

**Obstacles to the Implementation of the Financial Action Task Force's
Recommendations in the Eastern and Southern African Anti-Money
Laundering Group (ESAAMLG)**

Research Paper submitted in partial fulfilment of the degree of Master
of Laws: Transnational Criminal Justice and Crime Prevention

BY

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Table of contents

Table of contents	ii
Key words	v
Declaration	vi
List of Abbreviations and Acronyms	vii
Dedication	viii
Acknowledgements	ix
CHAPTER 1	1
GENERAL INTRODUCTION AND OVERVIEW OF THE STUDY	1
1.1 Background to the Study	1
1.2 Research Questions.....	3
1.3 Significance of the Study	5
1.4 Scope of the Research Paper	5
1.5 Hypothesis	6
1.6 Research Methodology	6
1.7 Chapter Outlines.....	6
CHAPTER 2	8
THE DEFINITION AND LEGAL FRAMEWORK OF MONEY LAUNDERING	8
2.1 Introduction	8
2.2 Definition	8
2.3 Stages of Laundering	9
2.4 Legal Framework.....	9
2.4.1 Financial Action Task Force (FATF).....	10
2.4.2 The FATF's Membership	10
2.4.3 The FATF's Mandate and Purpose.....	12

2.4.4 The Evolution and Nature of the FATF Recommendations.....	12
2.4.5 Who Developed the FATF Recommendations?	13
2.4.6 The Enforcement of the FATF Recommendations.....	16
2.5 The FATF Recommendations and International Legal Instruments.....	18
2.6 Eastern and Southern Africa Anti-Money Laundering Group.....	20
2.6.1 National Initiatives Undertaken by ESAAMLG Member States.....	21
2.7 Conclusion	22
CHAPTER 3.....	24
THE SCALE AND EFFECTS OF MONEY LAUNDERING	24
3.1 Introduction	24
3.2 The Global Scale of Money Laundering.....	24
3.3 Money Laundering in Eastern and Southern Africa	25
3.3.1 Drug Trafficking	25
3.3.2 Corruption	27
3.3.3 Human Trafficking	28
3.3.4 Other Major Activities that Yield Illegal Proceeds.....	28
3.4 Effects of Money Laundering.....	29
3.4.1 Weakens Financial Systems	30
3.4.2 Affects Economic Growth	31
3.4.3 Facilitates Crime and Corruption	31
3.4.4 Loss of Revenue	33
3.4.5 Risk to Privatisation Efforts.....	33
3.4.6 Reputational Risk	34
3.4.7 Facilitates Capital flight.....	35
3.4.8 Defeats the Rule of Law	36
3.5 Why Should ESAAMLG Members Fight Money Laundering?.....	37

3.5.1 Fights Crime and Corruption	37
3.5.2 Attracts Productive Investment and Taxable Revenue	38
3.5.3 Enhances Stability of Financial Institutions	38
3.6 Conclusion	39
CHAPTER 4.....	41
OBSTACLES FACED BY ESAAMLG MEMBERS IN THE IMPLEMENTATION OF THE FATF FORTY RECOMMENDATIONS AND THEIR POSSIBLE CAUSES.....	41
4.1 Introduction	41
4.2 Competing Priorities for Scarce Government Resources	42
4.3 Acute Shortage of Material, Technical and Skilled Human Resources	45
4.4 Dominant Informal Sectors, Cash-Based Economies and Porous Borders.....	47
4.5 Poor Record Keeping Systems.....	50
4.6 Political Will and its Effects.....	52
4.6.1 Unreasonable Delays to Enact AML/CFT Legislation.....	53
4.6.2 Unreasonable Delays to Amend AML/CFT and Related Legislation.....	54
4.7 Political and Personal Concerns by Parliamentarians	55
4.8 Political Interference and its Impact on the Independence of AML Authorities and Institutions	58
4.9 Conclusion	62
CHAPTER 5.....	64
THE FATF's SOLUTIONS TO THE OBSTACLES, CONCLUSION AND RECOMMENDATIONS.....	64
5.1 Introduction	64
5.2 What is Being Done to Address the Obstacles in Low Capacity Countries (LCCs)?	64
5.2.1 Implications of Prioritisation.....	66
5.2.2 Procedures and Mechanisms of Prioritisation	66

