal property sets it at 3 years from the time "the true owner makes a demand for return of the chattel and the current possessor refuses to return it."[12] Louisiana, which considers such a cause a personal action, sets the statute of limitation at 10 years; New Jersey and Hawaii set it at six, and Kentucky at one.[13] For criminal acts, the statute of limitations begins to run when the criminal activity occurs and ends at the start of an investigation. In Brazil, the counting of the statute of limitations from the start of the filing of suit can actually benefit crime since can be subjected to interruption or suspension.

29. Do the authorities set these questions aside in order to concentrate on issues they deem more important (such as kidnapping, murder, etc.)?

They do in Brazil. The issue sparks little interest, given the exacerbated criminality that exists. Nor does the market comply with its obligation to report

[12] Cf. Barbara Hoffman. International Art Transactions and the Resolution of Art and Cultural Property Disputes. *Art and Cultural Heritage: Law, Policy, and Practice*, p. 171.

[13] For more on this, see Leonard DuBoff, Michael Murray and Christy King in *The Deskbook of Art Law*. Booklet C (*Theft*). New York: Oceana, Second Edition, Release 2010–2012, issued December 2010, p. C49.

suspicious transactions, in part because of lax inspection. There appears to be considerable interest in conducting investigations in the United States, but this comes about after the discovery of some violation of revenue or customs laws, or of suspicious payments through banking institutions.

30. Are art thieves connoisseurs of works of art? Or are they just good at committing burglary?

They apparently are not connoisseurs, except in the cases in which they may be hired to commit crimes.

31. Might not an art thief be an insider (watchman or guard) and replace a genuine artwork with a copy?

In the case of *The Mystic Lamb* by Jan Van Eyck, Noah Charney tells us that in one of the many robberies of that particular work (at the close of the nineteenth century), the crime was committed by an insider,[14] so it is theoretically possible and real.

32. Do IAHs, art galleries, libraries, museums and oversight agencies ever announce the discovery (recovery) of any works of art?

Those cases are showcased by the press.

33. How do artwork recovery figures compare to the figures for losses?

Sadly enough, one estimate has it that only 5% of stolen artworks worldwide are ever recovered[15] despite the efforts of the FBI, INTERPOL, countries engaged in international cooperation, the cooperation of museums, the Art Loss Register and other cultural entities such as Christie's and Sotheby's.

34. Should revenue authorities and the courts punish IAHs, art galleries, libraries or museums with heavy taxes and fines, and are any person involved subject to arrest and corporations to criminal liability?

If crime is to be prevented, it is important that consequences like that be instituted, for they will make people aware that crime does not pay.

35. Do IAHs, art galleries, libraries or museums provide their customers with confidential storage of artworks by request?

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[14] Cf. *The Mystic Lamb. The True Story of the World's Most Coveted Masterpiece*. New York: PublicAffairs, 1st ed., 2010, p. 103.

[15] For more on this, see Leonard DuBoff, Michael Murray and Christy King in *The Deskbook of Art Law*. Booklets C (*Theft*) and M (*Auctions*). New York: Oceana, Second Edition, Release 2010–2012, issued December 2010, p. C14.

Some of the international auction houses and galleries do provide confidential after-sale storage services.[16]

36. If so, will that end up causing problems in the tracking of missing works of art, especially if the collector passes away years later?

The problem will only arise in the event of refusal to provide information to the proper authorities.

37. Does the market for artworks spring from underground roots where people constantly lie by saying, for instance, "This has been in my family forever"?

Institutions ought to take precautions. For example, New York's Metropolitan Museum of Art was publicly criticized for its policy of acquisitions. This is an example of the sort of problems arising from secrecy in acquisitions. In 1972, Dietrich Von Bothmer, curator of Greek and Roman Art at the Met, saw a vase in Zurich which was presented and represented by Roberto Hecht, Jr., an American living in Italy and involved in the arts—albeit in several questionable transactions. Dietrich Von Bothmer acquired the piece and put it on exhibit in November of that year. A later investigation, however, found that a Lebanese exchange broker took part in the negotiations, and had initially introduced himself as a Swiss collector, then as an Armenian collector and finally as an art dealer. This individual claimed to have received the vase from his father, and to have owned it for 50 years. A subsequent investigation by the Italian police revealed that the piece had in fact been illegally excavated from an Etruscan tomb in 1971.[17]

38. What about fake certificates of authenticity? Do buyers, sellers and auctioneers ever work together to artificially inflate prices and foster illegal transactions?

It was not possible to confirm that in practice because the questions and the research sources were not categorical in that regard.

39. Are auctions or artworks ever used to launder money? For example, might an individual hire someone to buy his own art at an inflated price?

Yes. Many such cases have been discovered, and there have even been criminal convictions.

40. Can an official be bribed to put a work of art up for sale?

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[16] See, for example, Christie's Catalogue. *New York, Old Master Paintings. Wednesday 6 June 2012*. London: Christie, Manson & Woods Ltd., 2012, p.116; likewise Sotheby's Fine Art Storage Facility http://www.sothebys.com/en/inside/services/sothebys-fine-art-storage-facility/overview.html. Accessed July 11, 2012.

[17] Cf. Leonard Duboff, Michael Murray e Christy King, in *The Deskbook of Art Law.* New York: Oceana, Second Edition, Booklet B (*International Movement of Art*), Release 2010–2011, issued November 2010, p. B-94.

In theory, yes.

41. Has unethical conduct among employees prior to an auction—such as making deals with a seller—ever been uncovered?

That is clearly a possibility, so much so that there is a code of ethics and a policy in effect at the larger international auction houses to carefully screen their employees.

42. What can be said about the flea markets for works of art?

The importance can be inferred when you see that many works of art are taken to flea markets by ordinary criminals who are not art connoisseurs. Most of the time these are stolen or purloined goods accidentally mixed in among many other pieces of stolen property, and they end up in the hands of collectors for a nominal price.

43. Would a comparison of taxes paid versus annual profit/loss figures suffice to put a curb on tax evasion? Or might any differences discovered simply be imputed to delays in collecting installments?

Not necessarily, as the question itself suggests.

44. Are there any guidelines for auctions? Are there any plans for a series of inspections to be carried out by the IAHs? Any plans to educate the art market on public policy?

There is a movement afoot for increased awareness, but no specific public policy.

45. Can an IAH refuse to assist in an investigation based on taxes paid versus yearly profit/loss statements, on grounds that such an examination might undermine their credibility in the trade?

Theoretically, yes.

46. Has provenance (documentation attesting to origin) sufficed to ensure the authenticity of works? If an artist or his or her family members were to attest to the authenticity of artwork in the hands of an outside party, might there not be conflicting assertions regarding authenticity?

Provenance does provide a parameter. But it should not be considered an absolute guarantee of authenticity. Conflicts could also emerge, such as when artists or their relatives certify copies of a given original production as genuine.

47. Are IAHs self-regulated or are they subject to regulation by a specific agency?

They are self-regulated, as are museums and art galleries in the United States.

48. How are nondisclosure agreements between buyers and sellers handled when there is a need for proper monitoring by government authorities?

In the United States, confidentiality agreements are not binding on government authorities. I believe the same goes for Brazil.

49. Can artworks be purchased from an IAH using Stored Value Instruments or Prepaid Access Cards?

Given the high prices, it would be difficult to make purchases with those cards. However, there is no law against it.

50. And what about payments through remittance companies or foreign exchange brokers?

Yes. It can be done because no prohibition exists. These are channels that require better oversight because they easily facilitate the transfer of dirty money.

8.2 Conclusions

Denis Williams once stated that "the destruction and removal of our cultural heritage will not cease until everyone views it as a personal affront."[18] The adoption of isolated measures, apart from any global consideration of the problem, will never suffice as an effective strategy in the war against money laundering. Even self-regulated entities, such as Sotheby's and Christie's, along with other international auction houses, have understood the seriousness of the problem and created the Art Loss Register to assist in checking provenance in order to keep looted or stolen works from circulating in the market. If a given work of art is listed in the ALR or INTERPOL files, it will not be put up for sale.

More than just aesthetics goes into measuring the importance of a work of art. Art transcends all institutions, and, deep down, reflects how people lead their lives.

Hence, we should conclude at the outset that all discussion on the need to reform pertinent legislation should to be unanimous as to the direction to which things should be taken. Trends toward a regulatory environment of extreme liberty do not necessarily lead to proper protection of vital assets; even less do they reflect criminal guarantees, the leading exponent of which theory, Luigi Ferrajoli, himself fell short of conceiving.[19] To the established doctrinaire, criminal guarantees, meaning

[18] In the writings of Alissandra Cummins, in The Role of the Museum in Developing Heritage Policy. *Art and Cultural Heritage: Law, Policy, and Practice*, p. 47.

