

ESTONIA'S SUCCESS AND CHILE'S FAILURE: A COMPARATIVE ANALYSIS OF CRYPTOCURRENCY REGULATIONS AND THE IMPACT ON ANTI MONEY LAUNDERING IN ESTONIA AND CHILE

O SUCESSO DA ESTÔNIA E O FRACASSO DO CHILE: UMA ANÁLISE COMPARATIVA DA REGULAÇÃO DE CRIPTOMOEDAS E SEUS IMPACTOS NO COMBATE À LAVAGEM DE DINHEIRO NA ESTÔNIA E NO CHILE

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Abstract: This Article is a critical analysis of the lack of cryptocurrency regulations in Chile and offers gains Chile may have by implementing Estonia's pro-cryptocurrency approach. Additionally, the absence of regulations in Chile is examined through the comparative lens of Chile and Estonia's global ranking in anti-money laundering. Part A begins with a brief introduction to blockchain and financial technology. Parts B and C will discuss Estonia's and Chile's existing crypto attitudes. Part D will include recent histories of anti-money laundering efforts of both Estonia and Chile. Part E will assess other factors that may also be impacting Estonia's decrease and Chile's increase in economic crimes—like money laundering. Finally, Part F will discuss whether a “one size fits all” approach works, and, particularly, if Estonia's success could transfer to a high-risk country like Chile through the adoption of pro-cryptocurrency legislation.

Keywords: anti-money laundering, blockchain, cryptocurrency, FinTech, distribution ledger, Chile, Estonia.

Resumo: Este artigo oferece uma análise crítica da falta de regulamentações de criptomoedas no Chile e o que este país poderia ganhar seguindo a abordagem pró-criptomoeda da Estônia. Além disso, a ausência de regulação no Chile é analisada com lentes comparativas da posição do Chile e da Estônia do ranking global de combate à lavagem de dinheiro. A Parte A começa com uma breve introdução ao blockchain e à tecnologia financeira. As partes B e C discutirão a legislação de criptomoedas existente, ou a falta dela, no Chile e na Estônia. A Parte D tratará da história recente de esforços anti-lavagem de dinheiro da Estônia e do Chile. A Parte

E examinará mais de perto outros fatores que também podem estar impactando a redução, na Estônia, e o aumento, no Chile, de crimes econômicos como a lavagem de dinheiro. Finalmente, a Parte F será uma discussão sobre se uma abordagem “padrão único” funcionaria e, particularmente, se o sucesso da Estônia poderia ser transferido para um país de alto risco como o Chile por meio da adoção de legislação pró-criptomoedas.

Palavras-chave: anti-lavagem de dinheiro, blockchain, criptomoeda, FinTech, registro de distribuição, Chile, Estônia.

Introduction

Picture this: the year is 1983. Microsoft Word has just launched. NASA’s STS-7 Mission, carrying the first female astronaut, Sally Ride, came home safely. Most notably, the Super Mario Bros. video game was released on Nintendo. Teenagers were listening to Bonnie Tyler and The Police, chain-smoking the cigarette pack that only cost them 80 cents - all while contemplating the future that will surely have flying cars and robot armies. While neither flying cars nor robot armies have come to fruition, the early 2000s did see the birth of something arguably even more futuristic — cryptocurrency.

Following the global recession of 2008, Bitcoin and other cryptocurrencies gained traction all over the world as people lost trust in traditional banking systems.¹ The modern era is still not sure how to feel about it. An alternative to central bank-backed (fiat) money, cryptocurrency appeals to many because of its anonymity. A combination of “financial technology,” the word “fintech” describes new tech that seeks to improve and automate the delivery and use of financial services.² However, cryptocurrency also worries lawmakers because that same anonymity may enable fraudsters to launder money under the radar. This is because cryptocurrencies are so unregulated and not yet fully understood by legislators. Cryptocurrencies are only now beginning to report to financial institutions, but only in countries where effective regulations are actually in place. Some countries either do not have regulations in place, or do not permit cryptocurrency at all. Those that do not permit cryptocurrencies take the stance against it in an effort to fight money laundering and other economic crimes.

1 *Latest Developments in FinTech*, FINTECH WEEKLY, <https://www.fintechweekly.com/fintech-definition> (last visited Aug. 24, 2020).

2 Julia Kagan, *Financial Technology – FinTech*, INVESTOPEDIA, <https://www.investopedia.com/terms/f/fintech.asp> (last updated June 25, 2019).

This Paper will examine the different prescriptions of Estonia and Chile regarding cryptocurrency and the effect their stance has on anti-money laundering (AML) efforts. Whereas Estonia supports cryptocurrency and is consistently ranked among the countries with the lowest risk of money laundering, Chile is anti-cryptocurrency and is seeing a steady increase in money laundering. According to the Basel Index, the only independent, research-based index that ranks countries according to their risk of money laundering and terrorism financing using related factors, out of 125 countries, Chile ranks at 104 and Estonia ranks 125.³ Position 125 represents the country with the lowest risk, placing Estonia in first place in the fight against money laundering.

Part A will feature a brief and overly simplified introduction to cryptocurrency and blockchain technology. Parts B and C will discuss the respective regulations in place for cryptocurrency in both Estonia and Chile. Part D will include Estonia's and Chile's recent histories of money laundering efforts. Part E will take a closer look at other factors that may also be influencing Estonia's decrease and Chile's increase in economic crimes like money laundering. Finally, Part F will be a discussion about whether a "one size fits all" approach works, and, particularly, if Estonia's success could transfer to a high-risk country like Chile through the adoption of pro-cryptocurrency legislation.