5.3 Merits and Demerits of the LCC Guidance	67
5.3.1 Prioritisation	67
5.3.2 Political Commitments through Cooperation and Engagement	68
5.3.3 Leadership and Interagency Co-operation and Co-ordination	70
5.3.4 Private Sector Outreach and Consultation.....	71
5.3.5 Technical Assistance	71
5.4 Conclusion	72
5.5 Recommendations.....	74
5.5.1 Enhancement of the ICRG Process.....	75
5.5.2 Enhancement of Technical Assistance	76
5.5.3 The ICRG Process to Apply to Lax Financial Institutions	77
5.5.4 Embracing the theory of Re-socialisation.....	78
BIBLIOGRAPHY	80

Key words

Money laundering

Eastern and Southern African Anti-Money Laundering Group (ESAAMLG)

ESAAMLG Member countries

Financial Action Task Force

FATF 40 + 9 Recommendations

Implementation of FATF Recommendations

Key challenges

Political will

Obstacles

Low capacity countries

Re-socialisation

Declaration

I **JEAN PHILLIPO** hereby declare that this research paper is my own work, that it has never been submitted before any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Student Name: Jean Phillippo

Signature:

Date:

List of Abbreviations and Acronyms

AML	: Anti-Money Laundering
APG	: Asia Pacific Group
CDD	: Customer Due Diligence
CFATF	: Caribbean Financial Action Task Force
CFT	: Combating of Terrorist Financing
DNFBPs	: Designated Non-Financial Businesses and Professions
ESAAMLG	: Eastern Southern African Anti-Money Laundering Group
FATF	: Financial Action Task Force
FIU	: Financial Intelligence Unit
FSRBs	: FATF Styled Regional Bodies
GAFISUD	: Financial Action Task Force on Money Laundering in South America
GIABA	: Intergovernmental Action Group against Money Laundering in West Africa
ICRG	: International Cooperation Review Group
IMF	: International Monetary Fund
LCCs	: Low Capacity Countries
MDGs	: Millennium Development Goals
MENAFATF	: Middle East and North Africa Financial Action Task Force
MERs	: Mutual Evaluation Reports
MOU	: Memorandum of Association
OECD	: Organisation for Economic Cooperation and Development
STR	: Suspicious transaction report
TI	: Transparency International
UN	: United Nations

Dedication

This paper is dedicated to God Almighty, for being the Wind beneath my wings, my

All in all, the 'Glorious Impossible'....

It is also dedicated to my family, for being the reason I keep daring to go on and on

and on... surely, *Eu Prossigo!!!*

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CHAPTER 1

GENERAL INTRODUCTION AND OVERVIEW OF THE STUDY

1.1 Background to the Study

Money laundering is a global problem that has adverse effects on both the developed and developing countries. If unchecked, it accelerates crime and criminal activities, affects the economy, undermines the integrity of financial markets, undermines the legitimate private sector, causes loss of revenue, poses security threats to privatisation efforts and brings about reputational risks as well as social costs.¹

Given the transnational and cross-border nature of money laundering, the fight against it is global. This is why in 1989 the G7² countries decided to set up the FATF³ as a global standard-setting body for Anti-Money Laundering (AML) and combating of terrorist financing (CFT).⁴ The FATF has since developed standards for countries across the globe to adopt so as to facilitate this global fight.⁵ The standards are in the form of recommendations, and so far there are Forty Recommendations on money laundering (hereafter referred so as the Recommendations), Eight Special

¹ Moodley (2008: 16).