[19] Ferrajoli's "garantismo," with some footholds in constitutional maxims, reinforcing principles of *nulla poena sine juditio* and *nulla poena sine processu*, among others, fell short of nullifying the quest for real truth through excessive resort to appeals or curtailing the court's exercise of jurisdiction over a substantive case. Neither has it come down to point-by-point analysis of facts placed before it; it comes down to verifying necessity, fault-based liability, adequate proof, cross-examination and the right to a hearing. Then again, one doesn't go off in search of truth at any price, especially at the cost of historic advances that have resulted in the recognition of universal rights, consisting at first of individual principles, progressing through collective, to trans-individual. The right of the whole.

the Constitutional Rule of Law, that is, that set of duties and of rational rules imposed upon all powers in the exercise of protection over the rights of all, which is the only proper response to dog-eat-dog regimes, a response that divides guarantees into primary and secondary. *Primary guarantees are limits and regulatory ties—that is prohibitions and obligations both formal and substantive—imposed in the protection of rights, on the exercise of any power. Secondary guarantees are the various forms of reparation—the capacity to nullify wrongful acts and all liability for illegal acts—which themselves flow from violations of primary guarantees.*[20]

Constituted branches of government perform essential functions; most notable is the Judicial Branch, which, in interpreting the Constitution, is no mere executor of rules conjured up by the will of common legislators, but rather acts as the guardian of fundamental rights.

Criminal Law, like any and all law, in seeking a solution for conflict situations, with the necessary weighing of the values at stake, leaves all concerned satisfied with the result of a claim almost invariably adverse to one of the parties. Its mission is therefore delicate, and boils down to a redefinition of the prosecution, often requalifying it by adoption of consequences most damaging to strictly personal property.

The regulation of financial law, especially financial criminal law—and here we are referring to the idea of the war on money laundering, generally speaking (especially in the tumescent, efficient and ill-disciplined world of art)—is justified by the simple idea that market rules alone cannot provide all of the aspirations emerging within the context of the course of business practices—oftentimes through dangerous, ethical gray areas.

There is a need to fill loopholes that ordinary criminal law (protecting property from theft and robbery, public faith, forgery, counterfeiting, copyrights, public health, and drug trafficking) has largely been insufficient to properly suppress given the increase in financial crime arising out of the exponential increase in international crime.

If financial crime has often elicited lackadaisical social reaction, because of a perception that this is something engaged in by people of social or professional prestige, we have seen that in many court cases reported in the press, the opposite emerges to the extent that money laundering (especially involving artworks) has arisen out of ordinary serious crimes, such as drug trafficking.

The absence of overt violence could perhaps explain some moral neutrality. I believe, however, that society is slowly becoming aware of the deleterious effects of financial crime, for it in turn also fosters ordinary crime. We must move in the direction of imprisoning these financial criminals, who themselves are becoming increasingly dangerous and bold. Hence, on account of the cost-benefit calculation of the proceeds of criminal behavior versus possible outcomes (penalties) imposed by the legal system, they should not be dealt with leniently or with less than the strictness that is called for.

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[20] Cf. FERRAJOLI, Luigi. *El garantismo y la filosofía del derecho*. Bogotá: Universidade Externado de Colombia, p. 132.

With their clearly necessary reintegration into society and rethinking of their behavior, the result will be a throttling of crime as a function of improvement of the legal system and adoption of measures to close legal and institutional loopholes through which crime perpetuates itself—and this is in addition to rethinking the application of pecuniary sentences or curtailment of rights.

It is a tricky analysis, easily swung toward the trivialization of human rights, and the serious danger of their being seen as so irrelevant that any conclusion weighing them in on either side is self-disqualifying. Criminal Law for enemies, as advanced by Günther Jakobs, or Criminal Law for enemies as a "third speed," as advanced by Silva Sánchez,[21] would serve to preserve not only the law but also people's confidence in the system of criminal laws so that the purpose of the penalty is to reaffirm the rule of law.

There is a regulatory and functional concept of culpability (reproachability), without ontological foundation, and based on general positive prevention.[22] Hazards facing the foundations of a punitive system are acquiesced in a criminal law system based on potentialities (preemption of punishability), on future events rather than actual occurrences, on the imposition of (disproportionate) harsh penalties and non-objectivity of procedural guarantees. This is criminal law divorced from context, only to meet the expectations of general prevention: a dangerous instrumentality, violative of human dignity.[23]

The idea here is neither to defend this theory, nor to nullify criminal law through the practical impossibility of its enforcement. Even worse would be to perpetuate the general impression that this branch of law penalizes poor criminals while catering to the wealthy. That would be frustrating, unjust, evil, and in its consequences a danger to democracy and to the belief in democracy.

Hence, a clear and systematic ordering of existing rules on money laundering, especially laundering made possible through art, so as to block off any possibility of criminal behavior, must be defended. Here, then, it would make sense to put every effort into effective crime fighting not restricted to setting up regulations for the sector, but also aiming at the improvement of payment methods and a clearer notion of the kind of work done by NGOs.

The study of this problem does not stop at an analysis of conduct held to be criminal, but rather addresses the need to tailor the preventive system to social

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[21] Cf. JAKOBS, Günther, and MELIÁ, Manuel Cancio. *Direito penal do inimigo. Noções e críticas*. Transl. André Luís Callegari and Nereu José Giacomolli. Porto Alegre: Livraria do Advogado, 2005. pp. 66–69.

[22] Autonomy (the subject's capacity to abide by law) is held to be a functioning capacity where its outcome is functional, and absent that there must be another way of resolving the conflict. (ROXIN, Claus. Derecho penal—Parte general—Fundamentos. La estructura de la teoria del delito. Madrid: Civitas, 2006. t. 1, p. 806).

[23] We would have violations of human dignity, and the subject would come to be used by the state to further its preventive convenience. (ROXIN, Claus. Reflexões sobre a construção sistemática do direito penal. *RBCCrim* 82/35).

realities. Simply bringing awareness to a sizable fraction of those involved has not sufficed to contain those who would defy the law.

Observed cases of money laundering through artworks were detected by sectors unconnected to art. These may have come about after triggering an alert in the banking system, or simply because the antecedent crime was found out (theft or drug trafficking, for example), culminating in arrests, convictions and confiscation of assets.

We do know that the fight against crime requires much more than its mere discovery. There are five stages to the process: (1) prevention, (2) repression, (3) trial and judgment, (4) recovery, and (5) reintegration. Education given by schools, family, churches and nongovernmental organizations go into the first stage, followed by the police (the second), the justice system (the third), and by the justice system and other government sectors (fourth and fifth stages). It is here that procedural acts gain in importance. If the best solution to the conflict is not found—and that is something visible only from a perfect global overview of the problem—it could come to be perceived as nearly useless, a bit of theater.

To give substance to its purpose, the quest for truth and all that it implies would be a compatible systemic reaction. This is the existential minimum, for truth is a value intrinsic to the judicial function, one that does not apply solely to the parts, subject as they are to the imperfections of humanity: laziness, selfishness, dereliction and disdain.

On par with seeking a proper judicial decision we have, most notably, prevention as carried out by society to keep serious events from coming to the courtroom, or delaying too long in arriving there due to the dereliction that accompanies a preventive system that does not work.

Thus, rethinking the role of museums, galleries, auction houses, insurance companies and nongovernmental organizations to get them to adapt to the situation we face is in order, and to do likewise with regard to the way suspicious payments are made, the hazards of which have hardly been assessed.

States, the police, prosecutors, judges and government agencies are all essential to efforts toward international cooperation and repatriation of goods. Note that U.S. courts have been sympathetic to the requests of foreign governments for the return of stolen antiquities, despite all of the obstacles, criticism and tension usually surrounding litigation of that sort.

As pointed out by José Paulo Baltazar Júnior,[24] "Failure to act on the part of a legislator is practically the same, in effect, as counterproductive interference." Thus, the things the law is there to protect by positive action by the State must be protected, and the means to do so effectively must be accepted. This is to say that we must adopt clearly defined government standards that are necessary in order to perform existing protective duties (prohibition of insufficiency).

This sort of normative construct is not original on the part of this author. It comes from the Federal Constitutional Court of Germany, in a decision on

[24] BALTAZAR JR., José Paulo. *Crime organizado e proibição de insuficiência*. Porto Alegre: Livraria do Advogado, 2010. pp. 53–54.

abortion (*BVerfGE*, 39, 1 ff.—*Schwangerschaftsabbruch*),[25] of 02/25/1975. The idea is occasionally referred to as a reflection of the prohibition of excess. The theory (prohibition of insufficiency) calls for restriction of fundamental rights of potential perpetrators of aggression, that is, protection through state intervention. Legislators must make an effort not to fall short of minimum protection requirements. The prohibition of excess involves a substantive legislative act (its content) and the suitability of the response involved (the minimum requirement). The discussion on prohibition of insufficiency revolves around the necessity of law (as a precondition) for the protection of basic rights (as opposed to legislative dereliction). Both constitute the right to a defense, and are complementary government guarantees of freedom on different levels.

