

Two Faces of the FATF: Modernity and Coloniality

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Abbreviations

AML/CFT/CFPWMD	Against money laundering and counter-terrorist financing, and the financing of the proliferation of weapons of mass destruction
CMP	Colonial Matrix of Power
DPRK	Democratic People's Republic of Korea
FATF	Financial Action Task Force
FPWMD	Financing of the proliferation of weapons of mass destruction
FSRB	FATF-Style Regional Bodies
GAFILAT	Financial Action Task Force of Latin America
GDP	Gross domestic product
ICRG	International Cooperation Review Group
ML	Money Laundering
NATO	North Atlantic Treaty Organization
OECD	Organisation for Economic Co-operation and Development
TF	Terrorist Financing
TWAIL	Third World Approaches to International Law
UNCAC	United Nations Convention against Corruption
UNFT	International Convention for the Suppression of the Financing of Terrorism
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolutions
UNTOC	United Nations Convention against Transnational Organized Crime
USA	United States of America
Vienna (1988)	United Nations Conventions against illicit trafficking in Narcotic Drugs

Introduction

The Financial Action Task Force (FATF) was created by the G7 in 1988 as an inter-governmental body to promote international recommendations to prevent and tackle money laundering (ML). After the attacks in the United States of America (USA) in 2001, the FATF broadened its scope to include combating the financing of terrorism (TF). In 2012 the FATF made an essential update of its standards by adding, among others, measures against the financing of the proliferation of weapons of mass destruction (FPWMD), seeking the implementation of the United Nations Security Council (UNSC) sanctions regimes on Iran and the Democratic People's Republic of Korea (DPRK).

The FATF Recommendations called the 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation' are a compilation of related elements already defined in United Nations Conventions against illicit trafficking in Narcotic Drugs (Vienna, 1988); the United Nations Convention for the Suppression of the Financing of Terrorism (New York, 1999); the United Nations Convention against transnational organized crime (Palermo, 2000); the United Nations Convention against corruption (Merida, 2003); and the United Nations Security Council Resolutions (UNSCR) 1267, 1989, 1373, against terrorism; UNSCR 1898 related to the peace and security in Afghanistan; UNSCR 1718 on the Sanctions Regimen on DPRK; and the UNSCR 2231 terminating the Sanctions Regime on Iran¹.

Additionally, in its Standards, the FATF included elements motivating the regulation and supervision of the financial sector and other economic sectors, which the FATF considers highly vulnerable to ML/TF, and promoted mechanisms to strengthen the capacities of the relevant authorities to prevent, identify, investigate or prosecute, ML/TF and predicate offenses. The FATF standards are all included in forty recommendations, which can be grouped into the following main themes²:

1. National coordination and policy
2. Identification, investigation, and criminalization of ML, predicate offenses, and TF.
3. The implementation of UNSC Resolutions against terrorism and its financing and combating FPWMD.
4. Regulation and Supervision of the Financial and other economic sectors
5. Corporate transparency, including access to information related to the beneficial owner of legal persons and arrangements.
6. International cooperation

¹ FATF, "FATF 40 Recommendations."

² FATF (2012).

Complementary to the forty recommendations, the FATF has developed a peer review mechanism and an assessment Methodology³. In this process, the FATF has created a system in which a country or jurisdiction that receives bad ratings on the assessment or decides not to undergo the assessment could be included in a non-compliance list⁴. The FATF makes this list of non-compliant countries publicly available and updates it three times a year, right at the end of its plenary session (February, June, and October), as will be explained in Chapter 2.

As explained in more detail in Chapter 2, the FATF has 39 members (37 countries and two regional organizations), and to have a global reach, the FATF promoted the creation of FATF-styled regional bodies (FSRBs). In the High-level principles of the FATF and FSRBs, the FATF explains that it is the only standard-setting body⁵. However, the FSRBs are essential to support the implementation of the FATF standards by providing technical assistance and assessing, per the FATF's methodology⁶. There are nine (9) of these regional organizations⁷, reaching out to all countries in the world, except Iran and DPRK.

The FATF is a *siu generis* entity. It is not a formal international organization as it lacks legally binding instruments such as a treaty or a covenant. Therefore, Chapter 2 will explain how the FATF is considered an example of a soft law standard-setting organization. Scholars have also highlighted the FATF as a success story of international governance, as it has achieved what most international organizations have failed to do, which is a global implementation of standards or best practices. Some scholars have credited this achievement to FATF's peer-review process and the pressure to be listed as a non-compliant country. Julia C. Morse further suggests a theory of unofficial market enforcement as the ultimate driver making countries adopt a regulation to comply with FATF standards⁸.

Notwithstanding, a growing number of scholars are flagging the unintended effects of these FATF standards and have explored instances in which these forty Recommendations reflect neo-colonialist practices⁹. Particular attention has been given to explaining how the counter-terrorism financing measures promoted by the FATF have a neo-colonial element from an African perspective¹⁰ and in the Arab world¹¹. However, there is a research gap when considering the Latin American region, which this paper aims to cover.

Latin America is a concept that could include different countries, depending on the approach used to define the region, which could be from historical, language, geographical, or cultural perspectives, among others. However, for this research, Latin America refers to the eighteen (18) member countries of the Financial Action Task Force for Latin America (GAFILAT – as is its abbreviation in Spanish). Currently, GAFILAT has the following eighteen member states: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador,

³ FATF, "FATF Methodology."

⁴ FATF, "FATF Universal Procedures."

⁵ FATF, "High-Level Principles of the FATF."

⁶ FATF, "FATF Methodology."

⁷ FATF, "Who We Are."

⁸ Morse, *The bankers' blacklist*.

⁹ Morse; Alzubairi, *Colonialism, neo-colonialism, and anti-terrorism law in the Arab world*; Azinge-Egbiri, "Regulating and Combating Money Laundering and Terrorist Financing."

¹⁰ Azinge-Egbiri, "Regulating and Combating Money Laundering and Terrorist Financing."

¹¹ Alzubairi.

Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Republica Dominicana, and Uruguay.

As will be explained in Chapter 1, neo-colonialism or imperialism does not fully explain the complex colonial relationships and mindset still present within and towards a region such as Latin America, which has been free from formal colonial rule for about 200 years. Therefore, this paper will use the modernity/coloniality school of thought to explain how an organization such as the FATF is successful in promoting a modern agenda, though, at the same time, it is an example of the Colonial Matrix of Power (CMP).

Latin American scholars are developing the modernity/coloniality theory of knowledge to explain today's power relations at a local and global level. Anibal Quijano, who coined the CMP concept, explains that social and international relations are a complex entanglement that includes capitalism, gender (patriarchy), racism, and Christianity or modern secularism¹². Walter D. Mignolo further explains that the CMP is one of the faces of modernity; therefore, western civilization is by nature embedded in coloniality¹³.

In its modern meaning, a social classification based on race was developed to distinguish Europeans from non-Europeans during the American conquest and, as such, created new social identities: Indians (native Americans), blacks, mestizos, and whites. This social discrimination was used in other parts of the world during the colonial process, creating a universal racial classification, which mutated in the term, but always to distinguish Western Europeans from non-Western Europeans (e.g., East-West, primitive-civilized)¹⁴. This social classification responded to a hierarchy configuring colonial domination relations, where the Europeans had the power to govern while the others were excluded from all decision-making. The power of coloniality extended beyond skin color to a Western mindset where liberalism, democracy, and capitalism have, and still, dominate the world¹⁵. Therefore, we live under the Western civilization or mindset, which has become universalized by different means, including by governing knowledge production and restricting other communities from developing their own learning processes or theories of knowledge¹⁶. As such Western mindset, also called modernity, goes hand in hand with the CMP, to abbreviate the term, these scholars speak of 'modernity/coloniality'.

Similarly to Third World Approaches to International Law (TWAIL), the modernity/coloniality scholars explain that today's international law originated in the early sixteenth century with the works of Francisco Victoria. Chapter 1 explains how Victoria's analysis of the concept of sovereignty with regards to the Europeans vs. the 'Indians' and the discussions which justified the violence towards the peoples of the Americas was the inception of today's international law, which then were replicated in Westphalia and then in the Berlin Conference of 1884 to divide Africa between the Western Powers.

However, in contrast with TWAIL and their decolonization approach, the modernity/coloniality scholars propose a decolonial thinking process, aiming to offer another

¹² Quijano, "Colonialidad del poder y clasificación social."

¹³ Mignolo, *The darker side of Western modernity*.

¹⁴ Quijano, *Colonialidad del poder, eurocentrismo y América Latina*.

¹⁵ Quijano; Escobar, *Pluriversal Politics*; Mignolo; Mignolo and Walsh, *On Decoloniality*.

¹⁶ Quijano (2014 b); Mignolo and Walsh; Escobar.

option. As explained in Chapter 1, a modern perspective consists of constantly thinking in opposites: men vs. women, capitalism vs. communism, mainstream international legal scholars (MILS) vs. TWAIL, etc. However, modernity/coloniality scholars suggest that more options should be possible; some might not even be the opposite, simply different.

Therefore, this paper explores how the FATF system is an example of the enforceability of international law and how it could be considered an instrument of the coloniality of power (the CMP), particularly towards the Latin American region.

Accordingly, Chapter 1 provides an overview of postcolonial schools of thought to explain further the modernity/coloniality school and its relationship with TWAIL. Chapter 2 explains how the FATF successfully promotes its forty recommendations and encourages countries or jurisdictions to implement them.

Despite the FATF's success, it struggles with legitimacy. Firstly, many wonder about its relevance and true motivations as it is not an international organization. As explained in Chapter 3, the FATF is seen as a tool of the G7 and Organisation for Economic Co-operation and Development (OECD) to implement a neo-liberal agenda. Secondly, the growing interest of different economies in moving away from the US dollar as the leading international trade currency can weaken, among others, the enforceability capacity of the FATF, which relies on the response of the international financial system to US regulations. Therefore, the sustainability of the FATF depends on its perceived legitimacy. Consequently, Chapter 3 discusses legitimacy as an essential element of the FATF, explains how the FATF and its legitimacy are embedded in the CMP from a Latin American perspective and suggests other options for how the FATF could strengthen its legitimacy.

From a methodological perspective, this research refers to various scholars from different fields, as the modernity/coloniality school of thought is multidisciplinary. However, it highlights how these scholars understand international law and how international inter-governmental entities, such as the FATF, shape international law.

In addition to secondary sources, primary sources are used too, such as documents produced by the FATF, United Nations Security Council (UNSC), International Monetary Fund (IMF), World Bank, or other related organizations. Furthermore, to develop the analysis and provide a perspective, my field experience helped identify the examples used. It is relevant to note that due to the limit in words for this paper, only a few examples have been considered.

Finally, this paper raises the attention that an entity such as the FATF has the potential to delink from coloniality and, by doing so, can move away from the political-biased perception¹⁷ it has gained and instead strengthen its legitimacy by moving towards a world where different ways to fight against ML/TF can co-exist and apply to a variety of circumstances. Consequently, the world could experience better results in the fight against illicit financial flows, transnational organized crime, and terrorism.

¹⁷ Morse; Azinge-Egbiri.

1 Chapter One: Contextualizing Coloniality Thought

This paper is founded on the modern/coloniality school of thought. In order to develop the arguments on coloniality/decoloniality in relation to an organization such as the FATF, it is important to understand first what is meant by coloniality/decoloniality and why it is different from imperialism, colonialism and neo-colonialism. Therefore, this chapter reviews literature that explains these concepts and clarifies that even though colonialism and coloniality are both part of a postcolonial line of thought, they are not the same. Furthermore, it will explain the decolonial thought process, which will be used in the following chapters.

1.1 Imperialism, colonialism, and neo-colonialism

Imperialism and colonialism are often used as synonyms, because in the last five hundred years, imperialism has been colonial or neo-colonial. However, imperialism is possible without colonialism. In fact, before the sixteenth century, many Empires expanded and ceased to exist over the years (e.g., The Roman or Ottoman empires), which did not exercise colonialism.