² Unger B *et al* (2006: 2). The G7 is a group of seven leading industrialized countries: the United States, the United Kingdom, France, Italy, Canada, Germany and Japan. Russia has recently joined and the group is now called the G8.

³ Allan (2006: III-7).

⁴ FATF Public Statement, 25 June 2010, Para 1.

⁵ Johnson (2008: 47).

Recommendations on CFT, and a Ninth Special Recommendation on cash-couriers.⁶

In order to enhance its work and the adoption of its Recommendations, the FATF has also facilitated the establishment of FATF- styled regional bodies (hereinafter referred to as FSRBs) across the world. One such group is ESAAMLG, which was established in 1999.⁷ Its mandate is to coordinate and guide its member countries in the implementation of the Recommendations and guidelines. Currently, it has 15 member countries.⁸

Over the first ten years of its existence, among other things, ESAAMLG has through its members, achieved the following in its mandate: all members except Uganda have enacted AML legislation⁹ and some have set up structures that are essential for the implementation of the Recommendations.

Despite the above-mentioned achievements, the overall implementation of the Recommendations has been generally slow and low. Most of the member countries have not yet enforced their enacted AML legislation as evidenced by low rate of money laundering prosecutions in the region.¹⁰ Some have not yet established financial intelligence Units (FIUs) nor ratified or domesticated important AML related international legal instruments, let alone train personnel adequately.¹¹ The

⁶ FATF's Mission Statement.

⁷ ESAAMLG 10 Year Report (2009: 4).

⁸ The members are Botswana, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Republic of South Africa, Seychelles, Swaziland, Tanzania, Uganda, Union of Comoros, Zambia and Zimbabwe.

⁹ Each member has AML legislation except Uganda, See ESAAMLG 10 Year Report (2009: 88).

¹⁰ Goredema and Madzima (2009: 8)

¹¹ ESAAMLG 10 Year Report (2009:17).

international instruments comprise the 2000 United Nations Convention against Transnational Organised Crime (Palermo Convention)¹² and the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention)¹³. There are also inordinate delays in the passing of AML legislation as well as the amendment of other domestic legislation, which is necessary in order to harmonise such laws with the AML standards. This gives rise to unevenness, disconnectedness and time variability in the implementation of the Recommendations among the member countries.

1.2 Research Questions

The main question this paper seeks to answer is this: Are there obstacles to the implementation of the Recommendations in Eastern and Southern Africa?

As noted above, there is low level of implementation of the Recommendations within the ESAAMLG region.¹⁴ On the surface, it appears that the member countries take the “adopt but not enforce or implement” strategy.¹⁵ This means that countries adopt certain policies as a way of succumbing to international pressure but without proper analysis and acceptance of the costs or embracing the benefits that come with such adoption.¹⁶ Thus the adoption is merely a face-saving exercise aimed at avoiding embarrassment on the international arena or to access benefits such as economic

¹² Adopted by the UN General Assembly in its resolution 55/25 of 15 November 2000 in Palermo. Entered into force on 29 September 2003.

¹³ Adopted on 20 December 1988 in Vienna. Entered into force on 11 November 1990.

¹⁴ ESAAMLG 10 Year Report (2009:17).

¹⁵ Tang and Lishan (2010: 218).

¹⁶ Sharman (2008: 651).

aid from developed countries.¹⁷ This could be one explanation for the insufficient implementation of the Recommendations by ESAAMLG member countries.

This paper therefore seeks to explore the key obstacles impeding the implementation of the Recommendations among ESAAMLG members. In so doing, the paper shall explore the reasons why the members joined ESAAMLG and committed themselves to adopting the Recommendations in the first place. This exploration will in a way help to reveal the root to the obstacles that are currently affecting the level of implementation.

The pertinent questions this paper seeks to answer are as follows:

--What prompted the joining of ESAAMLG and the pledges of commitment at the adoption of the Recommendations in the first place?

-What are the common key obstacles impeding the implementation of the Recommendations among ESAAMLG members?