Part A: A brief introduction to cryptocurrency

"Cryptocurrency is an internet-based medium of exchange which uses cryptographical functions to conduct financial transactions."⁴ In English, cryptocurrency is a workaround from large banking institutions and their fees. It promotes transparency and decentralization with the collaboration of one large network, a peer-to-peer system working off of transactions called a blockchain.⁵ While the idea behind autonomous financial transactions has been around for decades, the cryptocurrency craze did not take off until 2008 when Satoshi Nakamoto⁶ published a paper explaining Bitcoin, just one type of cryptocurrency, releasing the technology to the world shortly thereafter.⁷ Since its release, many governmental agencies, powerhouse businesses, and investors around the world have strived to understand the complexities that make up cryptocurrency and

3 INT'L CTR. FOR ASSET RECOVERY, BASEL AML INDEX 2019 A COUNTRY RANKING AND REVIEW OF MONEY LAUNDERING AND TERRORIST FINANCING RISKS AROUND THE WORLD 5-6 (Basel Institute on Governance, Basel, Switz. 2019), <https://www.baselgovernance.org/sites/default/files/2019-08/Basel%20AML%20Index%202019.pdf>.

4 Ameer Rosic, *What is Cryptocurrency? [Everything You Need To Know!]*, BLOCKGEEKS, <https://blockgeeks.com/guides/what-is-cryptocurrency/> (last visited Aug. 24, 2020) (explaining the basics of crypto technology and its origins using various media sources).

5 *Id.*

6 Satoshi Nakamoto is a pseudonymous group who published *Bitcoin: A Peer-to-Peer Electronic Cash System*, a paper which details blockchain benefits, transactions, and protection against double spending. *Who Is Satoshi Nakamoto?*, COINDESK, <https://www.coindesk.com/information/who-is-satoshi-nakamoto> (last visited Aug. 24, 2020).

7 One of the solutions Nakamoto proposes is a time stamp server within the blockchain, which Nakamoto provides a working formula for. Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, BITCOIN, <https://bitcoin.org/bitcoin.pdf> (last visited Aug. 24, 2020); see also Brian Martucci, *What is Cryptocurrency – How it Works, History & Bitcoin Alternatives*, MONEY CRASHERS, <https://www.moneycrashers.com/cryptocurrency-history-bitcoin-alternatives/> (last visited Aug. 24, 2020).

blockchain. In other words, it is not for the faint of heart. For example, the International Monetary Fund (IMF) and the World Bank created a cryptocurrency sandbox learning environment as a joint venture in an effort to dissect and test blockchain technologies.⁸ Due to the speed at which cryptocurrency is developing and its increased popularity, world leaders are faced with the tough decision to either support cryptocurrency, a financial system that is not attached to any regulated bank, or to implement roadblocks to slow or prevent its development.

Some countries such as Australia, Canada, and the United States take a more positive stance toward cryptocurrency and have developing legislation in place.⁹ While they do support it, these countries are still attempting to define cryptocurrency so as to be able to regulate it and prevent cryptocurrency from operating under the radar of governmental agencies.¹⁰ Although technically autonomous, blockchain transactions do interact with several agencies, particularly in Canada.¹¹ In Canada, the Canadian Securities Administrators (CSA) released an informative notice regarding cryptocurrency offerings.¹² The notice explains Canada's implementation of a four prong test to determine if an investment contract exists when the initial offering is made with a virtual currency.¹³ Additionally, because cryptocurrency transactions are considered "business income" in Canada, the transactions fall under the purview of the Canada Revenue Agency and are subject to AML laws.¹⁴ This means that Bitcoin, along with other cryptocurrencies, must report to and keep records for some financial institutions in Canada, thus curtailing some of that anonymity.

Cryptocurrency continues to draw both skeptics and supporters and has since its inception. One of the most popular issues raised against cryptocurrencies, like Bitcoin, is that cryptocurrency should meet a licensing requirement.¹⁵ However, the problem with granting licensure to cryptocurrencies without fully understanding the operation is that potential risks of cryptocurrencies are not fully addressed or mitigated under the current infrastructures of payment systems.¹⁶ The question posed is whether it would be possible for the system of one payment

8 Ana Berman, *IMF and World Bank Launch Quasi-Cryptocurrency in Exploration of Blockchain Tech*, COINTELEGRAPH (Apr. 14, 2019), <https://cointelegraph.com/news/imf-and-world-bank-launch-quasi-cryptocurrency-in-exploration-of-blockchain-tech>.

9 Prableen Bajpai, *Countries Where Bitcoin is Legal & Illegal (DISH, OTSK)*, INVESTOPEDIA (May 9, 2019), <https://www.investopedia.com/articles/forex/041515/countries-where-bitcoin-legal-illegal.asp>.

10 *Id.*

11 *Id.*

12 Canada Securities Administrators, *CSA Staff Notice 46-307 Cryptocurrency Offerings* (Aug. 24, 2017), http://research.osc.gov.on.ca/ld.php?content_id=34149486.

13 *Id.*

14 *Guide for Cryptocurrency Users and Tax Professionals*, GOV'T OF CAN. (June 27, 2019), <https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/compliance/digital-currency/cryptocurrency-guide.html>.

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To date, there has been no clarity about either the legal basis for granting such authorizations [licensing] or about their potential risks and implications for the conventional payment systems. As is the case with many legal issues, making a determination on issuing such an authorization or license often boils down to whether cryptocurrency exchanges can fall within the definitional parameters of *payment institution*.

Hossein Nabilou, *The Dark Side of Licensing Cryptocurrency Exchanges as Payment Institutions*, Vol. 14:1, L. & FIN. MKS REV. 39-47 (June 2019), <https://www.tandfonline.com/doi/abs/10.1080/17521440.2019.1626545>.

16 *Id.* (describing the need for a legal basis in order to effectively grant licensing to cryptocurrencies without upsetting the current parameters).

infrastructure to have the ability to regulate an entirely different payment infrastructure. Another point the skeptic makes says that cryptocurrency enables money laundering.¹⁷ This relates back to the first argument in that there is a severe lack of oversight and regulation to cryptocurrency. In particular, the Securities and Exchange Commission (SEC) and the Internal Revenue Service (IRS) in the United States posit that the risk for fraud and manipulation is large because of the absence of regulation like in traditional markets.¹⁸ Additionally, the New York Department of Financial Services (NYDFS) has cited its own concerns that “[cryptocurrency] serv[e] as a money changer of choice for terrorists, drug smugglers, illegal weapons dealers, money launderers, and human traffickers [and] could expose the virtual currency industry to extraordinarily serious criminal penalties.”¹⁹

Autonomy, on the other hand, is part of cryptocurrency’s very appeal. Supporters of cryptocurrency emphasize the exciting possibilities for peer-to-peer payment systems, money transmission, mobile payment systems, and investment opportunities.²⁰ Furthermore, blockchain technology defenders argue that it is not as risky as some say. Blockchain uses cryptography and provides users with a private and public key to encrypt and decrypt transactions.²¹ Both camps feel strongly about virtual currencies and countries continue to develop regulations accordingly.