The term 'imperialism' comes from the Latin word *imperium*, which means command or absolute authority¹⁸. For Alzubairi 'imperialism' refers to policies and practices aiming to maintain and extend an empire¹⁹. Michael Mann defines an 'empire' as a "centralized, hierarchical system or rule acquired and maintained by coercion through which a core territory dominates peripheral territories, serves as the intermediary for their main interactions, and channels resources from and between the peripheries"²⁰. Alzubairi, while agreeing with Mann, considers that the main characteristics of an empire are centralization, militarism, exceptionalism²¹, and economic expansion²².

Furthermore, Mann describes three types of empires: Direct, Indirect, and Informal. In the direct empire, the conquered territories (peripheries) are incorporated into the core, and the sovereign rules both the core and the periphery. An example of this type of empire is the Roman Empire. In the indirect empire the periphery retains some autonomy and has the ability to negotiate with the sovereign; an example is the British Empire in Egypt which would retain political and military power, though local elites would enforce everyday rules. An informal empire is when the local rules have full sovereignty, but tacitly it is limited by the imperial core through military or economic intimidation. Mann considers this last type of empire to be the most contemporary exercised by, for example, the USA or Britain²³.

As for the word 'colonialism', according to the online etymology dictionary, "the system of colonial rule."²⁴, referring to the use of power to rule another territory, is only from 1884. Before the sixteenth century, terms like 'colony' and 'colonia' existed but did not have the

¹⁸ Alzubairi, 20.

¹⁹ Alzubairi, 20.

²⁰ Mann, *The sources of social power. Volume 3, Global Empires and Revolution, 1890-1945*. 17

²¹ Alzubairi explains that exceptionalism are emergency measures such as martial law and state of emergency.

²² Alzubairi, 17

²³ Mann.

²⁴ "Colonialism | Etymology, Origin and Meaning of Colonialism by Etymonline."

same connotation as 'colonialism'. The word 'colony' dates back to Roman times and meant an "ancient Roman settlement outside Italy and came from the Latin word 'colonia' which meant "settled land or state". Along the years, the word colony has mutated, and since 1540 it meant "company or body of people who migrate from their native country to cultivate and inhabit a new place while remaining subject to the mother country"²⁵, referring only to the movement of people to other territories to work the land. Therefore, 'colonialism' has been used since the late nineteenth century to explain a characteristic of the European empires and became more prominent after the 1920s with the development of Postcolonial thought²⁶.

Alzubairi recognizes Mann's empire definitions and typologies and explains that colonialism consists of military and political occupation and overseas expansion of the European empires²⁷, and further suggests two types of colonialism: classical and neo-colonialism. She agrees with Edward Said when defining classic colonialism as a manifestation of modern imperialism, which ended in the twentieth century.²⁸

However, she explains that an informal empire with a neo-colonialist characteristic is still present today. This neo-colonialism is less coercive and is exercised by an indirect imperial control of the global domination of Western (mainly the USA) cultural, political, economic, and social patterns²⁹. The characteristics of this neo-colonialism are the same as in classical colonialism: economic expansion, centralization, militarism and exceptionalism, though more implicit. To evidence this Alzubairi analyses how the USA and other Western Powers have promoted an anti-terrorist agenda since 2001 in the Arab world, and uses Egypt and Tunisia as examples³⁰.

Many scholars focus on explaining colonialism as it was conceived since the nineteenth century, after the partition of Africa in the Berlin Conference of 1884-1885, which coincides with the date since the word 'colonialism' was used, as explained earlier (1884). However, by the mid-nineteenth century most Latin American countries (except Cuba) were already independent from Spain and Portugal³¹. This raises the question if the Spanish and Portuguese Empires had a 'colonialist' characteristic towards Latin America. Depending on the definition given to colonialism, for some scholars Latin America was also under colonialism during the rule of the Spanish and Portuguese Empires until most of the continent gained independence early in the nineteenth century. For others, it was not, for example some Spanish scholars argue that the Spanish Empire was not colonial.³² However, all scholars agree that the encounter and rule by western powers of the American continent was violent.

As explained previously, most Latin American countries gained independence in the early 1800s, and since then, it has been difficult to identify with clarity aspects of indirect or informal imperial ties to Spain or Portugal, as both Empires were in decline, neither other European power. After independence, Latin American countries, except for Cuba, did not have strong European influence promoting the four characteristics explained by Alzubairi

²⁵ "Colony | Etymology, Origin and Meaning of Colony by Etymonline."

²⁶ Etymonline.

²⁷ Alzubairi, 22.

²⁸ Said, *Culture and imperialism*.

²⁹ Alzubairi, *colonialism, neo-colonialism, and anti-terrorism law in the Arab world*.

³⁰ Alzubairi.

³¹ Cuba gained independence from Spain 1898.

³² *El Imperio Español NO Fue Colonial. Contra La LEYENDA NEGRA. Clase Magistral de Ana CARABIAS [USAL]*.

(militarization, centralism, exceptionalism and economic expansion), instead these four elements were exercised by the local governors as sovereign nations. Actually, by the year 1900, countries like Argentina, Chile, and Uruguay were among the richest countries in the world, and the GDP per capita was higher than that of Spain³³.

However, with the rise of the USA as a power after World War II, many scholars argue³⁴ that Latin America became once again a target of neo-colonialism practices, where capitalism, liberalism, and neo-liberalism were promoted (sometimes violently) by the USA. In the early nineteenth century the USA proclaimed the Monroe doctrine aiming to keep the American continent free from European interference. Yet, the USA interference in Latin American strengthened over the years and by the twentieth century such doctrine, in combination with other USA foreign policies (e.g., good neighbour, Alliance for Progress), became the leading strategy for the USA to exercise its power over the region and shaped its history by supporting dictatorships, promoting military coups, and intervening at important moments for example in Guatemala 1954; Chile 1973; Nicaragua 1979; El Salvador 1979-82³⁵.

Although these scholars have argued about imperialism in Latin America and whether there is or no colonialism and neo-colonialism, as well as its impact in the region, there is a limitation with the argument. As explained, there was no clear colonialism (or neo-colonialism) for about a century in Latin America (approximately between 1830-1945), from the independence of the Latin American countries until the emergence of the USA as a world power, except in Cuba³⁶; and yet, life, power, and Latin America's role in international law and politics were still very colonial.

Furthermore, since 2000s with the rise of multipolarism, and regional powers strengthening, the USA hegemony and consequently its imperialist capacity is in decline³⁷. Countries like Brazil and Mexico have a more prominent role in international politics, so the influence of neo-colonialism is less notorious in the region. However, Latin America's cultural development, power structures and role in international law and politics are still defined and shaped by a colonial history and mindset. Consequently, the historical and political analysis of imperialism, colonialism, and neo-colonialism cannot fully explain why the region still struggles with a colonial legacy, as it was not under a direct, or indirect empire for many years and the USA neo-colonial influence in recent years is much evident.

Therefore, this paper will not focus on imperialism, colonialism, or neo-colonialism and instead will use the colonality/decolonality theory, emphasizing what Anibal Quijano called the Colonial Matrix of Power (CMP). In order to present the arguments in light of this theory, the following sections will explain where colonality/decolonality is positioned within postcolonial thought, present an explanation of the theory, followed by explaining how this school of thought is in dialogue with the Third World Approaches to International Law (TWAIL).

³³ The comparison is based on the Maddison Database 2010 collected by Professor Angus Maddison and stored by the University of Groningen. <https://www.rug.nl/ggdc/historicaldevelopment/maddison/releases/maddison-database-2010>

³⁴ Mann.

³⁵ Livingstone, *America's backyard*.

³⁶ After the in from Spain (1898) the United States intervened in Cuban Politics (as per requested by Cuban politicians), and began the neo-colonial period over Cuba until 1958 with the victory of the Cuban revolution.

³⁷ Mignolo.

1.2 Postcolonial thought

The vision of a world after colonization has been in development since a century ago. However, it was not recognized as an academic field until the mid-1980s. Postcolonial thought examines the impact of colonialism and imperialism in the periphery areas or those that once were under a colonial power. It also explains how today's modernity is a product of colonialism and imperial relations, for example, how the industrial wealth of Anglo-European societies was based on the exploitation of colonies and their commodities.

Julian Go explains that there are two waves of postcolonial thought. The first wave was motivated by the growing anti-colonial sentiment after the first world war and promoted by thinkers and activists such as Fran Fanon, W.E.B. Du Bios, Amilcar Cabral, Aimé Césaire, Mahatma Gandhi and Kwame Nkrumah³⁸. These thinkers contributed to promoting the ideas and narratives that motivated the decolonization period of Africa and Asia, which began after the First World War and ended after the Second World War.

The second wave of postcolonial thought started in the 1970s, particularly due to different events worldwide, such as the Arab-Israeli conflict, the end of the African decolonization process, and the Iranian revolution. By the late 1980s, the postcolonial school of thought became recognized by the USA academia. Developed by sociologists and political philosophers at first, it soon reached out to other humanities, such as literature³⁹ and international law.

This second wave of postcolonialism was no longer contesting the occupation of a territory and its impact in many fields (economic, social, political) – as many countries were now independent. These scholars focused on explaining that although there was no longer a formal colonial power, the newly formed countries still were under a colonial legacy, for example, from an economic, political, and legal perspective.

Edward Said is a leading scholar in this field with his work on *Orientalism* (1978). Said explains that European colonization of the Orient was also epistemic⁴⁰ and ontological⁴¹. The concept of the 'Orient' was created by Europe (the West) to delineate and separate themselves from the others – the 'Orient' - that can be subjugated and colonized. Said also explains that colonization was not only military, economic, social, and political but also created and controlled by academia and the concept of scientific knowledge. Dominating knowledge allowed the West to create the narrative of the 'Orient' and obstructed another knowledge from developing and forming.⁴²

Consequently, within the decolonization movements in the last century, both waves of postcolonial thought focused on the impact of colonization and decolonization in Africa and Asia. In sync with the second wave, after the 1960s, Latin American philosophers and

³⁸ Go, *Postcolonial thought and social theory*.

³⁹ Go.

⁴⁰ Epistemology is the theory of how knowledge is produced or created.

⁴¹ Ontology is the philosophical branch seeking to define the nature of being, the "I" and its relations.

⁴² Go.

sociologists, such as Leopoldo Zea, Pablo González Casanova, and Rodolfo Stavenhagen, made colonialism a central topic of their work aiming to explore its impact in Latin America.

However, Said raised an important point about how colonization impacted the narratives of the world (e.g., the definition of the 'Orient' as discussed above) and the production of knowledge. In dialogue with Said, Anibal Quijano began explaining that colonization of the American continent was a starting point for the development of modernity, and such colonization was, of course political, cultural, economically - colonialist; moreover, it was ontological and epistemological⁴³. Therefore, there is not only colonialism but also 'coloniality', as described below. Consequently, even though the ties to a colonial power in Latin America are less evident and perhaps neo-colonialism is less coercive nowadays, yet, as modernity governs our thoughts, the production of knowledge, and other spheres of live, coloniality is still present.

1.3 (De) Coloniality theory

"(De)coloniality thought" refers to the work developed by the modernity/coloniality group since the 1970s but has gained more momentum in the 21st century, with the participation of intellectuals from multiple disciplines. The work of this group dates back to the first studies carried out by Anibal Quijano – who coined the term 'coloniality'- and Emmanuel Wallerstein. The group began to discuss the decolonial approach which exposes the racial, political, and social hierarchical orders that modern European colonialism imposed on Latin America, in addition to analysing the living legacy of colonialism: an articulation of power and knowledge structures established on the basis of race and gender, that survived historical colonialism and were integrated into the social orders along the years⁴⁴.

Coloniality is shorthand for Colonial Matrix of Power (CMP), which, in Mignolo's words, is the 'darker side of modernity'. Mignolo explains that modernity is a set of narratives built since the sixteenth century to articulate what it means to be 'civilized', which then transformed into what is 'modern', and nowadays it is called 'developed' in contrast with the 'uncivilized', 'undeveloped or developing'. The fact that modernity is by definition a constant underestimation or patronizing of the non-western shows its Coloniality aspect, it is its other face, and therefore, 'coloniality' and 'modernity' go hand in hand⁴⁵.