So the course and bearing to be set are bound to attain satisfactory levels of efficacy only attainable through absolute technical rigor. Lack of technique, casuistry or losing sight of the principles that guide criminal justice will hinder rigorous application to specific cases.

In a contemporary government, it is inevitable that here or there some new legal understanding will take root, but this has to be accompanied by harmonization, universal application, impersonality and morality—of language drafted as you will—but without losing sight of social reality and established principles.

Hence, the fight against the trafficking of drugs and weapons, corruption, terrorism and money laundering requires concerted action that is not restricted to the regions affected by the criminal behavior. One task requiring systematic protection from governments is protection of the integrity of international financial systems.

Resolution No. 1373, adopted on 09/28/2001 by the UN Security Council, makes it clear that global stability is threatened by sophisticated criminal organizations, including terrorists, as well as by traditional and modern methods of money laundering.

According to Fletcher Baldwin, Jr., "[p]otentially, the most harmful effects of money laundering by these highly skilled organizations is not only the worldwide undermining of financial institutions—both banks and non-banks—but also the loss to the public of cultural heritage".[26]

It is not just the concern of immediate participants in the art world, but primarily of public authorities, including police, government agencies, prosecutors and even judges. Thus everyone, including governments, must contribute to profound and broad concerted action. This means cooperation at the national and international levels.

This idea is seldom dealt with or at best timidly advanced in university and institutional circles, whether by professors, students or industry professionals. Their best efforts are invested in issues supposedly more relevant, although there

[25] Id. p. 55.

[26] Cf. *Art Theft Perfecting the Art of Money Laundering*, p. 15.

is already an idea of criminal justice making a greater effort at doing away with serious crime, that is, in the fight against organized crime.

The technical propriety and consistency of these efforts have made them a model of their time. It was not easy to outline a subject so complex and riddled with secrecy. However, its very nature—the care of universal cultural goods—cannot be uncoupled from values near and dear to our society.

It may seem counterintuitive, but governments are not going away. They are becoming stronger, more cooperative, and are joining together to fight crime. I do not believe that human rights are being abandoned, but rather that modern criminality as an offshoot of globalization is now better understood.

The balancing act in this sector, as in all human action, legitimizes a host of public decisions, some already adopted and others being advanced with prudence and responsibility—in other words, with public-spiritedness. This should be our primary goal. Policies concerned with ideological or economic interests are really no more than powerful individual interests masquerading as the former, and must give way before that primary goal.

Recall this historical fact: during World War II, the United States organized an art protection division. March 1941 saw the organization of the Committee on Conservation of Cultural Resources, tasked with protecting and conserving American artistic collections from the threat of Japanese invasion, after the December 1941 attack on Pearl Harbor in Hawaii. Then, in May 1944, Winston Churchill organized and Hugh Pattison Macmillan supervised the British Committee on the Preservation and Restitution of Works of Art, Archives, and Other Material in Enemy Hands, also known as the Macmillan Committee. Its purpose was to preserve and lay the groundwork for restitution, after the war, of stolen or looted works of art. U.S. President Franklin Delano Roosevelt created the American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas on June 23, 1943. It was presided over and run by Supreme Court Justice Owen J. Roberts, and was known as the Roberts Commission. This commission managed to map all of Italy, its islands and coastline (on 168 maps). A total of 700 maps were produced covering all of Europe, including detailed maps of large cities, along with maps of a significant number of Asian cities.

This gives us an idea of how transcending the need to protect our cultural goods is, irrespective of origin and the country to which they belong, but out of a need to preserve intellectual, historical, artistic and universal production. Such was the fear at the time that informants with ties to Adolf Hitler disclosed the dictator's secret order that "all historical buildings and artworks in Germany—whether of Germanic or foreign origin, legally or illegally acquired—were to be destroyed rather than let them fall into the hands of Germany's enemies."[27]

[27] See Noah Charney, in *Stealing The Mystic Lamb: The True Story of The World's Most Coveted Masterpiece*. New York: PublicAffairs, 1st ed., 2010, pp. 214–215 and 221–223.

Preservation, according to Noah Charney, was considered more important during the war than any number of human lives. Charney adds: "Once the art was removed from its country, that country had lost a piece of its civilization; once all the art was destroyed, the civilized world would be less civilized."[28]

Many people fled to the United States and left behind their works of art, works which are to this day the subject of claims for restitution in U.S. courts, since they have ended up in U.S. museums such as the New York Museum of Modern Art (MoMA).[29]

Facts such as these accurately exemplify much of our recent history, in which we came to learn of investments by criminals in artworks for purposes of money laundering, and possibly even the financing of terrorism.

In presenting this work, I have strived to bring out my constant, daily concern over these modern times, times that stand the authorities at defiance and press them to take action—action other than the quest for some sort of abstract happiness finding its expression in derision or the disgrace of another. Welfare is itself a form of heritage to be sought by all, each contributing with small deeds (never in isolation), most notably those who carry the torch of power for a people thirsting for justice.

My purpose was to go beyond a mere introduction to this engrossing subject. The idea was to present additional considerations in an effort to further the closer study of the art industry, which will also further the prevention of money laundering in general.

The idea was—as much as possible—to look outward toward that universe that surrounds our world, in an effort to bring about improvements in systems for the enforcement and prevention of crime.

Governments should take a tougher stand against money laundering, and quickly identify and close the loopholes that allow money to flow among organized crime cartels. In view of the foregoing, developing a policy to establish the role of each actor in the system, whether museums, galleries, auction houses, libraries, art dealers or government agencies—especially those of the executive, legislative and judicial branches—is of utmost importance in facing up to the current problem, and even the preservation of our cultural heritage.

According to Alissandra Cummins, specifically with reference to museums and the like, but also as valuable guidance to all participants in, and managers and controllers of the art market, "[t]he role of heritage institutions in this area should be recognized and coordinated with the role of their counterparts in the legal, security, and customs professions. Initiatives ensuring enhanced dialogue and coordination between the sectors include specialized training and public information programs."[30]

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[28] *Id.* p. 283.

[29] Cf. David McKay Wilson (in *Who Owns Art?* Raymond Dowd, Law'91, and the Fate of Artworks Looted by the Nazis. *Fordham University Alumini Magazine,* Spring 2012, pp. 23–25).

[30] Cf. The Role of the Museum in Developing Heritage Policy. *Art and Cultural Heritage: Law, Policy, and Practice*, p. 50.

Thus, an outline is sketched for the reader to be able to conduct a critical, real, and practical analysis, in an effort to restore to society that which it most deeply and sincerely believes in: its own dignity and cultural heritage.

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Chapter 9
Proposals to Improve the War Against Money Laundering and Terrorism Financing

As we have seen, a number of different national and international initiatives are being put forth in the war against money laundering and the financing of terrorism.

International treaties, supplemented by recommendations from foreign multilateral organizations, along with recurring discussion meetings, have all sought to improve the global system of enforcement to curb these serious crimes. Now we turn to effective enforcement in the sector under study: the art world.

The subject is one of constant concern, for much is said about the need to improve the sector, yet in practice, nothing effective has been done toward the prevention of crime, for when duly regulated (Brazil) there is little enforcement, and where self-regulated (USA), crime-fighting efforts are left up to each stakeholder. Cases brought to court show that only when investigators resort to the financial system can we detect suspicious transactions. There is no significant record of reporting on the part of museums, galleries, international auction houses, etc., and they only limit themselves to occasional cancellation of the acquisition or sale.

Furthermore, with the study done on the art world, the preferred method of payment was at least brought into focus. This is important in any business environment, and could make things easier for money launderers—hence the need for the study of this method.

It is hard not to notice that major drug traffickers, among other criminals, look to the art industry as a way of investing the profits from their deals or as currency to use in the illegal drug market. Art has been targeted for use for illegal ends.

The concern has emerged in several debates, but still in a timid or incipient form, so that the real work ahead is to get all government agencies to put some teeth into the prevention and punishment of money laundering through the recovery of dirty money and of cultural goods.

There is no sign of important advances in this area, and that may explain the fact that organized crime, in principle, finds an extraordinary array of techniques to put a legal face on the proceeds of crime using artworks.

What is called for is an immediate rereading of all mechanisms of enforcement and prevention of money laundering as a general proposition, and all of its myriad

F. M. De Sanctis, *Money Laundering Through Art*, DOI: 10.1007/978-3-319-00173-9_9,

forms of expression, but notably in this very important area where enforcement is the reaffirmation of cultural and social traits.