-Are the member countries ready to bear the cost of implementing the Recommendations at the expense of their other respective national priorities?

-Does the FATF have effective mechanisms for enforcing the implementation of its Recommendations so as to ensure that ESAAMLG member countries do not get away with the “adopt but do not enforce or implement strategy”?

In addressing these questions, this paper will discuss the tension that exists on the one hand, between the benefits of implementing the Recommendations, on the other

¹⁷ Tang and Lishan (2010: 218).

hand, the costs that come with it and which must be disbursed at the expense of other pressing issues affecting the developing ESAAMLG member countries.

1.3 Significance of the Study

Given the dangers that money laundering can cause to states and to the world economy, it is imperative that the fight against this vice should be global and harmonised. ESAAMLG, through its members, would contribute significantly towards this fight if all member countries prioritise and are able to implement the Recommendations. This research paper will accordingly help to contribute to the understanding of the key obstacles that impede implementation and thereby assist the member countries, ESAAMLG, the FATF and all other players on how best these obstacles may be addressed in the developing regions.

The findings of this study will contribute towards how similar FATF-styled regional bodies in the developing world may best tackle the implementation of the Recommendations since the obstacles are bound to be significantly similar for all developing countries. Unless these obstacles are addressed, the global combating of money laundering will never be effective since developing regions such as ESAAMLG will remain the weakest link and safe havens for launderers.

1.4 Scope of the Research Paper

This research is limited to ESAAMLG and its member countries. The obstacles under discussion are common to all member countries, so reference will be made to all or most of the member countries when giving examples. It should be noted that the mandate of both the FATF and ESAAMLG covers both money laundering and

terrorist financing. However, for purposes of this research, the focus will be on money laundering alone.

1.5 Hypothesis

This study is based on the assumption that developing countries hastily adopt AML policies as a way of succumbing to international pressure before they are fully prepared to implement such policies. They adopt them before taking into account costs of implementation, their underdeveloped financial markets and political situations. This proves to be a problem especially when the implementation of such policies competes with other domestic priorities or meets reluctance from key stakeholders and political decision makers.

1.6 Research Methodology

This study will adopt the desktop research methodology. It will involve the reading and analysis of primary sources such as international Conventions, treaties, memoranda of understanding, official reports and national laws. The secondary resources will range from books, journal articles, conference papers and electronic resources.

1.7 Chapter Outlines

This paper comprises five chapters. The remaining chapters are as follows:

Chapter 2:

This chapter discusses the definition of money laundering as well as the AML legal framework at international, regional and national levels.

Chapter 3:

This chapter will deal with the scale, effects and relevance of money laundering within and to ESAAMLG member countries. It will first give the scale of money laundering at the global level.

Chapter 4:

This chapter will explore the obstacles faced by the ESAAMLG member countries in the implementation of the Recommendations. It will also discuss the possible roots of such obstacles.

Chapter 5:

This final chapter comprises the current FATF's solutions to the obstacles, a general conclusion of the paper and then recommendations by the author.

CHAPTER 2

THE DEFINITION AND LEGAL FRAMEWORK OF MONEY LAUNDERING

2.1 Introduction

Money Laundering has diverse definitions and is regulated globally. This chapter will discuss its definition as well as its legal framework, both at global level and at the Eastern and Southern African regional level.

2.2 Definition

Money laundering has been defined differently in different writings. It is the process of manipulating legally or illegally acquired wealth in a way that obscures its existence, origin or ownership for the purpose of avoiding law enforcement.¹⁸ It is also described as a deliberate, complicated and sophisticated process by which proceeds of crime are disguised or made to appear as if they were earned by legitimate means. Simser defines it as a technique designed to make illicit acquisitive gains appear legitimate, usually by disguising the property's illegal provenance.¹⁹

What comes out clearly from these definitions is that the proceeds of a crime or illegal activity are made to appear as if they are from a legal and 'clean' source or activity. Furthermore, the definitions do not limit the concept to laundering of money by using terms like wealth, proceeds of crime and illicit acquisitive gains. So even though the concept is termed money laundering, it is not limited to money alone. On this point it has been argued that using the term 'money' on 'money laundering' as a

¹⁸ Mugarura (2011: 60).