One of the problems addressed by Quijano is the question of power. Quijano considers that both Hobbes and Marx present one-sided theories and have limits to explain the complexity of the heterogeneity of power, which should not be reduced to the statist (Hobbes) or economic (Marx) model. To overcome these problems, Quijano proposes an encompassing model and suggests that power is a mixture of four interrelated domains: control of the economy, authority, gender and sexuality, and knowledge. The interaction of these domains can be experienced among imperial states and their colonial subjects⁴⁶.

⁴³ Mignolo and Walsh.

⁴⁴ Quijano (2014 b).

⁴⁵ Mignolo.

⁴⁶ Mignolo.

Mignolo explains that coloniality is the term that uncovers the underlying logic of modernity as an expression of Western civilization which is dominated by patriarchy, Christianity or secular philosophy, race, and capitalism. Modernity is characterized by consolidating a Eurocentric system of knowledge development in all areas (theology, philosophy, science, politics, economics, biology, culture, law, etc.), combined with the dismissal and negation of non-western systems of knowledge, beliefs, and languages. Therefore, coloniality is a complex configuration enacted by Western actors that narrates modernity and control knowledge production⁴⁷.

Mignolo takes Quijano's concept of the CMP and expands it by explaining that the domains of control (economy, authority, race, gender, and knowledge) are the heads which are supported by two legs: patriarchy and Christianity or secular philosophy⁴⁸. Following this line of ideas, I suggest that the development of legal principles in national and international law legitimizes and institutionalizes the CMP, and makes it sustainable.

Decoloniality

Decoloniality is not decolonization. Decolonization means to become independent from the European colonizer, and it refers mainly to two waves of liberating campaigns: the first one in the nineteenth century with the liberation wars of the Americas and the Caribbean and the second wave in the twentieth century with the decolonization processes in African and Asian countries.

Decoloniality seeks to delink our thinking from the CMP. For Mignolo, it is a long-term process that begins with analyzing the CMP to the level that allows deconstructing concepts or developing different ones and then building a different world where many worlds can coexist⁴⁹. This means that decoloniality though seeks to promote other forms of governance besides the Westphalian Nation-State concept. Building a society by means of a strong state is for Mignolo just dewesternization, while decolonization requires a more encompassing process⁵⁰. Dewesternization is not anti-West, but instead, it is accommodating a society to fit the western ideas of living, with economic autonomy and decision-making autonomy in the international arena⁵¹. This process is currently being led by the so-called BRICS countries: Brazil, Russia India, China and South-Africa.

For Jose Manuel Barreto, decoloniality is a dialectic process with three moments: critically analyzing the Western civilization, recognizing the validity of the third-world perspective, and engaging in a dialogue of equals between the Eurocentric and third-world perspectives⁵². Barreto suggests that decolonial thinking is more of a process aiming to create a dialogue between two valid ideas, instead of one feeling and exercising superiority⁵³. On that basis, this paper will follow a decolonial process by analyzing the CMP, then recognizing

⁴⁷ Mignolo and Walsh.

⁴⁸ Mignolo.

⁴⁹ Mignolo and Walsh; Escobar.

⁵⁰ Mignolo and Walsh.

⁵¹ Mignolo.

⁵² Barreto, "Estrategias para descolonizar los derechos humanos."

⁵³ Barreto.

the validity of the Latin American perspective, and then it will suggest how these two perspectives could coexist as equals.

1.4 Decoloniality and TWAIL

The traditional narrative about the origins of modern international law focuses on the Peace of Westphalia in 1648. These peace accords were very important for international law as they defined that the European States were equal and sovereign. It is considered the beginning of (Christian minded) secularism in international law, as every State could now choose a religious branch, as long as it was within Christianity: Catholicism or Protestantism.⁵⁴ However, for TWAIL and coloniality scholars, the origins of modern international law can be traced to the sixteenth century, and specifically the works of Francisco Victoria.⁵⁵

One of the key elements of modern international law is the concept of sovereignty and secularism. Anthony Anghie explains that Victoria's work creates the first secular international law definition. According to Anghie, Victoria reduces the power of the Pope as the sovereign when establishing that *jus gentium* (rights of peoples or rights of nations) applies to both the Spanish and the barbarians⁵⁶ and limits the capacity of the Pope to rule on human issues: thought relations can be administered by the sovereign⁵⁷. The consideration that the Indians have *jus gentium* is also a secular transformation, as it means that the Indians are endowed by natural law and not divine law⁵⁸.

Additionally, Victoria justified the war in the New World by explaining that the resistance to conversion (to Christianity) was a cause for war. Furthermore, he considered that the Indians, though humans, did not have the capacity to go to war, were uncivilized and pagan, and therefore not sovereign. As a *just war* can only be applicable between two Sovereigns; thus, the principles of a just war did not apply to the non-sovereign Indians. Anghie considers this the beginning of modern international law and also the beginning of colonialism. After all, colonialism was legitimized by the agreement among the European powers that the non-Europeans were not sovereign under international law. Consequently, modern international law is colonial by definition⁵⁹.

Coloniality scholars agree with Anghie though they add that Victoria was also a scholar who contributed to the definition of modernity and, therefore, the CMP. Victoria insisted that there was a difference in the relations between two sovereign nations, using France and Spain as examples, and between the Spanish and the non-sovereign (Indians). He concluded that due to the inferiority of the 'indians', they are not capable of governing themselves⁶⁰. Victoria, by emphasizing the difference between European and non-Europeans, and claiming that Europeans were superior, sovereign, and had the capacity to exercise their rights fully, whilst

⁵⁴ Hernández, *International Law*. In 5-6

⁵⁵ In many English texts, the name of the Spanish Scholar has been spelled Francisco de Vitoria. However, in this paper, I will use the Spanish spelling of his name: Francisco de Victoria.

⁵⁶ Victoria called the Native American Peoples barbarian, pagan, or uncivilized.

⁵⁷ Anghie, *Imperialism, Sovereignty, and the Making of International Law*.

⁵⁸ Mignolo.

⁵⁹ Anghie.

⁶⁰ Mignolo; Mignolo and Walsh.

the non-Europeans must be governed, converted, and civilized, created the legal narrative which institutionalized modernity/coloniality. In order to appreciate coloniality thought, it is important to realize that modern international law insofar as it concerns relations between colonial powers and 'Indians' was developed on the basis of such explicit racism.

In addition to this agreement about the origins of modern international law, TWAIL and coloniality Scholars also coincide in their objective to:

“(1) understand, deconstruct and unveil the uses of international law as a means for creating and perpetuating racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans; (2) to build and present an alternative legal system for international governance; (3) to eradicate, through detailed study, public policies and politics, the conditions of underdevelopment in the Third World”⁶¹.

However, TWAIL and coloniality scholars have a slightly different viewpoint. TWAIL emerged from postcolonial studies, which, as explained above, focus on decolonization, while coloniality thought is a process to unveil how modernity is colonial by definition. Mignolo explains that a characteristic of modernity/coloniality is that it is binary, where only two opposing options are possible, e.g, men vs. women, European vs. non-European, capitalist vs. communist.⁶² Postcolonial studies and, consequently, TWAIL are embedded in such a binary system, as they oppose colonization and the Mainstream International Law Scholars (MILS).

However, modernity/coloniality scholars aim not to be the only truth but instead suggest that other narratives of the world's past, present, and future are and should be possible. Consequently, writers like Jose Manuel Barreto promote a dialogue between mainstream concepts, TWAIL, and coloniality to exemplify how this last school of thought is a valid option apart from other valid options, an approach aiming to build *a world in which many worlds fit*.

⁶¹ Mignolo. 16.

⁶² Mignolo and Walsh; Mignolo.

2 Chapter Two: The FATF and its enforceability capacity

2.1 The Financial Action Task Force

The Financial Action Task Force (FATF) is an international watchdog against money laundering and counter-terrorist financing, and the financing⁶³ of the development of prohibited weapons of mass destruction programs (AML/CFT/CFPWMD). In its more than thirty years it has created a Global Network and promoted significant changes in the global fight AML/CFT/CFPWMD. Its enforceability system makes it more effective than the UN security council or other UN agencies. This section will explain how and why the FATF can compel countries to implement its forty recommendations despite not being an international organization.

The FATF was established in 1989 by the G7, under the initiative of the USA, in promoting the war on drugs. The USA government had criminalized money laundering in 1986 and was aware that a multilateral approach was needed to prevent banks from being used for ML⁶⁴. In parallel to the negotiations to adopt the United Nations Convention against Illicit Trafficking Narcotic Drugs and Psychotropic Substances⁶⁵, the USA rallied the G7 to create the FATF to monitor the efforts AML, promote additional preventive measures, and strengthen law enforcement actions.

The first meeting was in April 1990, and a few months later, the first Forty Recommendations were issued to strengthen the fight AML. In response to 9/11 in October 2001, eight special recommendations on TF were added. With the momentum of the 'war on terror', by 2003, the FATF added new recommendations related to terrorist financing, creating what became known as the 40+9 FATF recommendations. The latest structural revision was done in 2012, and the FATF added more measures to tackle the financing of prohibited weapons of mass destruction programs, such as those in Iran and the DPRK. This revision merged and re-structured the ML and TF themes into forty recommendations against ML/TF/CFPWMD. Since then, more additions and changes have occurred, for example to include preventive measures related to virtual assets and to strengthen corporate transparency. However, no major structural changes⁶⁶ have occurred.

The FATF is not an international organization; it has no legal personality nor permanent charter or treaty that binds the members legally. Thus, it works under the legal umbrella of the OECD. Since 2019 the FATF members decided on an open-ended mandate contrary to the periodical revision and extension of the mandate they used to work with⁶⁷. Consequently, the forty recommendations are by nature a soft law instrument⁶⁸.

⁶³ FATF, "Who We Are."

⁶⁴ Morse. 56

⁶⁵ This UN Convention introduces and promotes the criminalization of the money laundering crime for the first time in the international arena. This Convention was adopted in 1988 and entered into force in 1990.
https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=VI-19&chapter=6

⁶⁶ FATF, "History of the FATF."

⁶⁷ FATF, "The FATF Mandate."

⁶⁸ FATF.

However, it is important to note that the current forty Recommendations include elements already defined in various UN instruments. Specifically, the FATF has included in its recommendations the implementation of certain aspects of the following UN Conventions: Vienna (1988), against transnational organized crime (UNTOC), against corruption (UNCAC), and for the suppression of the financing of terrorism (UNFT). The forty Recommendations also include specific references to the implementation of the UNSCR and sanctions regimes against terrorism (UNSCR 1373, 1267, 1988, 1989) and to counter the PWMD illegal programs of Iran and DPRK (UNSCR 2231 and 1718)⁶⁹. Therefore, one could argue that the elements raised by the FATF, which are included in UN Conventions and the UNSCR, are binding to all participating states.

Nevertheless, the forty Recommendations add a wide range of elements to the instruments already adopted by the UN. Just as an illustration, the Vienna (1988) Convention, UNTOC, and UNCAC include the ML crime as a criminal offense that all signatory countries must criminalize at a national level. However, the FATF, in addition to promoting the criminalization of ML as defined in these Conventions, set a minimum list of 21 categories of crimes that must be considered predicate offenses of ML, meaning that in some countries to fulfil such list, they need to create additional criminal offenses.

In addition to complementing certain elements already included in the UN instruments, the FATF developed a new set of standards for the private sector. Initially, it was focused on the financial sector, but over the years, the FATF included other economic sectors considered highly vulnerable for ML & TF, such as corporate lawyers, notaries, accountants, and real estate agents, among others⁷⁰. Therefore, the FATF recognizes that the public and private sectors must be involved in the fight against ML/TF/FPWMD.