There will be proposals to reflect upon—not necessarily the last word—but rather more like the beginning of a new debate over our forms of cultural expression. It is hoped that these proposals will prove useful to the art world, but also as a means of better handling prevention and enforcement in the war on money laundering and the financing of terrorism.

9.1 An International Perspective

9.1.1 Financial Action Task Force

Explanation: The Financial Action Task Force (FATF) has not expressed any particular concern regarding art, despite the significant number of cases discovered so far.

01. Include art galleries, international auction houses and museums in the Suspicious Transaction Reporting Recommendation for non-financial companies and professions alongside casinos, real estate brokers, dealers in precious metals or gemstones, attorneys, notaries and accountants. (Recommendation No. 22, together with 18–21)

9.1.2 Tax Havens, Offshore Accounts and Trusts

Explanation: The advantage of offshore accounts is that they enable the free movement of capital, which is only taxed in negotiations taking place in-country, with exemptions for transfers to other offshore or nonresident accounts, corporate income taxes, and income tax withholding on payments made to nonresidents. Arnaldo Sampaio de Moraes Godoy has relevant observations on these, especially concerning Barbados, Panama, the Bahamas and Vanuatu.[1] Moreover, there are treaties to avoid double taxation, and which allow governments to establish unilateral measures domestically (such as exemptions for fiscal credits at a reduced proportional rate, and deduction of taxes paid abroad from domestic taxable income), which is why they are referred to as tax havens. The author cited also adduces that there is a text being circulated by the Organization for Economic Cooperation and Development (OECD), called the *Model Tax Convention on Income and on Capital* (comprising 31 articles distributed over seven sections) aimed at eliminating obstacles relating to double taxation. It provides, for example, that dividends paid by a company having

[1] In *Direito tributário comparado e tratados internacionais fiscais*. Porto Alegre: Sergio Antonio Fabris, 2005, pp. 83–84.

its home office in one state party to someone living in another state party to the convention will be taxed by the latter, and their remuneration taxed by the state in which the services are rendered.[2] It is true, as they say, that they facilitate the circulation of goods, services and capital, but they are also an effective instrument for evading taxes with considerable legitimacy. They lend themselves to legal uses, of arguable utility, but also to illegal practices. There are considerable advantages to be had by using them as conduits, especially by those interested in laundering ill-gotten money, on account of defective or nonexistent government control, but also because they make it easy to generate false trails and international wire transfers. Offshore bank accounts make it possible to disguise their real controllers, since ownership is—according to the legislation in the countries in which they are located—evidenced by bearer paper, and partners or officers are simply proxies, often proxies for hundreds of companies of the same pattern. All of this amounts to creating a veil for the actual owners to hide behind. Their paper cannot be traded on the domestic market, nor cashed in without considerable expense and questions, about possible complicity in money laundering, directed at anyone who converts it. It is argued that these accounts are advantageous in that owning one does not involve liability to taxes, unless one were to actually invest in the country. Loan agreements are often written so as to lay hold of funds from offshore accounts without exposing them to tax liability. There are transparency requirements for beneficiaries of companies, with countries required to obtain reliable real-time information (FATF Recommendation No. 24), including information on trusts, settlors and trustees or beneficiaries (Recommendation No. 25), which would preclude anonymous accounts. This is why the customer and actual beneficiary must be identified (i.e., "know-your-customer" duties, often called "customer due diligence") along with a requirement to collect enough information about the institution to which service is rendered so that the trustee, who administers the assets, is accountable for turning in suspicious transaction reports. Note that the FATF takes a clear stand against the invocation of banking secrecy or professional privilege as a means of obstructing its recommendations (Recommendation No. 9).

02. Require tax havens to comply with all provisions whereby information must be provided to proper international authorities. This amounts to placing ethical and legal considerations above financial considerations, all the way down to obtaining information about the ownership (beneficial or ultimate beneficial ownership) and identifying the controllers. Indeed, the controllers merit special attention, and their very existence should be looked into to check whether they might be providing services to criminal enterprise. The hurdles in the way of their suppression are closely related to the Janus-faced discourse of many states that rely on tax havens to conduct non-transparent transactions purportedly having connections to "reasons of state" or for the management of assets belonging to their political elite.

[2] Cf. *Id*. pp. 166–170.

9.1.3 International Legal Cooperation and Repatriation

Explanation: Improving international cooperation, to also provide repatriation of assets and lend substance to the administration of justice, which should be considered universal, through the following measures and national policies, mindful that the fight against crime is independent of where the crime occurred, and that confiscation is essential.

As already put forth by the Financial Action Task Force, there is a need to make it possible to bring about freezing and seizure, even if the antecedent crime occurred in another jurisdiction (country). There is also a need for deployment of specialized multidisciplinary teams (task forces) (Recommendation No. 30). It also recommends International Legal Cooperation, pursuant to the UN Conventions of Vienna (international traffic, 1988), Palermo (transnational organized crime, 2000) and Mérida (corruption, 2003), by withdrawal of obstacles (Recommendation No. 37) and direct mutual assistance toward a quick, constructive and effective solution (Recommendation No. 38). The fight against organized crime must not be defeated by lack of understanding regarding the various international legal systems. Consider the impact on U.S. asset forfeiture legislation of the case in which Brazil filed for freezing of assets belonging to a Brazilian defendant, and for keeping those assets in the United States. At issue was whether, based on 28 U.S.C. § 2467 (d) Enforcement of Foreign Judgment,[3] foreign assets may only be frozen after a foreign court has definitively ruled in favor of forfeiture, or if it may be done before any final decision on confiscation has been rendered. The United States Court of Appeals for the District of Columbia Circuit, on review of two decisions by the Court in March and April 2009, decided that a final decision by Brazil regarding confiscation was required, according to its interpretation of 28 U.S.C. § 2467 (d) (3).[4] Following this decision, the U.S. Department of Justice requested and obtained from Congress a resolution of the problem because, if upheld and followed, the decision would have compromised international cooperation efforts with other countries.

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[3] 28 U.S.C. § 2467: (d) *Entry and Enforcement of Judgment—(1) In general—The district court shall enter such orders as may be necessary to enforce the judgment on behalf of the foreign nation unless the court finds that—(A) the judgment was rendered under a system that provides tribunals or procedures incompatible with the requirements of due process of law; (B) the foreign court lacked personal jurisdiction over the defendant; (C) the foreign court lacked jurisdiction over the subject matter; (D) the foreign nation did not take steps, in accordance with the principles of due process, to give notice of the proceedings to a person with an interest in the property of the proceedings in sufficient time to enable him or her to defend; or (E) the judgment was obtained by fraud.*

[4] United States v. Opportunity Fund and Tiger Eye Investments, Ltd. No. 1:08-mc-0087-JDB, United States District Court for the District of Columbia. Decided 07/16/2012. http://www.cadc.uscourts.gov/internet/opinions.nsf/1B9DC0B1D05DB6D5852578070070EC9C/$file/09-5065-1255619.pdf. Accessed June 14, 2012.

03. Cooperation through letters rogatory is not recommended because it is slow and bureaucratic, and because analysis in the requested country is limited to checks on public policy and affronts to sovereignty.

04. Prioritize cooperation by direct assistance as the response followed by states because it is faster, based on mutual trust and conveys to the requested state a proper analysis of the requests.

05. Give preference, if at all possible, to the clear, simplified and standard Mutual Legal Assistance Treaty format. Specific, separate MLATs are not required for each asset, security or pecuniary amount if the requesting state attaches to its request a list of assets and gives grounds.

06. Consider that central authorities have facilitated matters, for they place no obstacles in the way of direct contact between magistrates or competent authorities, and channels of communication must be opened up to ease unnecessary bureaucratic burdens (Article 18.13 of the UN Convention Against Organized Crime at Palermo does not prohibit such understandings).

07. The regular legal systems of countries involved must be respected (requesting and requested states), and it is no bar to cooperation if the request originated with or was addressed to the police, the Office of the Public Prosecutor, or the courts.

08. If extradition is refused on the grounds of citizenship, then the person believed to be involved should be promptly turned over to authorities in his own country (Article 16.10, Palermo). However, if accepted, it is recommended that the sentence be served out in the requested state (Article 16.11, Palermo); otherwise, require serving the sentence or part of it in the requesting state (Article 16.12, Palermo).

09. Consider the possibility of joint prosecution or transfer of criminal proceedings (Article 21, Palermo) for final disposal of assets and joint measures (cooperative debriefings with effects in both countries) to achieve better administration of justice.

10. International Cooperation should not be blocked while the whereabouts of an asset are unknown. The requested state should try all available means for tracing or seizure for future confiscation or repatriation.