Part B: The pro crypto legislation of Estonia

While Estonia is not feature prominently in media or popular culture, the small country is a prosperous digitalized society with one of the highest literacy rates in the world at 99.89%.²² Estonia faced conquest from both Nazi Germany and the U.S.S.R. throughout the 20th century.²³ Estonia’s independence was recognized in August of 1991 and formally adopted a constitution in June of 1992, joining the European Union (EU) in 2004.²⁴ In 2011, Estonia replaced its currency with the Euro and incorporated it with operations of the Bank of Estonia, drawing major foreign investments from Sweden and Finland.²⁵

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Regulations often fail to affect such virtual currencies due to lack of foresight by the regulation writers, creating a legal gray area. Thus, criminals can continue to capitalize on technological innovation to bolster their illegal activities. Money laundering is one par[t]icular criminal craft that stands to benefit from technological advancement.

Danton Bryans, *Bitcoin and Money Laundering: Mining for an Effective Solution*, 89 IND. L. J. 441-72 (2014).

18 Judge Herbert B. Dixon Jr. (Ret.), *Cryptocurrency: The Next Step in the Noncash Era*, 58 JUDGES’ J., no. 4 (Fall 2019), https://www.americanbar.org/groups/judicial/publications/judges_journal/2019/fall/cryptocurrency-next-step-the-noncash-era/.

19 V. G. Comizio, *Virtual Currencies: Growing Regulatory Framework and Challenges in the Emerging Fintech Ecosystem*, 21 N.C. BANKING INST. 131, 147 (2017) (quoting Rob Wile, *New York Will Be Holding Hearings on Bitcoin*, BUSINESS INSIDER (Nov. 4, 2013, 2:43 P.M.), <http://www.businessinsider.com/new-york-to-hold-hearings-on-bitcoin-2013-11>).

20 See Nabilou, *supra* note 15.

21 Jared Cotton, *Sending A Bit More Coin Home? An Analysis of Retail User Protection in Bitcoin Remittance Markets*, 49 VICTORIA U. OF WELLINGTON L. REV. 107,131 (2018).

22 *Estonia Education and Literacy*, UNESCO, <http://uis.unesco.org/en/country/ee?theme=education-and-literacy> (last visited Apr. 17, 2020).

23 Arno Artur Kõörna & James H. Bater, *Estonia*, BRITANNICA, <https://www.britannica.com/place/Estonia/Independence-lost> (last updated Aug. 18, 2020).

24 *European Community: Declaration on Yugoslavia and the Guidelines on the Recognition of New States*, 31 INT’L LEGAL MATERIALS 1485,1487 (1992).

25 U.S. DEP’T OF STATE, 2019 INVESTMENT CLIMATE STATEMENT: ESTONIA (2019), <https://www.state.gov/reports/2019-investment->

As a highly digitalized society, Estonia is supportive of crypto users. Estonia employs several safeguards against cryptocurrency being used to commit fraud and launder money. These regulations include several levels of governmental agencies working together. This Paper will coin the term “trickle-down finance laws.” Beginning with the global scope, the Financial Action Task Force (FATF) is “an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering...”²⁶ The official FATF Recommendations are recognized by the global community as AML standards.²⁷ In June 2019, the FATF updated their Recommendations to include the “goal of managing and mitigating the risks reemerging from virtual assets...”²⁸ Additionally, the FATF suggested that countries should regulate virtual asset service providers by ensuring that they are licensed, registered, and subject to AML laws and other relevant FATF Recommendations.²⁹

In June 2018, the EU passed the Directive (EU) 2018/843, also known as the “5AMLD,” amending the prior four versions.³⁰ This document is the EU’s primary directive against money laundering and terrorism financing.³¹ The Directive is the second layer of the trickle-down finance laws that Estonia uses to combat money laundering. The 5AMLD gives EU Member States the authority to require that countries with high-risk of money laundering have additional mitigating measures in place before any business transactions or relationships are formed.³² The development of cryptocurrencies also led to adding new definitions for “virtual currencies” and “custodian wallet providers” in the 5AMLD.³³ Furthermore, new regulations in the Directive took a cue from the FATF by requiring that providers of exchange services between virtual currencies be registered.³⁴ To keep up with the development of blockchain and other FinTech impacts, 5AMLD will release a report every three years beginning in 2022 to assess the Directive’s success.³⁵

Finally, at the local level of the trickle-down finance laws, Estonia enacted the Money Laundering and Terrorism Financing Prevention Act (MLTFPA) in 2007.³⁶ Estonia saw a busy

climate-statements/estonia/ [hereinafter INVESTMENT CLIMATE STATEMENT].

26 *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations*, FATF 2012-2019, (FATF Paris, Fr.) updated June 2019, <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf> [hereinafter *FATF Recommendations*].

27 *Id.*

28 *Id.*

29 *Id.*

30 Directive (EU) 2018/843 of the European Parliament and of the Council, amending Directive (EU) 2015/849, on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, *Official Journal of the European Union*, May 20, 2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L0843&from=EN> [hereinafter Directive (EU) 2018/843].