With the combination of UN instruments and the additional measures towards the private sector, the FATF promotes countries to implement an AML/CTF/CFPWMD regime that comprises three main pillars: Preventive, Supervisory, and Criminalization. The preventive pillar requires the private sector to implement measures to know who their clients are (Know Your Client), monitor them, and other measures to prevent being misused for ML/TF/FPWMD or, when having any suspicion, raise appropriate alarms to relevant authorities. The Supervisory pillar aims to develop mechanisms for the State to monitor the implementation of the private sector's preventive measures and to act administratively against any possible infraction. Finally, the third pillar entails the entire criminal process, from the investigative moments, including the use of intelligence, the judicial decision, and the seizing and confiscating of assets. All these pillars are potentialized with national and international cooperation⁷¹.

In addition to standard setting, the FATF monitors and assesses countries' compliance with its forty Recommendations. Similarly, to how the recommendations have evolved, the monitoring process has also changed. The assessment is a peer review process where public officials from member countries, in combination with the FATF Secretariat, evaluate compliance with the FATF standards. Currently, the FATF is finalizing the fourth round of assessments. Until the third round, the emphasis was mostly on assessing the level at which

⁶⁹ FATF, "FATF 40 Recommendations."

⁷⁰ FATF.

⁷¹ FATF, "FATF Methodology."

countries had transposed the FATF recommendations into their legal framework. However, since this round of assessments, the process is focused mainly on identifying the effectiveness of the entire system and the FATF developed an assessment methodology to that end⁷².

The FATF currently has 39 members, of which 37 are countries⁷³ and 2 are international organizations⁷⁴. It has about 25 observers: Indonesia and 24 international organizations, such as the World Bank, the International Monetary Fund, and the United Nations (various agencies).⁷⁵

To have a global reach, the FATF promoted the creation of regional task forces that would promote the implementation of the FATF standards worldwide. The FATF considers these FATF-Style Regional Bodies (FSRBs) as associate members; currently, nine FSRBs cover different regions worldwide. With the FSRBs, the FATF has created a global network of about 200 countries and jurisdictions⁷⁶ that must implement the FATF forty Recommendations and be assessed. The mutual evaluations can only be performed by the FATF, the FSRBs, the World Bank, or the IMF⁷⁷.

The American Continent has two FSRBs: the Financial Action Task Force of Latin America (GAFILAT- as its abbreviation in Spanish) and the Financial Action Task Force of the Caribbean. Though both entities have Latin American countries as members, this paper focuses on member countries of the GAFILAT. The GAFILAT was created in 2000 in Cartagena, Colombia. Currently, it has the following 18 member countries, 3 of which are also members of the FATF (Argentina, Brazil, and Mexico).

Table 1: GAFILAT member countries⁷⁸

Argentina*	Cuba	Nicaragua
Bolivia	Ecuador	Panama
Brazil*	El Salvador	Paraguay
Chile	Guatemala	Peru
Colombia	Honduras	Dominican Republic
Costa Rica	Mexico*	Uruguay

⁷² FATF, "FATF Methodology."

⁷³ This number includes the Russian Federation, which currently has its membership suspended due to the War in Ukraine.

⁷⁴ The two international organizations are the Gulf Co-operation Council of the Arab States of the Gulf (GCC) and the European Commission.

⁷⁵ FATF, "Who We Are."

⁷⁶ FATF.

⁷⁷ FATF, "FATF Procedures."

⁷⁸ GAFILAT, "Home."

2.2 The FATF enforceability effectiveness

One of the main challenges in international law is its enforceability, otherwise understood as its ability to motivate actors to adopt and implement the agreed provisions to obtain the desired results⁷⁹. Many scholars have discussed this issue from different perspectives, and there is a general agreement that enforceability is still a weak spot of international law.

Considering the definition provided above, two main components regarding enforceability are to be considered: i. Motivating actors to adopt international rules, and ii. Encouraging actors to implement such commitments. There are many examples of how each of the two components presents a constant challenge in different areas of international law.

However, the FATF is undoubtedly one of the most persuasive entities, having engaged the widest variety of countries and jurisdictions to endorse and implement the forty Recommendations. As explained earlier, the FATF's global network reaches more than 200 countries and jurisdictions, and this is more than the UN, who has 193⁸⁰ member States, or than INTERPOL (195)⁸¹, and almost as many as the FIFA (211 affiliated associations)⁸² which is the largest organization in the world from a membership perspective.

The success of FATF in rallying countries to join the global network and implement its forty Recommendations is due to its (black/grey) listing process implemented since 2007 under its International Cooperation Review Group (ICRG)⁸³. The FATF has two lists, which are revised three times yearly during FATF's plenaries (February, June, and October):

- the 'High-Risk Jurisdictions subject to a Call for Action,' widely known as the 'black-list,' and
- the 'jurisdictions under increased monitoring,' also known as the 'grey-list.'

The 'black-list' requests members of the global networks to apply countermeasures. The criteria for listing include not joining the global network and consequently not endorsing the FATF recommendations and the assessment process; not committing to fulfil the action plan set by the FATF to address the AML/CFT/CFPWMD deficiencies identified in the assessment or failing to finalize the action plan in a timely manner. Currently, only three countries are on this list: DPRK due to not joining the global network, Iran for failing to fulfil FATF's action plan timely and not being able to join an FSRB, and Myanmar due to not fulfilling its action plan or showing high political commitment to address its deficiencies⁸⁴.

As for the 'grey-list', a country or jurisdiction can enter this list due to not reaching a minimum threshold, defined by the FATF, on the results of the peer review assessment and

⁷⁹ Morse.

⁸⁰ United Nations, "About Us."

⁸¹ "INTERPOL Member Countries."

⁸² "FIFA."

⁸³ Morse. 66

⁸⁴ FATF, "Black List as of May 2023."

when the jurisdiction meets a minimum level of financial sector assets. By May 2023, 25 countries were on the list⁸⁵.

Listing can have far reaching consequences for the country concerned, as explained further below. In Latin America, these listing mechanisms have compelled countries to join the global network and to transpose the FATF recommendations into local legislation. As an illustration, the following are a few examples.

Cuba had not shown interest in joining the global network; consequently, in June 2011, the FATF black-listed Cuba and urged “the country to develop an AML/CFT regime in line with international standards.”⁸⁶ Accordingly, Cuba began a procedure to leave the list. Firstly, by requesting membership in GAFILAT, which was granted by GAFILAT’s Plenary in 2012, and then by engaging with the FATF to fulfil an action plan approved by FATF’s plenary in February 2013⁸⁷, which included criminalizing ML and TF and implementing UNSCR as defined in the FATF 40+9 recommendations. By October 2014, Cuba met “its commitments in its action plan regarding the strategic deficiencies that the FATF had identified in February 2013, [and was] no longer subject to the FATF’s monitoring process under its on-going global AML/CFT compliance process.”⁸⁸

From the perspective of implementing the FATF recommendations locally, the FATF has also been very successful. Countries worldwide, including in Latin America, have progressively implemented the FATF recommendations at an interesting rate. A telling example is the implementation in Latin America of the UNSC-targeted financial sanctions against DPRK’s nuclear program. The UNSC sanctions regimes are mandatory to all UN member states according to articles 39-41 of the UN Charter.⁸⁹ The UN targeted financial sanctions against DPRK’s nuclear program were adopted already in 2006 with UNSCR 1718⁹⁰.

However, it was only since 2013 that the Latin American region began to adopt related measures, in order to comply with the new FATF mandate which had recently included (in 2012), in its recommendation No. 7⁹¹, measures to implement the UNSC financial sanctions against the nuclear programs of DPRK and Iran. To evidence the above, the results of the FATF process are enlightening. By May 2023, 14 out of the 18 GAFILAT’s member countries have been assessed under the FATF recommendations from 2012, and only Colombia has not implemented DRPK sanctions accordingly (and was thus rated not compliant). From the other 13 countries, four are partially compliant, which means having moderate shortcomings, and nine have been rated largely compliant or fully compliant⁹².

To evidence that the FATF-style assessment was a critical driver in implementing these sanctions, the following table shows the last day of the onsite visit of the assessment team and the issuing date of the related regulation. The date of the onsite visit is key because according to the Consolidated Process and Procedures for the Mutual Evaluations of the FATF

⁸⁵ FATF, “Grey List as of May 2023.”

⁸⁶ FATF, “FATF Public Statement - 24 June 2011.”

⁸⁷ FATF, “FATF Grey List as of June 2013.”

⁸⁸ FATF, “Grey List as of October 2014.”

⁸⁹ United Nations, “UN Charter.”

⁹⁰ United Nations Security Council, “S/RES/1718.”

⁹¹ FATF, “FATF 40 Recommendations.”

⁹² FATF, “Consolidated Assessment Ratings.”

and all other assessment bodies in the Global Network, laws, regulations, and norms will be taken into account only if they are adopted and enforced by the last day of the onsite visit⁹³. Table 2 demonstrates that 11 out of 13 countries approved regulation before the assessment. Ecuador, Guatemala, Honduras, and Uruguay adopted the regulation just a few days or even one day prior to the last day of the onsite visit.

Table 2: Implementing regulations on DPRK and the last day of the onsite visit

GAFILAT MEMBER COUNTRY	YEAR THE REGULATION WAS ADOPTED.	LAST DAY OF FATF-STYLED ONSITE VISIT
1. Chile ⁹⁴	2019	17 January 2020
2. Costa Rica	2016 ⁹⁵	30 January 2015 ⁹⁶
3. Cuba ⁹⁷	2013	12 September 2014
4. Dominican Republic ⁹⁸	2017	25 January 2018
5. Ecuador ⁹⁹	21 March 2022	8 April 2022
6. Guatemala ¹⁰⁰	15 October 2015	4 December 2015
7. Honduras ¹⁰¹	11 June 2015	12 June 2015
8. Mexico ¹⁰²	2014	16 March 2017
9. Nicaragua	2018 ¹⁰³	20 January 2017 ¹⁰⁴
10. Panama ¹⁰⁵	2015	26 May 2017
11. Paraguay ¹⁰⁶	2019	3 September 2021
12. Peru ¹⁰⁷	2016	1 June 2018
13. Uruguay ¹⁰⁸	15 May 2019	17 May 2019

For Costa Rica and Nicaragua, the situation is somewhat different. Both countries did not reach the minimum threshold to avoid falling into the ICRG criteria, however, the FATF gives one year of grace, and only then the FATF will decide whether to list them or not.¹⁰⁹ Consequently, both countries approved the regulation during the following year.

As explained previously, the UNSC Resolution was adopted in 2006, but only seven years later, Cuba (2013) implemented the first internal regulations. More than half (8) of the countries took a decade or more to implement the UNSC Resolution, and it is evident that the actual purpose was to fulfil the FATF recommendation No. 7. This raises the question of how a task force, not at an international organization, promoting soft law can persuade countries

⁹³ FATF, "FATF Universal Procedures."

⁹⁴ GAFILAT, "Mutual Evaluation Report of Chile."

⁹⁵ GAFILAT, "First Follow-up Report of Costa Rica."

⁹⁶ GAFILAT, "Mutual Evaluation Report of Costa Rica."

⁹⁷ GAFILAT, "Mutual Evaluation Report of Cuba."

⁹⁸ GAFILAT, "Mutual Evaluation Report of Dominican Republic."

⁹⁹ GAFILAT, "Mutual Evaluation Report of Ecuador."

¹⁰⁰ GAFILAT/GAFIC, "Mutual Evaluation Report of Guatemala."

¹⁰¹ GAFILAT, "Mutual Evaluation Report of Honduras."

¹⁰² IMF/FATF/GAFILAT, "Mutual Evaluation Report of Mexico."

¹⁰³ GAFILAT, "Third Follow-up Report of Nicaragua."

¹⁰⁴ GAFILAT, "Mutual Evaluation Report of Nicaragua."

¹⁰⁵ GAFILAT, "Mutual Evaluation Report of Panama."

¹⁰⁶ GAFILAT, "Mutual Evaluation Report of Paraguay."

¹⁰⁷ GAFILAT, "Mutual Evaluation Report of Peru."

¹⁰⁸ GAFILAT, "Mutual Evaluation Report of Uruguay."