11. As a condition for restitution, the requested state should require proof of the legality of the asset, security or pecuniary amount whenever the requesting state's request for seizure with an eye to confiscation or repatriation is mooted by a court decision that did not rule on the merits as to the legality of its origin.

12. The invocation of absence of dual criminality cannot justify failure to cite or subpoena defendants, victims, witnesses or affected third parties once criminal proceedings have been initiated in the requesting State.

13. Information gained for criminal proceedings may be used in other such proceedings if the requested state so authorizes, even if retroactively.

14. Assets, securities or pecuniary amounts shall be restituted for indemnification of victims or turned over to the United Nations Fund for technical assistance among countries—or even for reimbursement of the state. A division might be arrived at to deduct only expenses, except for such crimes as corruption and the like, and also with regard to cultural goods, which should be so disposed of as to give priority to public access.

15. Reimbursement of states should lie outside the reach of the statute of limitations, which does not affect international cooperation.

16. The denial of a request of a court order for a mere citation, subpoena or copies undermines international cooperation. It is incumbent upon states to simplify their legal systems to make direct assistance workable.

17. Defense witnesses should be heard in the country filing charges, or else by teleconference from embassies or consulates, with international cooperation not being invoked except in cases of evidence being disguised by the charges.

18. International cooperation does not require the attachment of proof, but rather a presentation of arguments leading to the decision to see that measures be taken abroad.

9.2 A National Perspective

9.2.1 Institutional Measures (Executive and/or Legislative Branches)

Explanation: The hazards of globalization may be minimized if with globalization, our notions of law draw authority from social and philosophical—as opposed to just economic—considerations. The subject cannot be dealt with from a purely economic view. Criminal organizations must be throttled by denying them what gives them their mobility and power, affording them continuous and unprecedented illegal wealth. The subjective collective degradation afoot in the world today, which regards economics as the standard of value, can never so bind our numbers together as to gloss over such indispensable critical thinking. Legitimate social movements and individuals should assume a stance for ethical values to compel obedience to basic rules of coexistence. Standing these rules at defiance by parallel paths amounts to the real breakdown of rights both *de facto* and *de jure*. There is a duty to perform customer due diligence for all financial and non-financial activity, whether with natural or artificial persons, to ban anonymous accounts or those bearing fictitious names, and require identification of their beneficial owners, with records to be kept for at least five years (FATF Recommendations Nos. 10 and 11). There are, at times, requirements to make suspicious transaction reports on non-financial companies engaged in domestic or international cash transfer services, obliging them to record the amounts transferred, form of payment, transaction date, purpose of the wire transfer, name, individual or corporate taxpayer ID (where applicable) of both sender and receiver and addresses for both.[5] These requirements give a false impression that any money laundering

[5] See, for example, the Resolution by the Brazilian Financial Intelligence Unit, the Council for Financial Activities Control, COAF Resolution No. 10 of November 19, 2001.

occurring in that sector could actually be detected. There is also a need to make dealers liable to these rules, inasmuch as they may have knowledge or probable knowledge of criminal behavior (willful blindness doctrine).

9.2.2 Freezing, Seizing, Confiscating and Repatriating Assets

19. Allow administrative freezing and seizure to be accomplished quickly, so as to prevent disappearance or acts of terrorism.

20. Allow confiscation of assets when transferred to an outside party which may have been aware that the assets were illegal, or that they were transferred solely to avoid confiscation.

21. Allow confiscation of illegal assets when a conviction cannot be obtained on account of death, statutory limitations or granting of immunity. Adopt civil actions to terminate ownership.

22. Even after a decision has become final, allow further financial investigations to enforce prior confiscation orders covering all of the proceeds of the crime.

23. Once criminal proceedings are instituted, the statute of limitations should stop running, for there is no reason to count government inertia or lack of interest in criminal prosecution.

9.2.3 Regulatory Agencies

24. Establish a regulatory agency,[6] if it is not feasible for the Financial Intelligence Units to provide proper oversight so as to timely obtain direct or indirect access to financial and administrative information, and information from law enforcement authorities in order to fully perform their functions, including analysis of suspicious transaction reports (thereby fully complying with FATF Recommendations Nos. 26, 27, 29 and 31). The agency must be fully empowered and supplied with human and material resources to monitor and supervise in order to spot artificial inflation of art prices, as is done for real estate. It must also check for fraudulent sales or acquisitions, forged documents, financing of nonexistent objects, loans taken out in the name of third parties or trustees, and the involvement of offshore accounts to disguise the true identity of a buyer or seller.

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[6] Unlike Brazil, with its Ministry of Culture, the United States has no centralizing federal agency in charge of cultural policy. Yet some centralization in the industry may merit consideration (say, a council made up of congressional appointees, by the Smithsonian Institution, by the Secretary of the Interior, by the Treasury Secretary or the Chief Justice of the Supreme Court, etc.), for as things now stand there is no guidance as to policies for the prevention of money laundering and the financing of terrorism.

25. The regulatory agency shall be empowered to demand secure records with profound and specific evaluations of clients (photo ID, proof of domicile), of their works, and of similar institutions for constant review, physical whenever possible—since many entities stop everything whenever they believe that companies similar to their own have to enforce compliance.

26. Compare records with the contents of insurance company databases, to determine whether the underwriters demanded complete documentation before extending coverage. Whenever some third party is involved, check whether guarantees are accepted without proper appraisal. Insurance companies are themselves often offshore corporations organized solely to put up guarantees. And if there is one, but in the name of some third party inside a tax haven, that party might in the future claim not to have been party to the contract.

9.2.4 Art Dealers

Explanation: Persons with or without connections in the actual art have done considerable intermediation, and contributed in establishing a complex and impenetrable financial structure.

27. Require licensing to work as an art dealer, so as to lend some transparency to their dealings.

28. Regulate and supervise all activities of art dealers, with required licensing or special authorization (personal and nontransferable), to the extent that they might represent interests more inclined toward the financial exploitation of art, and lacking any commitment to the cultural goods.

29. Establish legal limitations for doing business as art dealers: require registration with a regulatory agency, with the central bank and the federal revenue authorities; impose a percentage limitation on profits; bar all those with criminal convictions; bar all those who lost civil cases relating to fraud, tax evasion, or other civil liabilities; require production of a detailed resumé; ban all dealings with any auction house, art gallery, museum or library whenever the work belongs to an employee, owner or representative of any of these.

9.2.5 Loans, Equity Holdings, Benefits and Payments (in Cash, Cards, Remittances, Stored Value Cards and via the Internet)

30. Require of all international auction houses, museums, art galleries and libraries—as should be required of all financial institutions—detailed records of loans, profit-sharing or other benefits to avoid substantial losses (equity holdings acquired to accommodate subsidiary institutions are often not handled the same way as for institutions outside of the holding company). Note, for example, the

absence of any formal equity holding or loan agreement, that is, the absence of documentation or frequent and excessive granting of benefits to partners.

31. All cash payments should be banned because they are practically untraceable and usually are the result of some sort of tax evasion or illegal act. Cash payment should therefore be banned for the purchase of vehicles, boats, airplanes, real property, shares of stock, lottery tickets, bets in excess of $10,000, artworks and luxury items. One thus tries to cut off the illegal flow of money and its entry into the legal market. This shifts us away from dereliction with regard to measures to curb money laundering and the financing of terrorism.

32. Payments by third parties should also be illegal, so as to preclude their use for purposes of masking real ownership of the goods and resources, with the potential for tax fraud that that entails.

33. Credit card payments should also be subject to stricter controls. Lax controls have been exercised by card issuers, often with no prior relationship, exacerbated by failure to disclose credit limits, changes of address, name, date of issue and expiration date. "Know-your-client" or due diligence rules must be enforced.

34. Ban all wire transfer payments that do not allow the money to be tracked. There is always a separation between the non-financial remittance company and the financial institution receiving the investor's money whenever these come from individuals or companies unrelated to the negotiations (cash deals negotiated by factoring companies or companies having home offices in tax havens). Currency brokers or hawala systems are often resorted to, as are wire transfers from and to secret banks or banks in tax havens—often by people having no connection whatsoever to the institution receiving the resources; either they are not account holders, or are unconnected with the account holder receiving the wire transfer, or even transfers the amount which is actually the sum of many small deposits. Allowing this sort of practice would amount to having no preventive measures whatsoever. In wire transfers, detailed information should be obtained on the sender, as well as the beneficiary, with monitoring made possible, and there should be an option to prohibit transactions by certain people pursuant to UN Security Council Resolutions 1269 of 1999 and 1373 of 2001, for the prevention and suppression of terrorism and its financing (FATF Recommendation No. 16). Require reporting of suspicious operations on the part of designated non-financial businesses and professions (DNFBPs) such as casinos, real estate offices, dealers in precious metals or stones, and even attorneys, notaries and accountants, requiring internal controls and protection of whistleblowers from civil or criminal liability (FATF Recommendation No. 22, in combination with Nos. 18–21). Require transparency for beneficiaries of companies, with countries also required to timely obtain sufficient information (FATF Recommendation No. 24), including information on trusts, settlors and trustees or beneficiaries (Recommendation No. 25).