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*

36 Protocol for the Money Laundering and Terrorist Financing Prevention Act, Oct. 26, 2017, Republic of Estonia Riigikogu, <https://www.riigiteataja.ee/en/eli/509012020001/consolide> [hereinafter MLTFPA].

year in 2019, where it both incorporated the EU's 5AMLD into its national law, and proposed amendments with stricter requirements for virtual currencies to its own regulations. The proposed amendments came as a direct response to Estonian case law. In 2014, Otto de Voogd, owner of a bitcoin trading platform BTC.ee, was ordered by an Estonian Financial Intelligence Unit (FIU) to provide client information, arguing that his crypto business was subject to Estonian AML laws.³⁷ Voogd filed suit against the FIU claiming, among other things, that the FIU was overreaching and expanding the MLTFPA scope under § 6(4) and that he did not meet the definition of an “obliged entity” and should therefore not be subject to the MLTFPA requirements of disclosure.³⁸ The case reached the Estonian Supreme Court. In a landmark decision, the Court sided with the FIU and relied on the definition of an “alternative means of payment service provider” to include Voogd and his crypto business, thereby upholding the Estonian law.³⁹

In January 2020, the MLTFPA successfully amended the proposed stricter requirements.⁴⁰ They went into effect on March 10, 2020 for virtual currency service providers.⁴¹ There are four relevant parts to the amendment.⁴² First, management must now verify whether crypto businesses are established in a “European Economic Area” or with an “e-resident” through compulsory identification mandates.⁴³ Second, crypto businesses must appoint a Compliance Officer with the competence, means and access to relevant information across all the structural units of the business under § 17 of the MLTFPA.⁴⁴ Third, the registered office of the crypto business, the seat of the management board, and the place of business must be in Estonia, or a foreign company may be operating in Estonia through a branch which is registered in the commercial register and has its registered office and head office in Estonia.⁴⁵ Lastly, crypto businesses must have an existing payment account with a credit or payment institution in Estonia or a contracting state of the European Economic Area.⁴⁶ According to Pritt Lätt, contributor to Global Legal Insights and who is a renowned specialist in cryptocurrencies, crypto finance, and the Founder of the Estonian Cryptocurrency Association, “[t]he main

37 *Otto Albert de Voogd v. Police and Border Guard Board* [2019] Sup. Ct. Admin. Board Ct. Decision, (appeal taken from Tallinn Cir. Ct.) [hereinafter *Voogd*]. See also Pritt Lätt, *Blockchain & Cryptocurrency Regulation 2020 Estonia* (Oct. 23, 2019), <https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/estonia> [hereinafter Pritt Lätt].

38 Anne Veerpalu, *Decentralized Technology and Technology Neutrality in Legal Rules: An Analysis of De Voogd and Hedqvist*, 11 *BALTIC J. OF L. & POL.* 69. (2018).

39 See *Voogd*, *supra* note 37.

40 See MLTFPA, *supra* note 36.

41 Sorainen is “a fully integrated regional business law firm with offices throughout the region, in Estonia, Latvia, Lithuania, and Belarus[]” that was founded in 1995. The law firm specializes in business and tax law in the Baltic States and has experts in Fintech licensing processes and compliance assessment. Reimo Hammerberg & Krista Ševerev, *Estonian Anti-Money Laundering Law is Due to Implement Stricter Requirements for Virtual Currency Service Providers*, SORAINEN (Feb. 3, 2020), <https://www.sorainen.com/publications/estonian-anti-money-laundering-law-is-due-to-implement-stricter-requirements-for-virtual-currency-service-providers/>.

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.*

area that will create a struggle for crypto-businesses in Estonia is the banks, i.e. opening a bank account and operating payments, as the banks are quite s[k]eptical when it comes to cryptocurrency.⁴⁷ An interesting note is that Pritt Lätt was the attorney that represented Voogd in the landmark case discussed above.

Estonia is making it difficult for would-be money launderers and abusers of cryptocurrency to go undetected. With its employment of trickle-down finance laws, Estonia casts a wide net of protection. All this while simultaneously attracting foreign investors by being a renowned digitalized community that accepts virtual currencies. The success that Estonia enjoys can be attributed to their highly adaptive legal system that chooses to dissect cryptocurrency, blockchain, and other FinTech initiatives in order to implement effective regulations.

Part C: Chile's blind eye

While Estonia has set forth extensive regulations to prevent individuals and businesses alike from money laundering or committing other fraud through cryptocurrency transactions, Chile has chosen an altogether different path. Known for its long strip of land that borders the Pacific Ocean in South America, Chile spent many years under Spanish rule. Conquistadores did not find the wealth they found in Peru, as Chile had no gold nor a high civilization.⁴⁸ After years of struggling for autonomy, Chile gained its independence in 1810.⁴⁹ Currently, Chile is part of the Pacific Alliance with Mexico, Peru, and Colombia.⁵⁰ The Pacific Alliance is an initiative of regional integration established on April 28, 2011.⁵¹ The primary goals of the initiative are moving progressively toward the free mobility of goods, services, resources and people by driving further development and competitiveness, and becoming a platform of political, economic, and commercial integration.⁵²

The official bank of the country is the Central Bank of Chile (BCC); the BCC implements the internal banking policies of the Chilean government.⁵³ Cryptocurrencies are not currently recognized by Chile's monetary system.⁵⁴ Additionally, Chile has no regulations in place for crypto exchanges, nor any that stop people from exchanging their cryptocurrencies for goods or services.⁵⁵ In other words, cryptocurrency clearly exists in Chile, whether in small numbers or

47 See Pritt Lätt, *supra* note 37.

48 Paul W. Drake & César N. Caviedes, *Chile*, BRITANNICA (April 14, 2020), <https://www.britannica.com/place/Chile/Recreation#ref25247>.

49 *Id.*

50 See *What is the Pacific Alliance*, PACIFIC ALLIANCE <https://alianzapacifico.net/en/what-is-the-pacific-alliance/> (last visited Apr. 17, 2020).

51 *Id.*

52 *Id.*

53 See generally *Banco Central de Chile* [Central Bank of Chile], <https://www.bcentral.cl/web/banco-central/inicio> (last visited May 21, 2020).

54 Fatir Malik, *Chile's Bitcoin and Crypto Regulations Will Send Shock Waves Across the World*, BLOCKPUBLISHER (Apr. 24, 2019), <https://blockpublisher.com/chiles-bitcoin-and-crypto-regulations-will-send-shock-waves-across-the-world/>.

55 Janneke Eriksen, *The Current State of Chile's Cryptocurrency Regulations*, CRYPTOCURRENCY365 (May 27, 2018), <https://>

not. However, Chile has not set up protections against the risks that come with the technology, choosing instead to ignore it altogether.