¹⁰⁹ FATF, "Grey List as of May 2023."

to implement standards, that not even UNSC has been able to achieve? The answer is through financial and economic coercion.

The financial and economic consequences of FATF listing

As explained, the FATF has two lists, the "black" and the "grey". When a country is listed on the black-list, the FATF calls upon countries to apply countermeasures¹¹⁰, and countries can decide on the type of applicable measures. In addition, for the grey-list, the FATF asks countries to inform their financial institutions to apply a risk-based approach towards these listed countries due to their weaknesses in their AML/CFT national regime¹¹¹. The financial consequence of such listing has been researched by different scholars who have concluded in general terms that the FATF listing has a negative impact on the GDP, foreign investment, and credit ratings of a country¹¹².

The consequences are immediate and with a longer-term impact. Once a country is on a list, one direct and immediate effect in practice is the closure of correspondent banking relations.¹¹³ Banks, in particular of countries of non-leading international currencies (e.g., USA Dollar, Euro), need an intermediary bank to send or receive international payments. A World Bank survey in 2015 and a recent study by the IMF (2016)¹¹⁴ suggest that a frequent reason to decline or close correspondent banking relations is the FATF listing, or the risk of ML/TF of the jurisdiction and the CDD measures applied by the local bank, in other words, the compliance level with the FATF standards.¹¹⁵

When considering other economic consequences, a study conducted on 36 Latin American and Caribbean jurisdictions identified that as a consequence of FATF's listing, jurisdictions could lose, on average, 20 percent of Foreign Direct Investment.¹¹⁶ Furthermore, a recent study by the IMF analyzed the impact of the FATF grey-listing on capital flows of 89 countries between 2000-2017 and concluded that a negative impact on the capital inflows was an average of 7.6 percent of the GDP, the Foreign Direct Investment declined on average 3 percent of the GDP and other investment flows reduced in average by 3.6 percent of GDP¹¹⁷. To put this into perspective, a study on the Russian sanctions as a consequence of the annexation of Crimea estimated that between 2014-2017 the total net capital inflows losses would amount to 8% of the Russian GDP of 2013 when also considering the effect of low oil prices.¹¹⁸ Thus, the consequence of FATF listing is comparable to unilateral sanctions imposed by the USA, the European Union, and other Western powers on Russia in 2014-2015 due to the Crimea crisis.

Public listing is not something new or unique for the FATF; international organizations and non-governmental organizations also use listing as a pressure mechanism. However, the FATF's enforcement capacity is undeniable. For Julia Morse, the FATF success is due to its

¹¹⁰ FATF, "Black List as of May 2023."

¹¹¹ FATF, "Grey List as of May 2023."

¹¹² Farías and de Almeida, "Does Saying 'Yes' to Capital Inflows Necessarily Mean Good Business?"; Kida and Paetzold, "The Impact of Gray-Listing on Capital Flows: An Analysis Using Machine Learning"; Morse.

¹¹³ Morse.

¹¹⁴ Almeida, "The Withdrawal of Correspondent Banking Relationships."

¹¹⁵ Almeida.

¹¹⁶ Farías and de Almeida.

¹¹⁷ Kida and Paetzold.

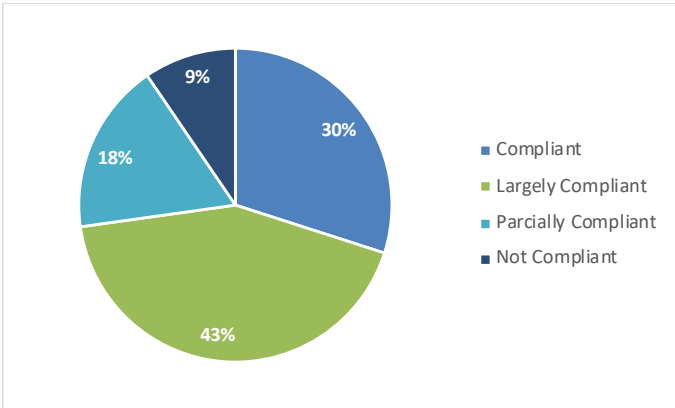
¹¹⁸ Gurvich and Prilepskiy, "The Impact of Financial Sanctions on the Russian Economy."

reliance on what she calls unofficial market enforcement, where banks and other financial institutions include the FATF results in their risks assessments and decide whether to accept, delay, or decline a transaction or a client. Morse explains that the grey-list is not explicitly coercive, and therefore, the harsh measures are a market decision and not necessarily enforced by any authority¹¹⁹. Though, I would like to offer a nuance to that view.

The FATF compels countries to implement its recommendations in local legislation, so that banks and other companies are legally required to take into account the grey-listing: they are obliged to use stricter CDD/KYC measures in relation to transactions and clients from or related to a grey-listed jurisdiction. The FATF or national authorities do not prohibit offering services to grey-listed countries, but when a client is not ‘worth’ taking the risk, financial institution in practice often prefer to cancel the business relationship. After all, the stricter measures come at a cost, as explained below. I would therefore argue that the market is highly motivated to apply local legislation which implements the FATF standards in order to prevent sanctions from their supervisory authority, and therefore the grey-list is in practice coercive.

The FATF has included recommendation 19 about high-risk countries, which clearly states that jurisdictions should regulate their financial sector to (1) implement countermeasures to the blacklisted countries and (2) take risk-based measures for grey-listed countries. The type of countermeasures or risk-based measures to be implemented depend on the local regulator; however, as stated in recommendations No. 1 and 10, enhanced measures should apply to higher-risk situations, which in practical terms means increasing client and transactional scrutiny, requesting more information, and applying various internal procedures, among others. These measures increase operational costs for financial institutions, which is an important decision-making variable. Figure 1 shows that 73% of the 147 jurisdictions assessed in the entire Global Network by May 2023 have high levels of compliance with recommendation 19 (fully or largely compliant), evidencing all those jurisdictions have regulated their financial sector to apply countermeasures and a risk-based approach to FATF listed countries.

Figure 1: Global Network Compliance of Recommendation 19 by Mayo 2023¹²⁰



¹¹⁹ Morse, 73

¹²⁰ Graph created using data from the FATF, “Consolidated Assessment Ratings.”

Furthermore, the FATF recommendations 26 and 35 also call for countries to supervise and apply a wide range of sanctions to financial institutions that fail to comply with legislation implementing the FATF standards, including those mentioned in this paragraph.¹²¹Sanctions increase costs and have a reputational impact, another important decision-making variable for the private sector.

Therefore, the FATF has created a very effective enforcement system where a country has to regulate and supervise its private sector, and when failing to do so, it will be listed, and the rest of the 200 jurisdictions will tell their financial institutions to raise the risk of the listed country. Then the financial institutions apply market enforcement, amplifying the impact of the listing, consequently negatively affecting the listed country’s financial position and economic growth.

Figure 2: FATF's enforcement system



Evidently, the FATF has promoted global AML/CFT/CFPWMD standards and has created a successful enforcement system that induces countries to implement its standards. Although its recommendations are by nature soft law, they have more impact even than legally binding measures from long-standing entities, such as the UNSC.

Despite this success, the FATF's legitimacy is constantly questioned. From one perspective, the lack of legal framework of the FATF raises questions about the legal obligations to implement its forty recommendations, however, the financial and economic consequences of failing to comply supersedes the weak legal binding. A soft law entity, with no legal framework depends on legitimacy to maintain its relevance. Therefore, legitimacy crucial to the FATF and its sustainability. However, many scholars question the FATF’s legitimacy from different perspectives, including how the FATF is seen a neo-colonial tool.¹²² Therefore, the following section explains some aspects about legitimacy, and how a decolonial perspective could strengthen the FATF’s legitimacy.

¹²¹ FATF, “FATF 40 Recommendations.”
¹²² Alzubairi.

3 Chapter 3: FATF’s legitimacy and coloniality

Legitimacy became an important feature of international law after the NATO incursion in Kosovo, where the rhetoric was built around “illegal but legitimate”¹²³. Since then, the term legitimacy is a tool to draw a bridge between international law, politics, and morality and to articulate a political project in the international arena¹²⁴.

Considering that the FATF is not framed under a traditional concept of international organization and does not have a legal foundation, scholars have used the legitimacy concept instead to analyze its legality from a moral standpoint¹²⁵.

Furthermore, the FATF seeks to strengthen its legitimacy hoping to reduce the criticism received as being considered a political tool of the G7 and the OECD to enforce neo-liberal and capitalist agendas¹²⁶. In Latin American this was very evident during the previous round of assessments where only and most left-wing countries, were grey-listed, as shown in the following table. These countries were elected democratically and promoted a progressive (social-democracy) or communist agenda, and openly rejected neo-liberal ideas. Therefore, were not inclined to implement all the FATF standards, and as explained in the previous section, the FATF coerced them by listing them.

Table 3: GAFILAT Countries grey-listed during the previous round of assessment and their type of government

	YEAR OF LISTING ¹²⁷	GOVERNMENT IN OFFICE	TYPE OF GOVERNMENT
ARGENTINA	2011	Cristina Fernandez de Kirchner	Left-wing
BOLIVIA	2010	Evo Morales	Left-wing
CUBA	2011	Raul Castro	Communist
ECUADOR	2010	Rafael Correa	Left-wing
HONDURAS¹²⁸	2010	Porfirio Lobo	Center-right(Previous government was left-wing)
NICARAGUA	2011	Daniel Ortega	Left-wing (with socialist and Marxist influence)
PANAMA	2014	Ricardo Martinelli ¹²⁹	Center-left
PARAGUAY	2010	Fernando Lugo	Left-wing

In this sense, this section will explain some of the legitimacy concerns raised by scholars regarding the FATF and will suggest how coloniality is another aspect of legitimacy that has

¹²³ Reis and Kessler, “Legitimacy.”

¹²⁴ Reis and Kessler.

¹²⁵ Morse; Azinge-Egbiri.

¹²⁶ Morse.

¹²⁷ Data coded by Morse, 69.

¹²⁸ Porfirio Lobo was elected President of Honduras in December 2009, after a military coup against Manuel Zelaya, a left-wing President. Honduras listing was due decisions taken by Zelaya’s Government.

¹²⁹ The year Panama was listed, Juan Carlos Varela had won the elections, and Martinelli stepped-down in July 2014. Therefore, Panama was listed due to decisions taken by Martinelli’s Government.

not been considered yet. Furthermore, it will explain how the CMP is evidenced in the FATF when considering the pillars of race, power, capitalism, and knowledge.

3.1 The FATF's legitimacy

Legitimacy motivates actors in international law to abide by when the law or the actions of international organizations is perceived “desirable, proper, or appropriate within some constructed system of norms, values, beliefs, and definitions.”¹³⁰ Consequently, legitimacy is related to the authority of international law and the degree the actors “acknowledge an obligation to comply.”¹³¹

As explained in the previous section, the FATF has developed an effective system to coerce members of the Global Network to implement its Standards. However, its legitimacy has been constantly questioned by scholars, in particular in relation to non-members, because it is driven mostly by financial and economic coercion¹³². Another important driver is the moral duty to fight against transnational crimes, particularly ML and TF. Though some countries have opposed implementing the FATF Standards and are therefore listed, countries have not openly rejected fighting against these crimes. The AML/CFT aim of the FATF is, in principle, a fight that jurisdiction feel compelled morally, to join and cooperate with.

However, coercion and morality are insufficient for sustaining long-term cooperation or compliance¹³³. Coercion is seen as a political tool, and as shown earlier the FATF is not exempt from this perspective. Though the assessment methodology is presented as a technical process, it is not a secret that global politics play an important role.¹³⁴ In addition, the perception of urgency to the moral issue could change, and the perception that coercion is used to legitimize the authority of the FATF will affect the overall engagement of actors¹³⁵. All in all, the strengthening of other elements of legitimacy can help to contribute to building FATF's credibility as a technical body instead of a political one. For which some comments will be given to the importance of consent, fairness, and democracy as the basis for strengthening legitimacy¹³⁶, as explained by Lake.