35. Establish clearly-defined categories for stored value cards (whether debit cards or prepaid access cards), so as to make it easier for government agencies to identify suspicious cards, given that it is not easy to distinguish between traditional debit cards and prepaid access cards. Identification should be demanded of their customers, so as to enable comparison of identities of those individuals and

wanted criminals. Hence the need for a top-down compliance program to include customer identification, storage of records and reporting of suspicious operations. Prepaid stored value cards have, with their explosive growth, become a perfect tool for money laundering, whereby illegal money may be moved, with no documentation, identification, suspicion or seizure. They are poorly (or sloppily) regulated, which ensures their anonymity, even when purchased or reloaded. Their daily limits are the same as the face value. They offer advantages over physical transfers because they are easy to carry and may be sent through the mail, and hence even replace the cross-border transportation of cash. Regulations alone will not suffice if they are issued by non-financial institutions. Their issuers' obligations must therefore be clearly established. They should be classified as monetary instruments and, therefore, be subject to declaration when going through customs. These cards, then, possibly in combination with cash or other monetary instruments, once aggregating the $10,000 limit, should be subject to customs declaration.

36. Tighten controls on remittance companies, so as to have real knowledge of situations that might allow clandestine wires or wires not subject to suspicious operation reporting requirements (poor or borderline tracking by authorities). One example would be requiring a declaration by the bank accredited by the Central Bank to handle the conversion whenever called upon by the government (say, of Brazil) to appear for settlement of the currency exchange operation. The requirement, in wire transfers, that detailed information be obtained on the sender as well as the beneficiary, with monitoring made possible, and the option of prohibiting transactions by certain people pursuant to UN Security Council Resolutions 1269 of 1999 and 1373 of 2001, for the prevention and suppression of terrorism and its financing is FATF Recommendation No. 16. Require reporting of suspicious operations on the part of designated non-financial businesses and professions (DNFBPs) such as casinos, real estate offices, dealers in precious metals or stones, and even attorneys, notaries and accountants, requiring internal controls and protection of whistleblowers from civil or criminal liability (Recommendation No. 22, in combination with Nos. 18–21).

37. There must be some form of electronic tracking of payments over the Internet, possibly even easier than for cash money, which simply passes from hand to hand. This would enable detection, for example, of payments made using bitcoins, even though considered a transparent method of conducting transactions inasmuch as the system allows identification of its users, albeit in aliases or nicknames. Hence, if a trafficker is using a given Bitcoin address, you can download all data on the person using that address and download the entire graph of parties with whom that trafficker has dealings. It might be possible to access all his clientele. Although the medium is not as anonymous as would appear at first glance, there is no denying the possibility of someone setting up channels on the Bitcoin system to conceal transactions behind anonymity. As more services like this come online, the more complex the transactions, and the greater the opportunity for apparently unrelated, off-the-grid offsets—especially when it is possible to use a number of different addresses, with each one used for only a single transfer.

38. Compile a National Listing of Buyers of Works of Art, with input from museums, libraries, art galleries and international auction houses. This would prevent the establishment of a no-man's-land for criminal practices, resorting to false identification or the use of front men.

39. Share all data contained in the National Listing of Buyers of Works of Art with INTERPOL, for compilation of a global registry, which would grant access to government agencies involved in enforcement and investigation.

9.2.6 Offshore Accounts and Trusts

Explanation: Obtaining information has been hampered considerably by a lack of channels of communication with the competent authorities—to say nothing of timely notice—in the conduct of international legal cooperation. Moreover, investors may have committed antecedent crimes and wish to launder the proceeds.[7]

40. Full particulars absolutely must be obtained on all actual investors, even if they belong to companies chartered abroad, provided they do business and are represented in the country. A simple listing of proxies or stockholders is not enough. Complete identification must also be required of partners and administrators concealed within offshore accounts or trusts domiciled in tax havens. A listing of all partners and administrators should be required for being listed or removed from the tax rolls (which in Brazil is the Treasury Ministry's National Corporate Register or CNPJ).

9.2.7 NGOs, NPOs and Foundations

Explanation: There should be a complete record by type of business and types of NGOs. NGOs should be required to keep records on all transactions entered into within the country and/or abroad. This would comply with FATF Recommendation No. 08, in the spirit of clearly delimiting the rights and responsibilities of directors and employees of NGOs. It would encourage countries to establish good policy whereby information on their activities, size and other important characteristics such as transparency, integrity, openness and best practices can be had in real time for purposes of supervision and monitoring (FATF

[7] In Brazil, Federal Revenue Service Regulatory Directive No. 748/RFB of 06/28/2007 does not require offshore accounts or trusts to completely identify stockholders and administrators as is done for companies domiciled in Brazil. All that is required for enrollment in the Corporate Taxpayer Register (CNPJ) is a copy of the company charter. This means they might be satisfied with a simple declaration issued by a tax haven's public agency (bearing the company name, date chartered, type, purpose and address).

Recommendation No. 8). There is evidence that such organizations have even been used for the financing of terrorism. Government policies have been initiated to curb the practice, most notably in Pakistan.[8] Cases of NGO involvement in terrorism and its financing have also been reported in India.[9]

41. Licensing should be required for operation under tax-exempt status, and continuation of this status should be contingent upon regular reporting to revenue authorities of all relevant information, in an official document duly dated and signed under penalty of perjury, listing the name and telephone number of the person in charge of the books and records of the organization or foundation.

42. The organization's books and records should include a detailed list of its activities and management, all revenue and expenses, as well as liquid assets, to include: the name and purpose of the institution; number of members; whether they have on hand more than 25% of their liquid assets; number of voting members listed within and outside the organization; number of employees; number of volunteers; unrelated business revenue and amount paid in taxes; contributions and donations; resources invested; benefits paid to and for members; total assets and liabilities; basic description of all assistance programs; whether any loans or benefits were granted to employees, directors, a trustee or any other person; name, number of hours worked, and job descriptions of all employees and former employees (including directors, trustees and key personnel); earnings had by these individuals; expenses claimed (including travel and entertainment); and names and particulars of all donors.

43. An external audit should be required above a given gross revenue ceiling (more than $100,000, for example), as the State of New York so ably provides.[10]

44. Include in their by-laws requirements for distribution of financial reports and outside audit reports for all directors and management personnel (president, manager and financial department), for easy review.

45. Universal access to all NGOs, associations or foundations (electronic addresses), containing important information on records and reporting requirements.

46. In the case of a synagogue, church, mosque, educational institution or trust, even if registered as an NGO, association or foundation, all sources of funding must be provided in sufficient detail.

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[8] Cf. Terror outfit-turned 'charity' JuD set to come under Pak Central Bank scanner. In *Asian News International,* 03/13/2012. www.lexis.com. Accessed June 19, 2012; reporter, Naveed Butt. Insurance/takaful companies: SECP enforces compliance with AML Act. *The Financial Times Limited.* NPO 3/25/2012, 2012 WLNR 6308356.

[9] See Prafulla Marpakwar. State forms cells to detect source of terror funds. *Times of India.* Copyright 2011 Bennett, Coleman & Co. Ltd. 12/24/2011. www.westlaw.com. Accessed June 19, 2012.

[10] Cf. www.charitiesnys.com or www.chaririesnys.com/pdfs/statute_booklet.pdf. Accessed May 29, 2012.

47. A bar on receiving cash donations, or at least a cap above a certain amount (say, $3,000), which would, above that amount, restrict donations to banking instruments.

48. Review accounts of all such entities to reinforce due diligence and check whether they actually perform the purposes for which organized. Allow only the opening of accounts in their own names and in accordance with the documentation turned in.

49. If announcements are made that a given account will be receiving donations or something similar, banking institutions must monitor this to check on the beneficiary of wire transfers made from that account, and promptly make out a suspicious activity report to the Financial Intelligence Unit if the published account is different from the account owned by the NGO or foundation.

50. Check that all donations and contributions received for specific purposes are being properly recorded and faithfully accounted for.

51. Provide clear procedures for board membership, thereby ensuring diversity among the members.

52. See to it that all board members act in good faith to avoid any conflict of interest between the entity, its purposes, and themselves.

53. To check the profits earned by auction houses and art galleries one must take account of the cost of goods sold, their inventory of works (stocks and consignments), their accounting and sales all matching the business done by them and the artist, with special attention to earnings from consignment sales. Some artists pay their own personal expenses in cash and prefer that form of payment from auction houses or galleries for their works sold on consignment.