Fatir Malik, electrical engineer turned blockchain developer, writes of Chile's resistance to FinTech in *Block Publisher*, an independent blockchain and cryptocurrency news publication.⁵⁶ Historically, Chile has often been criticized for being “old school” when it comes to development in FinTech.⁵⁷ Instead, Chilean banks have taken the position that regulations at this time are unimportant because there are such few crypto users in the country.⁵⁸ Tensions between the state owned banks and crypto businesses have escalated to the point that Chilean banks, such as BancoEstado, closed crypto accounts without explanation, seemingly attempting to curtail crypto development.⁵⁹ This forced the Tribunal de Defensa de la Libre Competencia, Chile's anti-monopoly court, to get involved in mid-2018, who granted protection to local cryptocurrency exchanges by forcing banks to keep the accounts open.⁶⁰

However, in December 2018, the Chilean Supreme Court handed down a decision supporting BancoEstado and reversing the Santiago Court of Appeal's decision.⁶¹ While the lower court ordered protection for crypto businesses' bank accounts, the Chilean Supreme Court sided with Chilean banks, writing that BancoEstado's policies did not violate any constitutional rules and therefore their actions could not be seen as illegal.⁶² The presiding judge addressed the problem with the lack of crypto regulations in his decision.⁶³ Cryptocurrencies cannot be seen as a legitimate currency because they are not backed or regulated by any governmental agency.⁶⁴ Additionally, the Court went on to say that banks have a duty to report any suspicious activity that hints at money laundering under AML laws, and a bank may not be able to report to the fullest extent if they host crypto accounts that do not disclose information.⁶⁵ This decision was closely followed by the global media and many scrutinized the Court for siding with national banks instead of promoting development and legislation for the FinTech sector in Chile. The *OrionX* decision is similar to the *Voogd* decision in Estonia in that they both involved crypto businesses and called into question the existing crypto regulations, or in Chile's case, the lack thereof. One of the major differences, however, is that the *Voogd* decision upheld Estonian

www.cryptocurrency365.com/news/the-current-state-of-chiles-cryptocurrency-regulations/.

56 See Malik, *supra* note 54.

57 *Id.*

58 *Id.*

59 See Eriksen, *supra* note 55.

60 See Malik, *supra* note 54.

61 *OrionX SPA contra del Banco del Estado de Chile/OrionX v. BancoEstado*, Chilean Supreme Court, 3d Chamber (Chile 2018) [hereinafter *OrionX v. BancoEstado*]. See also Jimmi Aki, *Chilean Supreme Court Backs Bank's Closure of Crypto Exchange Account*, CCN (Dec. 6, 2018), <https://www.ccn.com/chilean-supreme-court-backs-banks-closure-of-crypto-exchange-account/>.

62 See *OrionX v. BancoEstado*, *supra* note 61.

63 *Id.*

64 J. Shiraz, *Chilean Supreme Court Orders OrionX Exchange to Halt Ongoing Crypto Operations*, BITCOINEXCHANGEGUIDE (Dec. 6, 2018), <https://bitcoinexchangeguide.com/chilean-supreme-court-orders-orionx-exchange-to-halt-ongoing-crypto-operations>

65 See *OrionX v. BancoEstado*, *supra* note 61.

cryptocurrency laws rendering them effective in monitoring crypto businesses who do not want to disclose information. The *OrionX* decision sided with the banks' closure of crypto accounts because no cryptocurrency laws are in place.

Despite the blow to cryptocurrency with the Chilean Supreme Court's decision and after months of legal drama, Chile's tone toward cryptocurrency is seeing a change. In April 2019, Chile's Finance Minister, Felipe Larraín, introduced legislation to the Chilean Parliament on regulating cryptocurrencies—seemingly a direct response to the legal battle between Chilean banks and crypto businesses.⁶⁶ Speaking to media outlets, Larraín was quoted as saying, “[r]egulation of these platforms would mitigate some of the risks, such as money laundering and terrorist financing, and increase the legal certainty with which they operate.” Larraín seems to be open to the innovative development of blockchain while being explicitly aware of the risks ignored without any regulations in place. The bill may face the most opposition from the Chilean Association of Banks (ABIF), as banks have said, “[our] policy [is] not to deal with companies involved in the cryptocurrency sector.”⁶⁷

Chile is part of the Asia-Pacific Economic Cooperation (APEC), “a regional economic forum established in 1989 to leverage the growing interdependence of the Asia-Pacific.”⁶⁸ Made up of twenty-one member nations, including the United States, Russia, Mexico, and China, Chile is only one of two South American members.⁶⁹ APEC produced the Osaka Action Agenda in 1995.⁷⁰ Members of APEC must adhere to the guidelines to implement a strategic economic roadmap.⁷¹ The Osaka Action Agenda is comprised of the Bogor Goals, which APEC outlines as:

When APEC Leaders gathered in Bogor, Indonesia in 1994, they committed to achieve free and open trade and investment by 2010 for industrialized economies and by 2020 for developing economies. APEC members agreed to pursue this goal by further reducing barriers to trade and investment and by promoting the free flow of goods, services and capital. These targets became known as the “Bogor Goals,” an ambitious manifestation of APEC’s common belief that free and open trade and investment are essential to realize the growth potential of the region and enhance economic and social outcomes for all APEC economies.⁷²

In 2018, APEC published its biannual assessment of members' progress with regard to the Bogor Goals. In its report, it assessed Chile's performance, highlighting Chile's accomplishments

66 Adrian Zmudzinski, *Chilean Government Introduces New Cryptocurrency and Fintech Regulation Bill to Congress*, COINTELEGRAPH (Apr. 21, 2019), <https://cointelegraph.com/news/chilean-government-introduces-new-cryptocurrency-and-fintech-regulation-bill-to-congress>.

67 See Aki, *supra* note 61. See also *Asociación de Bancos e Instituciones Financieras A.G.* (ABIF), BNAmericas, <https://www.bnamericas.com/en/company-profile/asociacion-de-bancos-e-instituciones-financieras-ag-abif> (last visited May 21, 2020).