When taking a closer look into the FATF, the analysis of these additional legitimizing elements has a different impact when considering the FATF members compared to the non-FATF members of the global network. Scholars have argued that in both cases, the FATF should continue strengthening its legitimacy¹³⁷, and when emphasizing on the non-FATF members, the gap is even wider¹³⁸. Considering the limits of this paper, I would address these three elements briefly from the FATF perspective.

¹³⁰ Suchman, 574

¹³¹ Morse, 37

¹³² Alzubairi; Morse.

¹³³ Morse.

¹³⁴ Morse; Alzubairi; Azinge-Egbiri.

¹³⁵ Morse.

¹³⁶ Lake, *Hierarchy in International Relations*.

¹³⁷ Morse.

¹³⁸ Alzubairi; Azinge-Egbiri,

With regards to consent, as explained earlier, the FATF is not a formal organization and lacks any binding treaty or similar mechanism; therefore, formal consent is not applicable. However, it can be argued that the FATF members have given consent and constantly reaffirm their consent at every plenary when they adopt decisions. From the perspective of the non-FATF members, the situation is different. As an example, the GAFILAT members signed a memorandum of understanding agreeing to implement the FATF forty recommendations¹³⁹ and reaffirm such commitment during every GAFILAT plenary meeting. However, GAFILAT member states have no mechanism to consent to any changes produced by the FATF to its recommendations or procedures that would affect them, as they do not have membership status towards the FATF. Additionally, the GAFILAT members cannot withdraw their consent, otherwise, as explained in the previous section, they would be punished.

Thomas Franck explains that fairness in international law refers to due process, either in courts or how law is created in accordance with a right process. Also, he suggests that legitimacy is an important aspect because it reinforces the perception of fairness and compliance of international law. According to Lefkowitz, fairness means fair cooperation between agents and is based on voluntarily acquired obligations. Fairness is sustainable when the benefit of cooperating outweighs the costs of contributing to the scheme¹⁴⁰. Considering these definitions, FATF members could relate to fairness as they voluntarily agreed on the obligations and could see the benefits of fighting ML/TF and being part of the decision-making process. However, this is different for non-FATF members who cannot be part of the decision-making process to the changes or additions made to the forty recommendations, the assessment methodology or the listing process, though they can offer comments¹⁴¹. Additionally, the costs of not joining the FATF network, and implementing the FATF requirements, are immediately felt, and potentially higher than the possible benefits; consequently, forced to cooperate.

Finally, Lefkowitz makes the point that consent, or the acceptance of benefits is not in all cases a necessary condition for international law's legitimacy¹⁴², and the FATF is a clear example. However, he explains that international law should constitute just relations between agents, and for that, democracy is a popular answer¹⁴³. From this perspective, the FATF decision-making is democratic. Decisions are taken by consensus¹⁴⁴, and there are no veto powers. However, non-FATF members do not have a say in any of the decisions that could affect them; only the FSRBs have a voice but do not vote at the FATF plenaries. Therefore, towards the global network, the FATF is not democratic. It is important to mention that the FATF does reach out to the global network for comments, suggestions, and contributions, yet it is up to the FATF members to consider them.

Furthermore, legitimacy and the above-related elements are based on a constructed system of norms, values, beliefs, and definitions. This system was developed since Victoria in

¹³⁹ GAFILAT, "El Organismo Internacional."

¹⁴⁰ Lefkowitz.

¹⁴¹ The FATF share with the Global Network drafts of possible changes, the FATF secretariat receives comments and shares them to the FATF members. Yet, decisions are made by the FATF members only. The non-FATF members have no voice nor vote in any of the FATF working groups or at the plenary.

¹⁴² Lefkowitz, 120

¹⁴³ Lefkowitz, 120

¹⁴⁴ FATF, "FATF Procedures."

the sixteenth century, then in Westphalia, and further matured by Western philosophers and scholars; in other words, it is the system of modern, Western thinking.

3.2 The Coloniality face of the FATF

Chapter 1 mentions that modernity is one face of the coin, and the other is coloniality. Modernity and consequently coloniality is based on the CMP, an entanglement of social relations with pillars related to labor, capitalism, sex, race, Christianity / Christian secularism, authority, and knowledge¹⁴⁵. This section will follow decoloniality thinking where it will explain certain features of modernity/coloniality that can be identified in the FATF structure and recommendations.

One of the pillars of modernity/coloniality is the imposition of racial/ethnic classification of the world population, where Europeans are at the top of the social classification. This classification originated in the encounter of America but then was applied to the rest of the world. In the sixteenth century, the Europeans began to call the people living in America 'Indians,' the enslaved Africans became 'blacks,' and the Europeans called themselves 'whites,' 'humans,' and 'civilized.'¹⁴⁶ Then, European scholars, such as Victoria, argued that the 'Indians' were humans but ignorant and pagan, therefore, needed evangelization. Yet, once the 'Indians' became Christians, they were not considered equal to the Europeans¹⁴⁷.

Consequently, geo-references were created: the (Far) East, Middle East, West¹⁴⁸. These geo-references have mutated to for example: first (capitalist), second (communist), and third (not-aligned) world¹⁴⁹- denominations used during the cold war, though the 'Third World' concept is still used in international law. Since the 1990s, other denominations were created: 'developed,' 'developing,' and more recently, other terms such as the 'global north' and the 'global south' are common. Those geo-references are not exact geographic positions on Earth; thus, these terms are used to differentiate the Western core (of thinking) from the rest.

In the Western core of thinking, European and non-European countries such as the USA of America and Canada are included. These two countries are part of the core because their colonization process meant the extermination of almost the entire native population and the complete marginalization of these communities. Therefore, the governing society is of European descent, whites, and Christians¹⁵⁰. Australia and New Zealand are similar cases, though colonized somewhat later, still based on the marginalization of the native population, and the ruling elite has been mainly white, Christian, and modern since then.

Intertwined with social classification is the control of knowledge. Since the sixteenth century, Europe became the main hegemonic center of knowledge production. Influential philosophers such as Descartes (France), Spinoza (The Netherlands), Locke, and Newton (England) developed the concepts of modern philosophy¹⁵¹. Though the USA contributed to

¹⁴⁵ Quijano, (2014a).

¹⁴⁶ Mignolo; Mignolo and Walsh.

¹⁴⁷ Quijano, (2014a); Escobar.

¹⁴⁸ Quijano, (2014a), 324-325.

¹⁴⁹ Mignolo.

¹⁵⁰ Mignolo.

¹⁵¹ Quijano, (2014a).

this knowledge production since the eighteenth century with Thomas Jefferson and other intellectuals, it was not until 1945 that the USA became the leader in knowledge production. The accepted knowledge is not only produced in the Western core but also by those educated under the same way of thinking, therefore it could be developed in the periphery but following the same Western logic¹⁵². During the last 500 years, non-western knowledge has also been produced, but it was and is not considered rational, valid, or scientific enough, discouraging the production of knowledge outside the Western view, even though it was not fully eliminated¹⁵³.

The other important pillar of coloniality is capitalism. In general, capitalism is considered to have been developed during the industrial revolution in the eighteenth century, when the division of labor became massive, and the relationship between labor, salary, and capital became predominant. However, this narrative does not consider that this was already happening in the Americas since the sixteenth century. The labor division and the accumulation of capital intertwined with race were part for the social classification in the newly encountered continent¹⁵⁴ - through the CMP. The type of labor exploitation (paid labor, serfdom, and slavery) was related to race¹⁵⁵. Payment for work was given to the whites and their descendants (criollos and mestizos), and the 'Indios' were exploited through serfdom (or Encomienda).

In combination with control over labor, the concept of property is a key component of capital accumulation. Before the encounter, the concept of property was not part of native cosmovision. The Europeans brought and enforced the concept of property, and forcefully took the land from the native people, and claimed it as theirs¹⁵⁶. Furthermore, Europeans claimed that human beings and nature should be considered property. Similarly, to the enslaved Black people, nature became a resource to be exploited, hence the concept of natural resources. Consequently, during the conquest of the Americas, human beings and nature became a commodity of the global market¹⁵⁷.

The control over knowledge, capital, and social classification are some of the main components of the CMP, which is the basis of today's modernity/coloniality. The FATF, its global network, and its recommendations are an expression of this CMP, as it will be explained in the following paragraphs.

The FATF and control of power

The FATF has been embedded in the CMP since its inception. For example, its composition is mainly of members of the Western core. As mentioned previously, the FATF was created by the G7: the USA, Canada, France, Germany, Italy, the United Kingdom, and Japan - The prominent Western core leaders both economically and knowledge-wise. Japan¹⁵⁸

¹⁵² Quijano, (2014a).

¹⁵³ Mignolo and Walsh.

¹⁵⁴ Quijano, (2014a).

¹⁵⁵ The social pyramid in the Spanish colonized America considered the following: At the top, the Spanish born in Spain, then the criollos o creoles (Spanish descendants born in America), followed by the mestizos (a mix between the Spanish and the Indians), then the Indians, then the blacks or the mixture between the black and Indians.

¹⁵⁶ Quijano, (2014a).

¹⁵⁷ Mignolo and Walsh; Mignolo.

¹⁵⁸ Mignolo.

could be seen as the non-western minded of the group, however when the G7 was created, Japan had been under USA influence since 1945, which led to a significant 'westernization' and was a close ally in East Asia¹⁵⁹.

The first FATF meeting was held with 15 countries, then by 1991 the membership grew to 28 members, 26 countries, and 2 regional organizations (the European Commission and the Gulf Cooperation Council - GCC)¹⁶⁰. Of the 28 members, only the GCC, Turkey, Singapore, and Japan were not members of the Western core. Hong Kong, by then was still under British rule. Then in the 2000s, when motivations for multipolarism were growing, significant emerging economies were accepted.

Today, the FATF comprises 37 countries and 2 regional organizations. All members of the G20, except Indonesia.¹⁶¹, are members of the FATF. FATF members also overlap with the OECD membership. Table 4 shows that even though the FATF has accepted a wider variety of countries, the membership is still mainly from the Western core, representing 60% of the membership when not considering Japan, Hong Kong, Singapore, Korea, and Israel as part of the western core¹⁶².

Table 4: FATF members since its creation¹⁶³

Country	Year of membership	G20 member ¹⁶⁴	OECD member ¹⁶⁵
Australia	1989	✓	✓
Austria			✓
Belgium			✓
Canada		✓	✓
European Commission			
France		✓	✓
Germany		✓	✓
Italy		✓	✓
Japan		✓	✓
Luxembourg			✓
Netherlands			✓
Spain			✓
Switzerland			✓
United Kingdom		✓	✓
United States		✓	✓
Denmark	1990		✓
Finland			✓
Greece			✓

¹⁵⁹ Mignolo.

¹⁶⁰ Morse.

¹⁶¹ Indonesia has observer status.

¹⁶² Some coloniality scholars argue that Japan, Israel, Singapore, and Korea could be consider western core due their 'westernization' and their political western affiliation. Hong Kong as it is now ruled by China is clearly not from the western core, anymore. In such case, the percentage of western-core membership in the FATF would be 79%.

¹⁶³ FATF, "Who We Are."

¹⁶⁴ G20, "About G20."

¹⁶⁵ OECD, "List of OECD Member Countries - Ratification of the Convention on the OECD."

Golf Cooperation Council			
Hong Kong, China			
Ireland			✓
New Zealand			✓
Norway			✓
Portugal			✓
Sweden			✓
Turkey		✓	✓
Iceland	1991		✓
Singapore			
Argentina	2000	✓	
Brazil		✓	
Mexico		✓	✓
Russia*	2003	✓	
South Africa		✓	
China	2007	✓	
Republic of Korea	2009	✓	✓
India	2010	✓	
Malaysia	2016		
Israel	2018		✓
Saudi Arabia	2019	✓	

* Russia's membership is suspended due to the Ukraine-Russia War

Decisions in the FATF are unanimous, therefore it is impossible to make a decision that will not satisfy the Western core. In recent years the acceptance of non-European members aims to strengthen the institutional legitimacy and attempts to reduce the criticism of non-members calling the FATF a political tool of the OECD or G7¹⁶⁶, therefore the FATF has called for more regional representation and thus, during the last years, accepted Malaysia, Saudi Arabia, and Israel. However, besides South Africa, there is no other African representation.