54. Secure independent and exempt financial evaluation.

9.2.8 Money Laundering as a Crime

Explanation: The communications system for reporting suspicious transactions is the key to effective suppression of money laundering. It turns up a number of suspicious deals. Many others go unnoticed when there is no cooperation from those whose legal duty it is to report transactions. Certainly the failure of one of the methods of control held to be essential in the fight against money laundering, namely, reporting, can give rise to misleading statistics. Moreover, making one liable to criminal charges for incorrect notices of suspicious transactions is clearly aimed at protecting privacy and image, on the one hand, and the effectiveness of early investigations on the other, for the danger is that future freezes on accounts and other confidential security measures might be rendered inoperative.

55. Make failure to report, delays in reporting suspicious operations, incomplete or false reporting, making public the required reporting, or structuring transactions or operations to circumvent reporting requirements render the perpetrators liable to criminal prosecution.

56. Require the preparation of suspicious activity reports by individuals or companies that sell, import, export, or intermediate a sale—whether on a permanent or temporary basis, in a principal or accessory role, and cumulatively or otherwise, to prevent the laundering of money through art objects, with rules clear enough to include museums, art galleries, libraries and international auction houses.

9.2.9 The Administration of Justice and the Role of Judges

Explanation: The numerous complex actions involved demand considerable specific knowledge and may entail huge setbacks to criminal jurisdiction for failure to act at the proper time.

57. Have courts that specialize in money laundering, with criteria established for recommending, appointing or replacing judges, in addition to specialized criminal teams at the courthouses.

Explanation: Reintegration of financial criminals into society must be centered on making them rethink their behavior. If there is indeed any reasoning behind unlawful conduct involving cost-benefit analyses of the outcomes to the perpetrator, a given crime will be committed if and only if the expected penalty is outweighed by the advantages to be had from committing the act.[11]

58. Pecuniary penalties should not be so freely applied, and should perhaps even be restricted; the same goes for incarceration (even in plea bargaining) when there is a clear lack of intimidating effect. Far better to make the requirements of proportionality (gravity of the crime plus guilt) and the need for overall prevention require a response that is a better fit for serious financial crimes.

9.2.10 Law Enforcement Agencies, Financial Intelligence Units and an Agency to Regulate Art

Explanation: The FATF recommends that all countries identify, evaluate and understand the hazards they face because of money laundering and the financing of terrorism, and that they take coordinated action to mitigate it (*Risk-Based Approach—RBA*, Recommendation No. 1). This would provide for cooperation and national coordination of prevention and enforcement policies, with proper

[11] For more on this, see Jesús-María Silva Sánchez (in *Eficiência e direito penal.* Coleção Estudos de Direito Penal. São Paulo: Manole, 2004, No. 11, p. 11) and Anabela Miranda Rodrigues (in Contributo para a fundamentação de um discurso punitivo em matéria fiscal. *Direito Penal Económico e Europeu: textos doutrinários.* Coimbra: Coimbra ed., 1999, pp. 484–485).

actions, Financial Intelligence Units (FIUs), etc. (Recommendation No. 2). Establish the requirement of *Customer Due Diligence* (CDD), whether companies or individuals, a ban on anonymous accounts or those bearing fictitious names, and identification requirements for their beneficial owners (Recommendation No. 10). Require records to be kept for at least five years (Recommendation No. 11) and a definition of "politically exposed persons," that is, persons more readily able to launder money, such as politicians and their relatives (in prominent positions). These things require closer monitoring, and enlargement of their definition (2012 revision) to include both nationals and foreigners, and even international organizations (Recommendation No. 12). Require reporting of suspicious operations on the part of designated non-financial businesses and professions (DNFBPs), such as casinos, real estate offices, dealers in precious metals or stones, and even attorneys, notaries and accountants. Internal controls must be established along with protection of whistleblowers from civil or criminal liability (Recommendation No. 22, in combination with Nos. 18–21). Moreover, transparency should be required of the beneficiaries of companies, and countries should obtain sufficient information in real time (Recommendation No. 24), including information about trusts, settlors and trustees or beneficiaries (Recommendation No. 25), and Financial Information Units need to have timely access, direct or indirect, to financial and administrative information in the hands of law enforcement authorities in order to fully perform their functions. This includes analysis of suspicious activity reports (Recommendation Nos. 26, 27, 29 and 31). Proper regulation of casinos, with effective supervision and rules to prevent money laundering (Recommendation No. 28). The mistake, in our opinion, was to not publish recommendations similar to those for casinos to cover the art industry. But this does not mean that the FIUs cannot proceed thus, as indeed the Brazilian unit saw fit to do, but with little reporting and practically no oversight. (Council for Financial Activities Control [COAF] Resolution No. 008 of September 15, 1999). On the other hand, the breach of trust violates the consumer rights arising from an improper procedure. It compromises fair competition in the market. Good faith or loyalty contract should be a rule of conduct submitting to administrative penalty in order to prevent fraudulent business practices. The misconduct is not acceptable.[12]

59. Establish regulations, irrespective of any obligation arising in law (provided there is a basis in the reasons for which they are created), as to the requirement of suspicious activity reports by individuals or companies that sell, import, export, or intermediate a sale—whether on a permanent or temporary basis, in a principal or accessory role, and cumulatively or otherwise, to prevent the laundering of money through art objects, with rules clear enough to include museums, art galleries, libraries and international auction houses. In the absence of a regulatory

[12] See Humberto Theodoro Júnior. Consumer Rights (Direitos do Consumidor: a busca de um ponto de equilíbrio entre as garantias do Código de Defesa do Consumidor e os princípios gerais do direito civil e do direito processual civil). Rio de Janeiro: Forense, 2009, p. 25.

agency, supervision will be performed by the FIUs, so that no one may be induced to believe that money laundering through art is less risky than through other industries.

60. Require suspicious activity reports on the part of deed registries or agencies in charge of regulating real estate brokers, most notably when cash payments, or attempted cash payments are made, or payments are made through overseas accounts. There are frequent reports of politicians acquiring real estate in Brazil and paying for it entirely or in large part in cash, which has caused unprecedented inflation in the real estate market.

61. Require punishment of the offense of business practices that violate good faith or the loyalty contract that are protected by consumers' rights. They are supervised by, in Brazil, the National Consumer Protection System, formed by Procon, Public Attorney and Prosecutor, and in the United States, at the federal level, by the Federal Trade Commission and the U.S. Department of Justice.

9.2.11 Investigating and Prosecuting Tax Fraud

Explanation: The advisability of granting tax deductions should take account of a complex set of rules, and also requires some professional training on the part of agents. Because of its inhomogeneous nature, art requires some specialization, and agencies monitoring the industry must likewise be specialized.

62. Tax deductions should only be allowed if the donation is something other than an exchange of goods or services, and the beneficiary has been previously registered and qualified. Hence, a license should be required to be tax exempt.

63. Even if a license is granted, it must be required of the entities so benefited, with relevant information entered—under penalty of being closed down—on a form for that purpose, dated and properly signed under penalty of perjury, and containing the name and telephone number of the person who keeps books and records for the organization. These records must contain a detailed list of the organization's activities and management, of all revenues and expenses, and liquid assets, to include the name and purpose of the institution; whether it has on hand more than 25% of its liquid assets; number of voting members listed within and outside the organization; number of employees; number of volunteers; unrelated business revenue and amount paid in taxes; contributions and donations; amounts invested; benefits paid to and for members; total assets and liabilities; basic description of all assistance programs; whether any loans or benefits were granted to employees, directors, a trustee or any other person; name, number of hours worked, and job description of all employees and former employees (including directors, trustees and key personnel); earnings had by these individuals; expenses claimed (including travel and entertainment); and names and particulars of all donors.

64. Check that all donations and contributions received for specific purposes are being properly recorded and faithfully accounted for.

65. Require distribution of financial reports and outside auditors' reports for all directors and management personnel (president, manager and financial department), for easy review.

66. Require an understanding of all internal controls of the organization or foundation, its purposes, a check on whether there are documented updates of policies and activities, changes in its structure, procedures and programs.

67. Check the precise role of each manager (president, administrator, director) and require compliance with the obligation to follow the by-laws.

68. Check for clear procedures for board membership, to ensure diversity among the members, and observe whether this is being strictly complied with.

69. Check for any conflict of interest between the organization and its purposes and members, so as to ensure that all involved are committed to working in the public interest.

70. Check unusual loans, or loans outside of where the organization normally operates, deliberately vague documentation, financing of unconvincing or unlikely social works backed by invoices for nothing verifiable (talks, consultation, services, etc.).