68 See *What is Asia-Pacific Economic Cooperation?*, ASIA-PACIFIC ECON. COOPERATION, <https://apec.org/About-Us/About-APEC> (last visited Apr. 17, 2020).

69 *Id.*

70 *Id.*

71 *Id.*

72 See *Assessment of Achievements of the Bogor Goals*, ASIA-PACIFIC ECON. COOPERATION, <https://www.apec.org/About-Us/About-APEC/Achievements-and-Benefits/Bogor-Goals>, (last visited Aug. 26, 2020). See generally APEC Policy Support Unit, *APEC's Bogor Goals Progress Report-2018*, APEC#218-SE-01.18, APEC Secretariat, <https://www.apec.org/Publications/2018/11/APEC-Bogor-Goals-Progress-Report> (last visited Apr. 17, 2020) [hereinafter APEC Policy Support Unit].

as well as areas for improvement. Of significance, APEC noted no change in Chile's foreign investment regime since 2016.⁷³ This is important to cryptocurrency because without change in this particular area, Chile is missing out on foreign investment from crypto businesses or crypto users, which could be a source of significant funding to aid in Chilean development.

In October 2019, APEC held a Finance Ministers' Meeting in Santiago, Chile under Larraín's Chairmanship. In a joint Ministerial Statement, Larraín was quoted, Efficient, innovative, and competitive financial markets are important for continued growth. We acknowledge that technological innovation can deliver significant benefits to the financial system and the broader economy. New technologies can strengthen the work of financial supervision and regulation that may be applied to a wide range of industries within the APEC region to facilitate and improve compliance. However, we are mindful of the risks that digitalization poses such as security concerns, including those related to anti-money laundering matters or data confidentiality, and gaps in levels of readiness and capacities.⁷⁴

Larraín seems liberal when it comes to FinTech and supports the innovative concept. However, he is acutely aware of the risk of money laundering that could accompany blockchain technology. It is obvious by the Joint Ministerial Statement that APEC has given their full support to Chile's development of cryptocurrency legislation.

Interestingly, in their assessment, APEC commented that Chile, as is often the case, was chosen as a "pilot economy" for some new initiatives in a few different sectors.⁷⁵ This is undoubtedly an exciting time for Chile. If Chile's Parliament accepts and implements cryptocurrency legislation, Chile opens the door to investors from abroad given its successful record in attracting foreign direct investment over the years.⁷⁶ Additionally, they would be putting deterrents in place against any would-be money laundering frauds. As of this writing, it remains to be seen what kind of fight the courts, banks, or other interested parties may put up against the FinTech sector. What is clear, however, is that Chile's eyes are no longer closed to the realm of possibilities that cryptocurrency offers.

Part D: Anti-money laundering efforts

Most countries have their own set of AML laws and usually employ FATF Recommendations in some form or another. Chile and Estonia are two countries that have their own extensive AML infrastructure to defend themselves against fraud. According to the FATF website, Estonia is not a listed Member but adheres to the European Commission's laws, who is a listed Member.⁷⁷ Likewise, Chile is not a listed FATF Member.⁷⁸ However, both Estonia

⁷³ *Id.*

⁷⁴ Asia-Pacific Economic Cooperation, Ministerial Declaration of 7 December 2019, APEC Doc. https://www.apec.org/Meeting-Papers/Sectoral-Ministerial-Meetings/Finance/2019_finance.

⁷⁵ See APEC Policy Support Unit, *supra* note 72.

⁷⁶ Antonio De La Jara, *Foreign Investment in Chile Surges Due to New Law: Government*, REUTERS (July 11, 2018), <https://www.reuters.com/article/us-chile-investment-idUSKBN1K12NO>.

⁷⁷ See generally Financial Action Task Force, <https://www.fatf-gafi.org> (last visited Apr. 17, 2020).

⁷⁸ *Id.*

and Chile are part of the Organisation for Economic Co-operation and Development (OECD), and so indirectly observe the Recommendations.⁷⁹ Chile also belongs to the Financial Action Task Force of Latin America (GAFILAT).⁸⁰ This organization is different from the FATF in that, “GAFILAT enables regional factors to be taken into account in the implementation of anti-money laundering measures.”⁸¹

The FATF Recommendations were established in 1989 with the FATF Recommendations coming out in 1990.⁸² Elsewhere in the world, Mexico’s Sinaloa Cartel formed in 1990 and Colombia’s Medellin Cartel formed in 1976, the latter of which gained power was at its height in the 80s and early 1990s.⁸³ These two powerful cartels were making billions of dollars in the sale and production of drugs, which saw a sharp increase in the early 1990s.⁸⁴ The creation of the FATF may have been a direct response to the severe increase in money laundering. In 1996, the FATF standards were revised for the first time to extend the scope beyond only drug related money laundering.⁸⁵ Then, in October 2001 just after the terror attacks of September 11, 2001, the standards were revised again to include terrorism financing.⁸⁶ Finally, the standards were revised once more in 2012 to include new techniques being used in money laundering, such as cryptocurrency trends.⁸⁷ The revisions of 2012 highlight the intergovernmental concern that cryptocurrency will create new money laundering opportunities.

Chile and Estonia are both Members of the FATF with good reason as they both rely heavily on their FIUs, who are ultimately derived from the FATF Recommendations. The Chilean Financial Intelligence Unit (Unidad de Análisis Financiero (UAF)), was created by Act. No.19.913, known as the Chilean Anti-Money Laundering Act.⁸⁸ Article 3 of the Chilean Anti-Money Laundering Act imposes a duty on financial institutions to appoint an official or compliance officer responsible for relations with the Financial Intelligence Unit.⁸⁹ The compliance officer monitors the implementation of money laundering policies.⁹⁰ The UAF

79 See *Chile Signs Up as First OECD Member in South America*, OECD (Nov. 1, 2010), <http://www.oecd.org/chile/chilesignsupasfirstoecdmemberinsouthamerica.htm>. See also *Estonia and the OECD*, OECD (Dec. 9, 2010), <http://www.oecd.org/estonia/estoniaandtheoecd.htm>.