¹⁹ Simser (2006: 294).

descriptive tag for the object of laundering is quite misleading, as money is only one of a variety of susceptible assets.²⁰ Perhaps the question that comes to mind at this stage is how does one launder money or proceeds of crime? Well, there are three different stages of money laundering and these will be discussed below.

2.3 Stages of Laundering

Proceeds of crime are laundered in three different phases. These are placement, layering and integration.

Placement involves the physical movement of currency or other funds derived from illegal activities to a place or into a form that is less suspicious to law enforcement authorities and more convenient to the criminal.²¹ The second stage is layering, which involves the separation of proceeds from their illegal source by using multiple, complex financial transactions e.g. wire transfers and monetary instruments.²²

Finally, there is integration, which involves the conversion of illegal proceeds into apparently legitimate business earnings through normal financial or commercial operations.²³ All these stages are pursued by criminals in order to distance the proceeds and themselves from the criminal activity, thereby concealing their illicit source and nature.

2.4 Legal Framework

Money laundering is regulated at the global, regional as well as national levels.

²⁰ Goredema (2003: 1).

²¹ Reuter and Truman (2004: 25).

²² Okgbule (2007: 450).

²³ Reuter and Truman (2004: 25).

2.4.1 Financial Action Task Force (FATF)

The FATF²⁴ is a global standard-setting body for AML.²⁵ It is an international organisation formed in July 1981 by the G7 countries.²⁶ It is also described as an international task force with a specific purpose to establish international standards, to develop and promote policies for the combating of money laundering and terrorist financing.²⁷ Its work is coordinated by a secretariat which is based at the Organisation for Economic Cooperation and Development (OECD) offices in Paris, France.²⁸

2.4.2 The FATF's Membership

The FATF has 36 members, comprising 34 jurisdictions²⁹ and two regional organisations³⁰ representing most major financial centres in all parts of the globe³¹. Its membership is open to countries that are fully committed at the political level to the implementation of the Recommendations, and are strategically important, among other factors.³²

²⁴ Allan (2006: III-7).

²⁵ FATF Public Statement (25 June 2010: para1).

²⁶ Madinger (2006: 100).

²⁷ World Bank (2009: 24).

²⁸ Stephens *et al* (2005: 248).

²⁹ Argentina, Australia, Austria, Belgium, Brazil, Canada, China, Denmark, Finland, France, Japan, Germany, Greece, Iceland, India, Ireland, Italy, Japan, Kingdom of the Netherlands, Luxembourg, Mexico, New Zealand, Norway, Portugal, Republic of Korea, Russian Federation, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States.

³⁰ World Bank, (2009: 24). The organisations are the European Commission and the Gulf Cooperation Council on Hong Kong.

³¹ See FATF members and observers.

³² World Bank (2009: 52). The other two remaining factors are that a country should (a) be a member of the nearest and applicable FSRB, or (b) work closely with the FATF or undertake to lead in the establishment of an FSRB where none exists; should have criminalised the laundering of proceeds of

The FATF also has associate members, comprising the existing FATF-Styled Regional Bodies (FSRBSs) across the globe. FSRBs are task forces with regional jurisdiction that are modelled on the FATF in their mandate, functions and methods of operation.³³ An example is the ESAAMLG, which is the main focus of this paper. The rest are the Asia Pacific Group on Money Laundering (APG), Caribbean Financial Action Task Force (CFATF), Council of Europe MONEYVAL Committee and the Financial Action Task Force on Money Laundering in South America (GASIFUD), Intergovernmental Action Group against Money Laundering in West Africa (GIABA) and Middle East and North Africa Financial Action Task Force (MENAFATF).³⁴

Furthermore, the FATF has observer members. These are international organisations and bodies with wider mandates that have adopted initiatives in fighting money laundering and terrorist financing. They include the United Nations (UN), the World Bank, the International Monetary Fund (IMF), the Egmont Group³⁵ and the Basel Committee on Banking Supervision.³⁶ These organisations also provide technical assistance on AML capacity building, among others, hence will be referred to as technical assistance providers in this paper.

crime and other serious offences and finally should have already made it mandatory for financial institutions to identify their customers and to report unusual or suspicious transactions.