When looking at Latin America, countries such as Colombia, Peru, and Chile have not been accepted yet, despite requesting membership status. Argentina, Brazil, and Mexico are seen as the Latin American representatives. They became members in the 2000s as independent member countries. Though they do bring to the FATF their peripheric view, the other Latin American countries did not decide nor consent to these three countries to represent the view of all the entire region towards the FATF, nor do these countries speak for the rest of the region when addressing the FATF.

Another way how the FATF has aimed to become more inclusive is by empowering the FSRBs more. Some see these regional entities as a 'validation or credibility provider for the FATF system'¹⁶⁷ as they must implement the FATF assessment process, they are involved in reviewing the countries eligible to be listed and can lobby towards the FATF on behalf of their member countries. Morse suggests that this an attempt of the FATF to enhance the democratic legitimacy¹⁶⁸.

¹⁶⁶ Morse.

¹⁶⁷ Morse, 65

¹⁶⁸ Morse.

Other scholars have also suggested that the inclusion of the BRICS aimed to decrease a democratic deficiency and strengthen the FATF's legitimacy.¹⁶⁹ The BRICS is a group of the five leading emerging economies: Brazil, Russia, India, China and South Africa. The first four (BRIC) initial formal meeting was held in 2009, and South Africa joined the following year. Similarly to the G7, it is a platform that encourages commercial, political, and cultural cooperation. However, in contrast to the G7 the BRICS is composed by dewesternizing countries¹⁷⁰ that do not share all the same political agendas, though they are interested in promoting stronger multipolarity in the international arena¹⁷¹. The BRICS were granted FATF memberships before the block was officially consolidated, and they were accepted due to their economic growth and regional influence¹⁷². They certainly bring a dissenting voice to the FATF table. However, their overall capacity to shift decisions is heavily outnumbered by the western-core, and even more now with the suspension of Russia's membership to the FATF as a consequence of the Ukraine-Russia war¹⁷³.

Consequently, FATF's attempt to gain more legitimacy by promoting more non-western minded members and a regional representation is an interesting initiative. However, the decision-making process in the FATF is still in the hands of the western-core. By making these democratic legitimacy arguments a modern narrative is used to keep uncovering the coloniality aspect. To further evidence the coloniality face of the FATF, the following paragraphs present an analysis of the pillars of the CMP in relation to the FATF: Control of power and knowledge, and capitalism.

Listing process – The control of power

As explained, a country is liable to be listed once certain conditions have been met. The International Co-operation Review Group reviews the countries that have met the listing conditions and recommends whether to list a country. The FATF plenary makes the final decision.

The FATF created regional review groups to promote legitimacy within the ICRG, where the FRSBs and their members are encouraged to participate in the analysis panel. This regional group presents a report with a recommendation to the ICRG on whether the country should be listed. However, in practice these regional groups are always led by a FATF member, and the FATF secretariat has an important role in drafting such reports. Then, the ICRG decides unanimously whether to present the regional groups' recommendation to the FATF's plenary. Despite the intention to involve the global network in the process, only FATF members can ultimately vote and decide on the listing at the ICRG and the plenary. FSRBs and observer organizations have only a voice, not a vote, in both these meetings. Therefore, the FATF members control and decide the whole process.

The FATF is capitalist

As explained previously, another important component of the CMP is capitalism. The FATF focuses on ML/TF, which are offenses against the economic system, in other words, that

¹⁶⁹ Azinge-Egbiri.

¹⁷⁰ Mignolo.

¹⁷¹ Azinge-Egbiri.

¹⁷² Azinge-Egbiri.

¹⁷³ FATF, "Who We Are."

threaten a capitalist order¹⁷⁴. More than half of the forty recommendations aim to protect the financial and specific economic sectors (casinos, real estate agents, accountants, lawyers, notaries, trust and company service providers, dealers in precious metals and stones and virtual asset services providers¹⁷⁵) from being abused or misused for these crimes.

In addition, due to the enforceability capacity explained in the previous chapter, the FATF has the capacity to limit the access of poorly compliant countries or those that refuse to be part of the FATF network, to the international financial system, to be a player in the global economic arena and negatively impacting the economy. Consequently, the FATF has the power to restrict access to capital and trade, therefore using capitalism as an enforceable tool. In conclusion, the FATF is a capitalist watchdog with two capacities: protecting a capitalist status quo and a tool to bring back in line any divergent countries.

The control of knowledge in the FATF

In addition to the decision-making process, the coloniality in the FATF is also evidenced in the content of the forty recommendations and its enforcement, in particular on those elements that are added to UN Conventions or UN resolutions and the assessment methodology. Therefore, this section will further explain the modernity/coloniality mindset. Due to the limitations of this paper only one example within the FATF recommendations will be used to illustrate the point.

The Western mindset is characterized, among various, by a universality aim. As explained by Mignolo, before modernity became global, different non-western civilizations had their own narratives of the world. However, in contrast to other civilizations, western civilization became homogenizing by globalizing the Western thinking as the only valid knowledge. In the eighteenth century cosmology was transformed from Christianity to Western secular mindset where science and philosophy are its main pillars¹⁷⁶. Through social, cultural, and political processes, the Western core became the center of knowledge production, which via universities, museums, christian/secular philosophy, even Hollywood movies and consumer goods, the Western mindset became dominant and hegemonic.

The control of knowledge is a predominant element in the CMP. As explained in previous sections, the modern philosophers, when discussing and controlling the idea of 'human', 'civilized', and 'developed' were able to establish a hierarchy among human beings (divided in ethnicity), and such hierarchy is also used for the production of knowledge¹⁷⁷. When knowledge is produced in the Western core, it is reasonable, the truth; though when produced by non-Western minded, it is 'unreasonable', 'superstitious.'¹⁷⁸ Therefore, with regards to the control of knowledge, modernity/coloniality has two faces: a) the consolidation of Western mindset and, b) "the dismissal and disavowal of principles of knowing and created knowledge in non-European languages, non-European systems of belief"¹⁷⁹, or developed outside the

¹⁷⁴ FATF, "FATF 40 Recommendations."

¹⁷⁵ FATF.

¹⁷⁶ Mignolo and Walsh, 164

¹⁷⁷ Mignolo and Walsh.

¹⁷⁸ Mignolo and Walsh; Escobar.

¹⁷⁹ Mignolo and Walsh, 197

Western core. Such control makes the Western mindset feel superior and therefore universally homogenizing, imposing their cosmovision over others.

The FATF recommendations and its system exemplify the Western mindset of universally homogenizing. The drafting process of the FATF recommendation and the assessment methodology is not democratic as previously explained, and experts from the western-core wrote them¹⁸⁰. Currently, some parts of the forty recommendations are in the process of being updated, for which there is a consultation process both within the global network and towards the civil society and the private sector, but the inclusion of the comments received falls under the FATF secretariat and member states.¹⁸¹

From the perspective of those involved in adopting the recommendations, it is evident that it is controlled by the Western core, as explained previously. Even though the BRICS and other non-western countries are part of the FATF, they are still outnumbered by the Western core and their ability to make substantial changes to the FATF standards is still limited¹⁸².

In the official document of the forty recommendations, the FATF claims that these standards “have been endorsed by over 180 countries and are universally recognized as the international standard for”¹⁸³ AML/CFT. As explained previously, the endorsement has been via financial and economic coercion, and ‘universal’ means Western mindset hegemony¹⁸⁴. Considering that the FATF AML/CFT standards are Western-minded and enforced by coercion, their totalitarian character is evident.

The Western mindset hegemony can also be identified in how the FATF promotes the literal implementation of its recommendations, without considering other options or their inapplicability in non-western contexts. As per the FATF methodology, word by word of technical criteria must be transcribed in countries’ laws and regulations. In the assessment process, an important part is the review of the legal framework of any country reflecting the literal implementation of the FATF standards, including those elements that go beyond the UN Conventions and UNSC resolutions. According to the FATF’s methodology ‘compliant’ can be granted when the regulation reflects literally the FATF standards¹⁸⁵. The following is just one example chosen to illustrate this point.

In recommendation 6, the FATF has included the requirement to implement the United Nations targeted financial sanctions against terrorists and those supporting terrorism in compliance with UNSCR 1267, 1988, and 1989. In addition, this recommendation promotes the implementation of UNSCR 1373, issued to condemn the attacks in 9/11 and promoting international cooperation against terrorism and its financing¹⁸⁶. However, the FATF has added

¹⁸⁰ Azinge-Egbiri.

¹⁸¹ Over the past years, there has been a public consultation to review recommendations 24 and 25 on obtaining the Beneficial Ownership information of legal persons and arrangements. See the consultation process of recommendation 25 as an example in <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/R25-public-consultation-oct22.html>

¹⁸² Azinge-Egbiri.

¹⁸³ FATF, “FATF 40 Recommendations.” Recommendation No. 7

¹⁸⁴ Mignolo.

¹⁸⁵ FATF, “FATF Methodology.”

¹⁸⁶ FATF, “FATF 40 Recommendations.” See Recommendation 6

different requirements not in the UNSC resolutions but instead, mirroring the USA anti-terrorism sanctions list and procedures.

In recommendation 6, the FATF motivates countries to implement UNSCR 1373, in addition to elements not stated in any UN official document. For example, the FATF requires countries to have a procedure for national designations related to terrorism, in other words, procedures for a national terrorist sanctions list. The FATF recommendation 6 says:

“Countries should implement targeted financial sanctions regimes to comply with United Nations Security Council resolutions relating to preventing and suppressing terrorism and terrorist financing. The resolutions require countries to freeze without delay the funds or other assets of, and to ensure that no funds or other assets are made available, directly or indirectly, to or for the benefit of, any person or entity either [...] (ii) designated by that country pursuant to resolution 1373 (2001).”¹⁸⁷

Some of the FATF recommendations have interpretative notes to explain further the requirements, and the interpretative note of recommendation 6 says:

“Countries also need to have the authority and effective procedures or mechanisms to identify and initiate designations of persons and entities pursuant to S/RES/1373 (2001), consistent with the obligations set out in that Security Council resolution. Such authority and procedures or mechanisms are essential to identify persons and entities who meet the criteria identified in resolution 1373 (2001), described in Section E.”¹⁸⁸

Furthermore, the FATF methodology, which is the assessment's guiding document, includes very specific criteria that countries or jurisdictions must implement in their local framework and present evidence to the assessment team to comply with recommendation 6. According to Criteria 6.2 related to designation under UNSCR 1373, countries should (a) identify an authority responsible for listing persons that meet the criteria in Section E of the FATF recommendations, (b) have mechanisms to identify persons to be designated, and (c) develop procedures to answer international requests related to freezing the assets of foreign listed persons¹⁸⁹.

However, UNSCR 1373 does not request or encourages countries to define or create an authority or develop procedures to designate and sanction persons at a national level and does not set any designation criteria. While the FATF created the designation criteria in section E (c) of the interpretative note to recommendation 6¹⁹⁰. Moreover, the UNSC requested the Counter-Terrorism Committee Executive Directorate (a committee created by the UNSCR 1373) to develop a “Technical guide to the implementation of Security Council resolution 1373 (2001) and other relevant resolutions.” Such guidance was issued in December 2019 and does not refer to any FATF obligations mentioned above. Instead, the guidance says that those

¹⁸⁷ FATF. Recommendation 6 in 13

¹⁸⁸ FATF. Interpretative Note to Recommendation 6. Paragraph 4, in 44

¹⁸⁹ FATF, “FATF Methodology.” Recommendation 6, criteria 6.2 (a-e), in 32-33

¹⁹⁰ FATF, “FATF 40 Recommendations.” Interpretative Note to Recommendation 6. Paragraph 13, section E (c), in 49

countries with national sanctions lists should make them publicly available to promote international cooperation, and insists that:

"States remain sovereign in their determination as to whether to incorporate regional or other national asset-freezing lists domestically, should they meet their designation criteria, and pursuant to their own legal and regulatory frameworks."¹⁹¹

Despite this guidance, the FATF requests countries to implement all its requirements fully. Latin America has no tradition of implementing unilateral or regional sanctions like the USA, the European Union, or other Western-core countries. In the region, due to a history of dictatorships, authoritarianism, and other political background, publicly listing a person as a terrorist that has not been convicted could be seen a human rights violation. Therefore, the implementation of these requirements has been challenging. Yet, as it is one of the core recommendations of the FATF¹⁹², countries in the region have no choice but to identify an authority responsible for listing persons and create related procedures, though such procedure might not be used.