80 See Financial Action Task Force of Latin America (GAFILAT), FAFTA, <https://www.fatf-gafi.org/pages/gafilat.html> (last visited Apr. 17, 2020).

81 *Id.*

82 See FATF Recommendations, *supra* note 26.

83 *Sinaloa Cartel*, TERRORISM RESEARCH & ANALYSIS CONSORTIUM, <https://www.trackingterrorism.org/group/sinaloa-cartel> (last visited Apr. 17, 2020). See also CONGRESSIONAL RESEARCH SERVICE, MEXICO: ORGANIZED CRIME AND DRUG TRAFFICKING ORGANIZATIONS R41576 (updated July 28, 2020), <https://fas.org/sgp/crs/row/R41576.pdf>.

84 See *Trends in World Drug Markets*, U.N. OFFICE OF DRUGS AND CRIME (July 4, 2005), https://www.unodc.org/pdf/WDR_2005/volume_1_chap1_dynamics.pdf.

85 *Money Laundering and the Financing of Terrorism*, EGMONT PRINCIPLES GROUP, <https://www.egmontgroup.org/en/content/money-laundering-and-financing-terrorism> (last visited Apr. 17, 2020).

86 *Id.*

87 *Id.*

88 Act No. 19.913, Financial Intelligence Unit, Government of Chile, *Chilean Legislation ALA/CFT*, Official Diary (Dec. 18, 2003), https://www.uaf.cl/legislacion/nuestra_ley.aspx.

89 *Id.*

90 *Id.*

is an independent body and related to the Chilean Government through the Public Treasury Secretary (Ministerio de Hacienda).⁹¹ The UAF has the duty of requesting, receiving, analyzing, and forwarding to competent criminal prosecution authorities any financial information that arouses suspicions of money laundering activities, similar to the duties of Estonian FIUs.⁹² Additionally, the UAF can also provide information directly to the courts that are dealing with asset laundering cases just as Estonian FIUs monitor and assist with money laundering cases.⁹³

Both Estonia and Chile are listed Members of the Egmont Group, which is described on their website as:

... a united body of 164 Financial Intelligence Units (FIUs). The Egmont Group provides a platform for the secure exchange of expertise and financial intelligence to combat money laundering and terrorist financing (ML/TF). This is especially relevant as FIUs are uniquely positioned to cooperate and support national and international efforts to counter terrorist financing and are the trusted gateway for sharing financial information domestically and internationally in accordance with global Anti Money Laundering and Counter Financing of Terrorism (AML/CFT) standards [of the FATF].⁹⁴

Additionally, Estonia is a Non-permanent Member of the United Nations Security Council who will begin their term of Presidency in May 2020.⁹⁵ Estonia ran their campaign for a seat on the United Nations Security Council by advocating the need for creative e-solutions.⁹⁶ Chile is also a Non-permanent Member of the United Nations Security Council.⁹⁷ As Members, both countries agree to the Security Council Resolution 1617 (SR1617).⁹⁸ Under Paragraph 7, the SR1617 “[s]trongly urges all Member States to implement the comprehensive, international standards embodied in the Financial Action Task Force’s (FATF) Forty Recommendations on Money Laundering and the FATF Nine Special Recommendations on Terrorist Financing.”⁹⁹ Again, the FATF’s most recent revisions illustrate concerns that crypto exchanges enable money laundering. Chile’s absence of cryptocurrency regulations—to safeguard against fraud—is inconsistent with messaging from the OECD, the Security Council, and the FATF.

Part E: Investigating other potential factors

Chile and Estonia belong to many of the same organizations or have counterparts in their respective countries. Because of this, it is important to examine other relevant factors that

91 *Id.*

92 See *Anti-Money Laundering Forum*, Central Authority for Reporting, https://www.anti-moneylaundering.org/South_America/Chile.aspx (last visited Apr. 17, 2020). See generally Chilean Financial Intelligence Unit/Unidad de Análisis Financiero, <https://www.uaf.cl/acerca/quehacemos.aspx> (last visited Apr. 17, 2020).

93 See *Anti-Money Laundering Forum*, *supra* note 92.

94 See *About*, Egmont Group, <https://egmontgroup.org/en/content/about> (last visited Apr. 17, 2020).

95 See *Current Members*, U.N. SECURITY COUNCIL, <https://www.un.org/securitycouncil/content/current-members> (last visited Apr. 17, 2020) [hereinafter *Current Members*].

96 *Estonia at the UN Security Council 2020-2021*, PERMANENT MISSION OF EST. TO THE U.N., <https://un.mfa.ee/un-security-council/campaign/> (last visited Apr. 17, 2020).

97 See *Current Members*, *supra* note 95.

98 S.C. Res. 1617, ¶ 7 (July 25, 2005).

99 *Id.*

may be impacting money laundering increases. There are three relevant factors that should be investigated: (1) personal income tax rate; (2) population; and (3) land size. This section will explain why each factor is worth looking into and discuss the potential for impact from each.

The OECD defines personal income tax “as the taxes levied on the net income (gross income minus allowable tax reliefs) and capital gains of individuals.”¹⁰⁰ As of 2020, Estonia, one of the most competitive tax systems, has a flat rate of 20 percent on personal income.¹⁰¹ Since 2004, the percentage amount has decreased annually.¹⁰² What this means is whether an Estonian is earning \$30,000 a year or \$100,000 a year, their personal income tax rate is 20 percent. Additionally, in Estonia any foreign income is tax exempt.¹⁰³ In comparison, Chile’s income tax structure increases up to 35.50 percent depending on earnings.¹⁰⁴ For example, an income between \$58,945.52 and \$75,787.10 in Chile would be subject to 23 percent, which surpasses Estonia’s 20 percent flat tax rate.¹⁰⁵ Further, an income of \$101,049.46 or more is taxable at the rate of 35.50 percent.¹⁰⁶ Chile’s tax structure applies to residents or foreign workers on all worldwide income.¹⁰⁷ Whereas in Estonia laundering money might not be worth the risk because personal income is getting taxed 20 percent no matter the earnings, Chile is a country where its wealthy citizens have more incentive to launder money due to the high personal income tax rate.