³³ World Bank (2009: 28).

³⁴ See FATF members and observers.

³⁵ World Bank (2009: 28). The EGMONT group is an international network of FIUs.

³⁶ World Bank (2009: 28).

2.4.3 The FATF's Mandate and Purpose

As pointed out earlier, the FATF's purpose is to develop and promote national and international strategies for AML and CFT.³⁷ As a policy making body, it also attempts to generate the necessary political will to bring about national AML and CFT legislative and regulatory reforms.³⁸ Furthermore, the FATF's other core functions include ensuring the implementation of its Recommendations by countries, studying the techniques and typologies³⁹ on money laundering and terrorist financing, and conducting outreach activities that aim to spread its standards globally.⁴⁰

2.4.4 The Evolution and Nature of the FATF Recommendations

The FATF is characterised by the Recommendations it issues, which form the basis of most of the national AML laws.⁴¹ In 1990, the FATF first issued the so-called Forty Recommendations on money laundering, which set out a basic, universally applicable framework of measures covering the criminal justice system, the financial sector, certain designated non-financial businesses and professions (DNFBPs), and mechanisms of international cooperation.⁴² The first set of Recommendations issued in 1990 only focused on the laundering of proceeds of drug trafficking but their ambit was expanded in 1996 to cover laundering of proceeds of any serious crime.⁴³ The

³⁷ Hopton (2009: 8).

³⁸ Hopton (2009: 8).

³⁹ Typologies refer to the study and classification of trends and methods used for laundering money and the financing of terrorism. See FATF Methods and Trends.

⁴⁰ World Bank (2009: 24).

⁴¹ Hopton (2009: 17).

⁴² IMF Fact sheet 'The IMF and the fight against Money Laundering and the financing of terrorism' (2011: 2).

⁴³ FATF Annual Report (2010: 5).

FATF also issued Eight Special Recommendations on financing of terrorism following the September 11 Twin tower bombings in the USA in 2001, and then in 2004, a Ninth Special Recommendation on cash couriers, which applies to both money laundering and financing of terrorism.⁴⁴

These Recommendations give effect to the FATF's standard-setting mandate and are essentially soft law.⁴⁵ This means that they are best practice guidelines for countries to base their AML initiatives on, but countries are not bound by them.

2.4.5 Who Developed the FATF Recommendations?

Answering this question will help in the understanding of the involvement of developing countries such as ESAAMLG members, in the development of the Recommendations. As stated earlier, the FATF was founded by the G7 countries and they exclusively drafted the first Forty Recommendations in 1990. However, they invited eight countries to join the FATF⁴⁶ so as to expand its expertise and to get their views on the AML cause, which the G7 had embarked on.⁴⁷

In addition, all OECD and financial centre countries were invited to the FATF's second meeting in July 1990⁴⁸ so as to give them a chance to indicate what would

⁴⁴ FATF Annual Report (2010: 5).

⁴⁵ Blazejewski (2008: 10).

⁴⁶ Gilmore (1992: 1138). The eight countries were Sweden, Netherlands, Belgium, Luxembourg, Switzerland, Austria, Spain and Australia.

⁴⁷ FATF Annual Report (1991: 4).