71. To check the profits earned by auction houses and art galleries, one must take account of the cost of goods sold, their inventory of works (stocks and consignments), that their accounting and sales all match the business done by them and the artist, with special attention to their earnings from consignment sales. This obviates the need for some artists to pay their own personal expenses in cash and receive that form of payment from auction houses or galleries for works sold on consignment.

72. Revenue agents should have at least the specific knowledge required for a basic understanding of the art market in order to check on declared prices, and must therefore be subject to constant continuing education.

9.2.12 Insurance Companies

Explanation: Insurance companies are invariably hired in the case of high-value artworks, which are handled differently than ordinary personal property.

73. For purposes of coverage, the policy should identify each piece and state its value (hence the proper appraisal, so that the insured may be held fully accountable for the prices set forth on the insurance application which is the basis for issuing the policy and calculating the premium). Insurance will not be issued for goods unless irrefutable proof of legitimate ownership is shown, or background prior to the policy coverage period. Nor will insurers cover any goods that are vitiated, the subject of warrants (search, apprehension and seizure) or likely to have been smuggled, stolen, robbed, forged, illegally sold, illegally transported or involved in money laundering.

74. There must, in addition, be periodic updates on the item appraised (honesty clause) in order to adjust its value proportionally between the previous evaluation and actual market value.

9.2.13 International Auction Houses, Art Galleries, Museums and Libraries

Explanation: A notice from the Federal Prosecutor's Office in California, as an example, told of the 2011 arrest of Matthew Taylor, an art dealer, charged on seven counts related to art theft, defrauding a Los Angeles collector through sales of more than 100 forged works purportedly by Claude Monet, Vincent van Gogh, Jackson Pollock and Mark Rothko, for a total of $2 million, by purchasing works by unknown artists and replacing their signatures with those of famous artists. The defendant also pretended that the works had been in the holdings of the Museum of Modern Art and the Guggenheim Museum, both in New York. The FBI's Art Crime Team took part in the investigation, along with the Los Angeles Police Department's Art Theft Detail and the Internal Revenue Service Criminal Investigation team. The defendant, on March 12, 2012, made no admission of guilt before the Federal Court in Los Angeles.[13] Another case turned up money laundering by former Ukrainian Prime Minister Pavlo Lazarenko, arrested in June, 2012, in southern California, after the UN calculated that he had stolen some $200 million from the government of Ukraine. A lithograph by Pablo Picasso, believed to have disappeared, was found in an open space under his mansion in California.[14] These examples, even if—unlike many cited here—all the verdicts are not in, should spark serious concern on the part of the movers and shakers of the art world. Here we have illegal dealings in cultural objects, forgery, and the irreparable damage they often suffer, and which also affect national heritage along with that of tribal groups, indigenous populations and other communities. Eventually, these affect individuals and, in particular, the pillaging of archaeological sites destroys historical and scientific information. Closer attention to banking or non-banking transactions in their industry is in order. These entities have become centers for cultural diffusion and hooks for any number of multidisciplinary activities intended to draw people, entertain them and gain recognition. Such a role should strengthen their primary objectives and commitments as eminently social institutions.

75. A review of codes of conduct, with proper supervision, to see to it that the practice is taken up to not involve conflict of interest, or, failing that, at least a check on whether illegal behavior is being detected and proper sanctions applied. All sensitive information should be analyzed and duly reported to the directors of these institutions.

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[13] Cf. Florida Man Arrested on Charges of Selling Stolen Art and Selling Forged Paintings for Millions of Dollars. U.S. Attorney's Office Information from Central District of California. 09/15/2011. http://www.justice.gov/usao/cac/Pressroom/pr2011/134.html, Accessed June 13, 2012.

[14] In accusations of money laundering, vandalism and the theft of a Picasso lithograph in Northern California at a mansion allegedly belonging to the former Ukrainian Prime Minister. Association for Research into Crimes against Art—ARCA, 06/09/2012. http://art-crime.blogspot.com/. Accessed June 13, 2012.

76. Directors or board members at international auction houses, libraries, museums and art galleries should be recruited from the ranks of those holding degrees in art history or anthropology, inasmuch as they are considered sanctuaries for the appreciation of and education regarding art. There are times when these persons' qualifications do not link them to culture, but to business, and many exhibitions or expositions are cluttered with information on automobiles, various and sundry products, etc. A robust force of volunteer teachers should, if possible, be available as advisors. The value of scientific knowledge needs to be made clear to dealers and collectors, along with the potential importance of dealing in and collecting works of art in general, especially antiquities and archaeological objects, as these are the sort of things that will ensure them the continued respect of the public.[15]

77. Require Customer Due Diligence (CDD). Whether companies or individuals, ban anonymous accounts and/or anonymous participants clients. Make identification requirements, with records kept for at least five years. If they are found to be "politically exposed persons," that is, persons in prominent positions, such as politicians and their relatives, and hence more readily able to launder money, or businessmen from countries known to be large producers or consumers of drugs, they should be more closely monitored. This brings us to the establishment of a compliance job description or department, for the occasional work done by peers (especially when located outside of the country of negotiation or donation of artwork), because even information on its existence may be faulty and not prevent the artificial inflation of art appraisals, as occurs in real estate, and thwart sales or open the door to fraudulent acquisitions, forged documents, unconvincing or nonexistent identification, negotiations made in the name of outside parties or trustees, or the involvement of offshore accounts to conceal the true identity of buyer or seller.

78. Compare records from underwriters' databases, since insurance companies are themselves often offshore corporations organized only to put up guarantees. And if they do exist, but in the name of some third party in a tax haven, that company might in the future claim not to have been a party to the contract.

79. Cancel negotiations with or donations from businesses that cannot provide enough financial justification to make it possible to check on the investor's financial strength.

80. Refuse payments in cash, in prepaid access cards, through electronic transfers or other methods that are untraceable and usually are the result of some sort of tax evasion or illegal act.

81. Refuse payments on behalf of outside parties or trustees, or which involve offshore accounts that mask the true identity of the buyer because the use of third parties may be a device for concealing the actual ownership of the asset or resources, and possibly for tax fraud. Hence, payments should only be accepted by the buyer whose name appears on the invoice.

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[15] Along similar lines, S.R.M. Mackenzie (in *Going, Going, Gone: Regulating the Market in Illicit Antiquities,* p. 252).

82. In the case of international auction houses, the five-year guarantee should extend beyond the author or authorship (the period, culture, source or origin), and also include all other items described (including statements about provenance), and cover outside parties.

83. Require notification to the competent authorities or regulatory agency, if any, and to the Financial Intelligence Unit, of any offer or refusal based on suspicion of robbery, theft, fraud, forgery, illegal transportation of sale, money laundering and financing of terrorism—even if confidential.

84. Require advance registration of the buyer, even if online, with submission of personal documentation (copy of photo ID and proof of residence) and banking references—rather than just the account on which payment is drawn—and file the said information for five years.

85. Cancel sales if there is any suspicion of money laundering or that the funds came from the financing of terrorism, and notify the competent authorities whether or not there is some specific regulation requiring Suspicious Activity Reports.

86. No one should be allowed to invoke confidentiality or discretion in order to withhold information from law enforcement agencies, prosecutors, or courts, including auctioneers, for occasionally refusing a bid, speeding up the auction, dividing up lots or deciding who the winning bidder is in cases of uncertainty or error.

87. Provide information to Federal Revenue Authorities in their countries, or, whenever required, to the Financial Intelligence Unit as well, including detailed records on clients (name, address, identity, profession, fingerprints, profits or losses, deals made), under penalty for noncooperation.

88. Subject all personnel to required training on prevention of money laundering and financing of terrorism, with rewards for managers who properly enforce all compliance obligations.

89. Provide detailed reports, by client and by cultural goods, of all works received for storage, and facilitate broad access by government authorities.

90. Make a list of buyers and submit it to the National Register of Art Buyers.

91. Refuse negotiations involving art dealers who are not officially registered.

92. Exchange information with police agencies in charge of enforcement and prevention of robbery, theft, forgery, illegal international trade and transportation, money laundering and financing of terrorism, along with their international counterparts, before closing any deal involving art (purchase, sale, donation, consignment or warehousing).

93. Design supporting technology, such as software, to contain information on the stock of artworks, transactions, contacts, and names of buyers and sellers.

94. Artists must carefully consider the importance of preserving their artistic reputations so as to minimize problems in the marketplace (forgeries, tax fraud, etc.), by adopting a legal and commercial framework to include proper and consistent business practices—for the future of their artistic legacy.

95. To avoid fraud, auctions should be closed, unlike other systems, and invitations should be made from dealers to dealers. A list of potential buyers and their items should be submitted to local authorities ten days prior to the auction, in order to cut down on impulse buying or the artificial bidding up of item prices.

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