Population and land size between Chile and Estonia demonstrate a large gap. First, whereas Chile’s population is 18.7 million, Estonia’s population is 1.3 million.¹⁰⁸ Secondly, Chile’s land size is 756,102 square kilometers which dwarfs Estonia’s 45,228 square kilometers.¹⁰⁹ Estonia is one of the world’s smallest countries at roughly twice the size of New Jersey, while Chile is just less than twice the size of Montana.¹¹⁰

Not only do Chile’s and Estonia’s population and land size vary greatly, but the dispersion of their population among their land does, too. Much of Chile’s long strip of land is uninhabitable, and 90% of the population is located near the capital of Santiago, while Estonia

100 See *Tax on Personal Income*, OECD, <https://data.oecd.org/tax/tax-on-personal-income.htm>, (last visited Aug. 29, 2020).

101 See *Tax Rates*, REPUBLIC OF ESTONIA TAX AND CUSTOMS BOARD, (Feb. 20, 2020), <https://www.emta.ee/eng/business-client/income-expenses-supply-profits/tax-rates> [hereinafter *Tax Rates*]; Andrew Lundeen & Kyle Pomerleau, *Estonia Has the Most Competitive Tax System in the OECD*, TAX FOUNDATION, (Sept. 29, 2014), <https://taxfoundation.org/estonia-has-most-competitive-tax-system-oecd/>.

102 *Tax Rates*, *supra* note 101.

103 Lundeen & Pomerleau, *supra* note 101.

104 See *Chile Personal Income Tax Rates*, PWC Worldwide Tax, (June 2, 2020), <https://taxsummaries.pwc.com/chile/individual/taxes-on-personal-income>.

105 *Id.*

106 *Id.*

107 *Id.*

108 Rep. of the United Nations Development Programme, Human Development Reports, *Population*, June 17, 2019.

109 *South America Chile*, CIA, https://www.cia.gov/library/publications/the-world-factbook/geos/print_ci.html (last visited Apr. 17, 2020). See also *Estonia*, CIA, https://www.cia.gov/library/publications/the-world-factbook/geos/print_en.html (last visited Apr. 17, 2020).

110 *Id.*

enjoys a fairly even distribution of their population throughout the country.¹¹¹ These country conditions are relevant because Chile's law enforcement and government are policing criminals, such as drug traffickers and money launderers, among a significantly larger population and have much more land to cover. In other words, Estonia's law enforcement is not as inundated as Chile's. This could play a significant role in the monitoring of money laundering.

A lack of cryptocurrency regulations might only be one of the factors contributing to Chile's increase in money laundering. Likewise, the factors listed above may actually be helping Estonia's supervision of money laundering within its borders. Estonia is a small country with impactful legislation in place derived from the European Union. Chile is also neighbors with some of the most prolific drug trafficking countries, such as Colombia and Peru, which make up 90% and 6% respectively of cocaine sales in the United States mainland alone.¹¹² Further analysis is needed into what percentage of Chile's money laundering is traced back to drug trafficking. Additionally, Estonia has a complicated relationship with Russia next door. While the Basel Index is a detailed account of countries statistical AML efforts, it would be interesting to see how the rankings would look if small and large countries were only pitted against other small and large countries, rather than globally.

Part F: Can one size fit all?

Estonia is seeing success in the realm of AML because it is implementing global laws, EU laws, and it has heavy cryptocurrency regulations in place. Estonia embraces virtual wallet users and alternative forms of payments, making it one of the leading countries in Eastern and Central Europe regarding foreign direct investment per capita.¹¹³ Although cryptocurrency and foreign investment brings its share of risks, Estonia's complex network of FIUs and trickled-down finance laws maintain order. Estonia continues to actively engage with cryptocurrency.

Chile has been resistant to cryptocurrencies. Chilean national banks have shown distaste for the innovative technology. The Chilean Supreme Court, as evidenced by their decision in the *OrionX* case, has its hands tied due to the lack of laws in place. Estonia has a large net to cast in an effort to catch criminals who may be tempted to launder money through blockchain technology. Chile turned a blind eye for too long by pretending that cryptocurrency did not exist. Even so, crypto businesses such as Cryptomarket, Buda, and Zawadi operate within its borders and facilitate millions of dollars' worth of transactions.¹¹⁴ Without cryptocurrency regulations, Chile has no deterrents in place for crypto users that may be tempted to launder money.

111 *Id.*

112 U.S. DEP'T OF JUSTICE DRUG ENFORCEMENT ADMIN., NATIONAL DRUG THREAT ASSESSMENT (Dec. 2019), https://www.dea.gov/sites/default/files/2020-01/2019-NDTA-final-01-14-2020_Low_Web-DIR-007-20_2019.pdf.

113 See 2019 INVESTMENT CLIMATE STATEMENT, *supra* note 25.

114 Jacob Atkins, 8 *Chilean Startups Banking on Disruptive Blockchain Solutions*, CONXTXTO (Sept. 5, 2019), <https://www.contxto.com/en/market-map/8-chilean-startups-banking-on-disruptive-blockchain-solutions/>.

If Chile fully embraces cryptocurrency, as Finance Minister Larraín proposes, internal organizations could be formed to better understand the technology and the impacts it could have on Chile's economy, for better or worse. Some Chilean organizations are already embracing blockchain, making the unresolved lack of legislation even more urgent.¹¹⁵ By ignoring FinTech developments, Chile could be losing out on trade, foreign investors, and general financial competitiveness. Chile has much to gain by employing Estonia's pro-cryptocurrency attitude. Following Estonia's model, Chile could prosper as a prominent South American digitalized country that supports innovation, all while implementing policies to combat money laundering. It was Eric Hoffer, an American philosopher who was awarded the Presidential Medal of Freedom in 1983, who said, "[i]n a world of change, the Learners shall inherit the earth, while the Learned shall find themselves perfectly suited for a world that no longer exists."

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¹¹⁵ Jacob Atkins, *18 Fintechs in Chile Transforming the Financials Industry*, CONXTXTO (June 26, 2019), <https://www.conxtxto.com/en/market-map/17-fintech-startups-adding-diversity-to-the-chilean-ecosystem/>.

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