The FATF does recognize in a footnote (9) that the UNSCR does not request an actual terrorist list¹⁹³. Few Latin American countries have created a national, local list. A best practice paper developed by the GAFILAT and published in July 2019 shows that 13 GAFILAT member countries participated in a survey, from which 85% answered that they had developed procedures for national terrorist designations according to the FATF recommendation 6. In addition, 69% confirmed not having created a national terrorist list, despite having the procedures, and only 31% confirmed having created such a list¹⁹⁴.

These requirements added to the UNSCR by the FATF are in line with the unilateral sanctioning procedures of the USA, the United Kingdom, and other western-core countries, and this evidences how the FATF feels entitled to create and enforce procedures in addition to those defined by the UN, despite other non-western realities and contexts.

3.3 Another option is possible

Mignolo explains that the CMP is the darker side of modernity; therefore, the FATF is a product of modernity, consequently, of coloniality. In the previous paragraphs, the coloniality of racist power structures, control of knowledge, and the use of capitalism as a power tool, which are CMP pillars, has been explained, and by using examples, the coloniality aspect of the FATF has been evidenced.

The FATF challenges related to legitimacy explained above are based in coloniality. The perception of the FATF lacking inclusion, democratic procedures, and a fairness towards the global network has also developed because a Western-core mindset is the basis of the FATF. Consequently, the FATF is seen as a political tool of the Western core. Hence, to strengthen

¹⁹¹ Counter-Terrorism Committee and Executive Directorate, "UNSCR 1373 Guidance." paragraph 56.

¹⁹² FATF, "Listing Procedures."

¹⁹³ FATF, "FATF 40 Recommendations." footnote 9, 44.

¹⁹⁴ Garzon, "Good Practices on Procedures and/or Mechanisms for Domestic Designation or Execution of Third Countries' Requests in Line with United Nations Security Council Resolution 1373." 32

legitimacy the FATF should continue to work on dewesternization, as well as move towards a decolonial thinking.

Dewesternization, which in other words means allowing other possible ways to implement certain western ideas in non-western contexts, instead of forcing only one way of implementing such western ideas. Therefore, the FATF could continue to expand its membership to allow other alternative yet capitalism-type economies such as those promoted by the emerging economies, as the BRICS.¹⁹⁵

However, the *siu generis* nature of the FATF allows it to have a great potential to becoming decolonial. A decolonial mindset recognizes that other communities have a valid knowledge and engages in a dialogue as equals¹⁹⁶, instead of hierarchical.

A decolonial perspective also encourages breaking away from the Westphalia definition of Nation-State, where territory is one of the basic features of statehood¹⁹⁷. Similarly, to decolonial scholars, Cedric Ryngaert considers territory is a recent concept, and a positivist understanding of territory is challenged by today's global problems such as cybercrime. Therefore, Ryngaert suggests there should be other alternatives to the of concept territory and explores other forms of non-or extra-territorial jurisdiction based on, for example, space, time, or justice¹⁹⁸.

The global Network of the FATF has the potential to promote an alternative concept of territory in international law. Firstly, the global network is already considering as actors jurisdictions that are not yet recognized fully as countries such as Palestine, Kosovo, or Taiwan. Secondly, the FATF aims to tackle transnational crimes that by definition benefit from national jurisdictional boundaries to avoid prosecution, new internet based phenomena such as ML and TF using virtual currencies or through cybercrime challenge the basic concept of territory as they are non-physical¹⁹⁹. Lastly, the global network is organized by regions trough the FSRBs, that respond to language, culture or legal traditions. The FATF could move away from global harmonization to promote regionalization allowing more options to be possible and applicable in other contexts.

Therefore, the FSRBs could be potentialized to a level where a FATF-Region's dialogue could be promoted to adjust the forty recommendations to what the pressing needs are in the different regions, and therefore prompting a more focused and a truly risk-based approach towards ML/TF/FPWMD. For example, GAFILAT member countries have developed a regional threat assessment that clearly evidences the urgency of combating ML in the region from drug trafficking and corruption²⁰⁰. This explains how ML is a priority over TF and FPWMD. Consequently, the GAFILAT member countries should focus their efforts and resources on these offences and coherently, the FATF-styled assessment could emphasize on ML and motivate more results in this regards, instead of how it is currently happening where countries must also present results against TF and FPWMD, despite low or no-exposure to these threats.

¹⁹⁵ Mignolo; Mignolo and Walsh.

¹⁹⁶ Barreto.

¹⁹⁷ Mignolo; Escobar.

¹⁹⁸ Ryngaert, "Territory in the Law of Jurisdiction."

¹⁹⁹ Ryngaert, "Extraterritorial Enforcement Jurisdiction in Cyberspace."

²⁰⁰ GAFILAT, "Análisis de amenazas regionales."

Furthermore, a dialogue as equals between FSRBs-FATF would allow to consider other non-western core tools not yet included in its forty recommendations. For example, Colombia in the late 1980s developed a non-conviction based confiscation mechanism to confiscate the assets of Pablo Escobar and other drug cartels. Such tool is now in use and implemented in other countries of the region, such as Peru, Honduras, and Guatemala²⁰¹. However, it is not included in the FATF recommendations and thus not fully considered during the assessments.

Furthermore, ML/TF, corruption and the rest of these criminal phenomena behave different in the different regions and thus a regional approach could be more effective than just one western method applied in the same way across regions. To evidence this let's take for example ML from drug trafficking. Cocaine is produced in the Andes countries and trafficked to other regions. Most of the proceeds to be laundered are created at the final selling point, according to UNODC estimates in 2010 the prices of a gram of cocaine in Latin America was in average US\$ 11, in North America was US\$108, and in Oceania US\$ 291. Therefore, the approach to tackle ML should be different in the production countries from that at the final selling points. In the Andes countries, the effectiveness should consider not only the fight against ML alone, but also the fight against the production and trafficking of cocaine; for example, seizures of cocaine mean that ML was prevented from happening at all. While in North America and in the Oceania tracing the illicit proceeds as a priority is consistent with the ML phenomenon in those regions. Therefore, as these offences have particularities per region, a regional perspective to tackle them could be more effective.

Consequently, a decolonial thinking could strengthen the FATF's legitimacy as the FATF can truly become more democratic in the decision-making process as well in the use of knowledge. Best practices from different regions could be considered and the implementation would be really risk-based and targeting the pressing problems. The FRBS could adjust the the forty recommendations to address regional needs and consequently become coherent for non-western realities. Overall this could increase the international cooperation to tackle ML/TF and reinforce the importance of fighting against ML/TF/FPWMD as a whole, increase the perception of democracy and fairness, and consequently the FATF's legitimacy. Perhaps, as a side effect, the world could see an increase in results against organized crime.

²⁰¹ Wingate et al., *Stolen Asset Recovery*.

Conclusion

This paper is based on the modernity/coloniality of thought. Coloniality is a school of thought that originated in Latin America; however, it has expanded to include thinkers from other regions. Initially it was promoted by sociologists, philosophers, and anthropologists, yet it has expanded towards other areas of knowledge such as political science, and international law.

Coloniality presents a critical view of modernity, however it does not claim to have the only truth. Instead, it suggests that other narratives about the past, present and future should, and are, possible. Consequently, it explains that the discourse of modernity is true, for a population of the world, and yet there is another one: Coloniality. Both modernity and coloniality are the two faces of the Western civilization, developed hand in hand, since the encounter with the American continent and conceptually, since the early sixteenth century with the works of scholars such as Victoria.

International law as we know it today is a modern development, thus, it is also an expression of coloniality. Therefore, this paper focused on explaining modernity/coloniality in international law and used the FATF to evidence these both sides of the same coin.

The FATF, as its name suggests, is not an international organization but a task force. Member jurisdictions agree on the importance of promoting international standards against ML/TF/FPWMD and have created a global network of countries, jurisdictions, international organizations and other entities to coordinate and the implementation of the FATF forty recommendations world-wide.

From a modernity standpoint the FATF is the most successful international entity to enforce its standards. From the perspective of encouraging jurisdictions to adhere to the FATF principles, through the global network structure, the FATF has been able to engage with more than 200 jurisdictions. In addition, through the peer review process, and with the instructions given to financial institutions and other economic sectors to increase the risk and apply additional measures to listed jurisdictions, the FATF has created the most effective system to enforce international law.

Unfortunately, the FATF has received many criticisms. Some of the criticism is related to limited diversity in the FATF members, democracy, and fairness. This element in the end impacts the FATF's legitimacy as a technical entity. As explained, the FATF is not supported by a formal legal framework, therefore legitimacy is an important element that will provide sustainability to its mandate.

The FATF is aware of the importance to strengthen its legitimacy and therefore, has become more inclusive by allowing representatives of the global south to become members, and decisions are unanimous. However, this is when considering only the 39 members of the FATF and it is not applicable to the rest of the global network. The non-member jurisdictions, which entails most of the world, have limited participation and no decision-making capacity on elements that affect them directly, such as the content of the forty recommendations and the listing. Furthermore, the lack of democratic capacity of non-members questions the

fairness of the system and reinforces the perception that the FATF is a tool of the G7 and the OECD to impose a neo-liberal and capitalist agenda over the rest of the world.

This criticism, though, do not cover the whole story. Further to these arguments, another aspect that so far has not been consider and that impacts negatively on the legitimacy of the FATF is coloniality. Coloniality is an abbreviation of the CMP coined by Quijano and explains the complex social relations that define the Western civilization, developed since the encounter with the Americas, strengthen over the years, and still present today. The Western mindset created, since the sixteenth century, a vertical social hierarchy cantered on race, where Europeans or European descendants are high in the ladder. This allowed the European minded to have control over power and knowledge. Coloniality is constructed basically by an entanglement of race, capitalism, the control of power and knowledge. Coloniality scholars suggest more elements, however, in this paper these four where analysed.

The FATF is an expression of coloniality because it is based on a Western mindset which has both sides: modernity and coloniality. From the coloniality perspective, it is very evident that the FATF endorses a neo-liberal, capitalist agenda. The FATF's aim is to promote a fight against ML/TF, which are financial crimes that seek to protect capitalism and its sustainability. Furthermore, the FATF has control over knowledge, as the forty recommendations reflect a western-mindset; they were and continue to be drafted and approved by western-minded people. In addition, the control of power is only in the hands of the western core, as more than 60% of FATF members (with voting rights) are from the west, including all western economic powers. Such control of power uses capitalism (financial and economic coercion) to enforce a western-minded standards - the forty recommendations-, universally homogenizing the fight against ML/FT, despite it being inapplicable in certain contexts or going beyond legally binding tools such as the UN Conventions or the UNSCR.

The FATF is already engaging in dewesternization by allowing non-western core countries to become members of the FATF, however more could be done. In addition, the uniqueness of the FATF allows it to have the potential of becoming a decolonial international entity. Therefore, future research could focus con suggesting more ways in which the FATF could de-link from coloniality and gain more legitimacy from such a perspective.

In conclusion, the FATF is an example of good governance from a modernity perspective and currently it is the most successful entity to enforce international law, however its limited democratic process and fairness towards the global network, lack of diversity, and its entrenchment in coloniality raises many legitimacy questions. Therefore, to promote its sustainability and a technical agenda against ML/TF, the FATF must continue to strengthen is legitimacy by continuing a dewesternization path and eventually moving towards a decolonial mindset. A decolonial mindset in the FATF would allow the fight against ML/TF to focus in the pressing needs of different communities, which in turn clearer results will be more visible when combating transnational organized crimes.

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