⁴⁸ FATF Annual Report (1991: 4). Denmark, Finland, Greece, Ireland, New Zealand, Norway, Turkey, Hong-Kong, Singapore and the Gulf Co-operation Council (comprising Saudi Arabia, Bahrain, United Arab Emirates, Oman, Qatar and Kuwait).

be at stake for them if they endorsed the Recommendations.⁴⁹ However, all the other countries were merely invited to participate in the AML cause and to implement the FATF Recommendations as they found them.⁵⁰

The question at this point would be how did the Recommendations trickle down to Africa then to ESAAMLG? Well, this was achieved through the FATF's regional mobilisation program it carried through regional meetings in Asia Pacific, Central and Eastern Europe, Caribbean Islands and Central American States, Africa and Latin America.⁵¹ The purpose of the meetings was merely to assess the position of the countries in these regions on AML and to obtain their endorsement of the Recommendations.⁵² It is clear therefore that these countries, including ESAAMLG members, did not contribute to the drafting of the Recommendations but were only asked to endorse them.

The adoption and endorsement of the Recommendations trickled to Eastern and Southern Africa in October 1996 following a conference organised by the Commonwealth Secretariat and the FATF, attended by 13 of the current ESAAMLG member countries.⁵³ This meeting was part of the FATF's outreach program, an extension of the regional mobilisation program with the aim of spreading the AML message and encouraging non-members to adopt the Recommendations. At the end

⁴⁹ G7 Houston Economic Declaration of July 11, 1990.

⁵⁰ G7 Houston Economic Declaration of July 11, 1990.

⁵¹ FATF Annual Report (1991: 13).

⁵² FATF Annual Report (1991: 13).

⁵³ FATF Annual Report (1997: 25). Countries in attendance were Botswana, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.

of the Conference, the participants agreed among other things, on the urgent need to enact AML laws, set up national AML committees and also a proposal to set up a regional mechanism which would establish a Southern and Eastern African Financial Action Task Force (now ESAAMLG).⁵⁴ These agreements were made upon realising that all of the participating countries had not yet criminalised money laundering, yet there were a number of criminal activities whose illicit proceeds were being laundered in different ways in the region.⁵⁵

Despite saying that the participants of the Cape Town Conference agreed to enact AML legislation, it is evident that some were not yet convinced of the relevance of an AML regime. Case in point is a Malawian Economics and Planning Minister who expressed at an international summit in 2006, that despite arguing that Malawi did not have a money laundering risk, he was told that whatever the case, Malawi had to adopt the AML policy.⁵⁶ He was then told failure to adopt the AML policy would make it hard for Malawi to transact with the outside world and thus discourage foreign investment.⁵⁷ 'Then the minister concluded "we were told as told": the country adopted the standard AML package.'⁵⁸

⁵⁴ FATF Annual Report (1997: 25).

⁵⁵ FATF Annual Report (1997: 38-39). The criminal activities included fraud, corruption, narcotics trafficking and arms smuggling.

⁵⁶ Sharman (2008: 651). When the minister asked whether the AML recommendations could be adapted to suit local conditions, he was told no because in so doing Malawi would not meet international standards.

⁵⁷ Sharman (2008: 651).

⁵⁸ Sharman (2008: 651).

2.4.6 The Enforcement of the FATF Recommendations

The FATF monitors the implementation of its Recommendations through mutual evaluations and annual self assessments. During mutual evaluations, a team of assessors from other countries periodically assesses the AML system of a particular jurisdiction and rate the level of its compliance with the Recommendations.⁵⁹ In a self assessment, a country makes an assessment of its own AML system.⁶⁰

Enforcement of compliance through mutual evaluations puts countries under peer pressure⁶¹ in the sense that the assessors produce mutual evaluation reports (MERs) which are made public through the FATF or FSRB websites. Such publication works negatively for developing countries (such as ESAAMLG countries) when they are rated non-compliant and are labelled as crime havens, as this may lead into discouraging foreign direct investment or limiting foreign governmental aid.⁶²

Furthermore, the FATF has another enforcement mechanism whereby it identifies jurisdictions with strategic AML/CFT deficiencies that pose a threat to the international financial system.⁶³ The FATF helps such jurisdictions in developing action plans on how best to address their deficiencies and all this is done through its International Co-operation Review Group (ICRG).⁶⁴ The identified jurisdictions are

⁵⁹ Mathias *et al* (2005: 250). The countries are either rated compliant where they satisfy the requirements of each Recommendation, largely compliant if they satisfy most requirements, partially compliant and non-compliant if they partially or do not meet the requirements at all.

⁶⁰ Blazejewski (2008: 16).

⁶¹ Blazejewski (2008: 17).

⁶² Allan (2006: IV-2).

⁶³ FATF Improving Global AML/CFT Compliance: On-Going Process (2010: 1)

⁶⁴ FATF Improving Global AML/CFT Compliance: On-Going Process (2010: 1).

thus labelled as high risk and non-complying jurisdictions, through Public Statements Published on the FATF website.⁶⁵ As a result of the publicity, the identified jurisdictions make political commitments to implement the Recommendations.⁶⁶

In cases where the identified jurisdictions fail to address their deficiencies meaningfully, the FATF calls upon all countries to take counter-measures when dealing with such jurisdictions, so as to protect the international financial system from the risks arising from the deficiencies.⁶⁷ The counter-measures include all countries advising their financial institutions to give special attention to business relationships and transactions with an identified country, including its companies and financial institutions.⁶⁸

For jurisdictions that do not make considerable progress in addressing their deficiencies, the FATF also calls upon all countries to take precautionary measures when dealing with them, in view of the risks they pose to the international financial system.⁶⁹ Within ESAAMLG, this measure has been taken against Kenya.⁷⁰ Namibia, Tanzania and Zimbabwe too have been recently identified as countries with strategic

⁶⁵ FATF: More about International Co-operation Review Group (ICRG). The two documents are the 'Public Statement' for jurisdictions that fail or make little progress to address their deficiencies and 'Improving Global AML/CFT Compliance: Ongoing process' for those identified with strategic deficiencies and have made a commitment to address them.

⁶⁶ FATF Improving Global AML/CFT Compliance: On-Going Process (2010: 1).

⁶⁷ FATF Public Statement (June 2011). Iran and the Democratic Republic of North Korea have been mentioned in the most recent June 2011 Public Statement as countries against which all countries should take counter-measures.

⁶⁸ FATF Public Statement (2011).

⁶⁹ FATF Public Statement (2011).

⁷⁰ FATF Improving Global AML/CFT Compliance: On-Going Process (2010: 1). Kenya was included on the 2010 list but it still appears on the 2011 list because despite enacting an AML legislation (the Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009), Kenya has not yet put in place a fully operational FIU.

deficiencies, hence they have made commitments to work on the deficiencies, according to the actions plans they have drawn with the FATF.⁷¹

2.5 The FATF Recommendations and International Legal Instruments.

The FATF standards build upon a number of UN Conventions. These include the Vienna Convention and the Palermo Convention. An illustration on this point is the first part of the FATF's Recommendation 1, which encourages countries to criminalise money laundering on the basis of these two Conventions.⁷² These Conventions collectively promote international cooperation in preventing and containing drug trafficking, domestic and cross border organised crime, corruption and the financing of terrorism.⁷³

The Vienna Convention, in particular, has provided what has become a globally accepted definition of the offence of money laundering.⁷⁴ In a nutshell, the Convention criminalises the conversion or transfer of property, knowing that such property is derived from any offence or offences established under the convention, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions⁷⁵.

⁷¹ FATF Improving Global AML/CFT Compliance: On-Going Process (June 2011: 1). Among other deficiencies, Zimbabwe and Tanzania have to criminalise money laundering and terrorist financing adequately; and ensure fully functional and effective FIUs. Namibia has to adequately criminalise terrorist financing and ensure the autonomy of its FIU.

⁷² FATF Recommendations (2004).

⁷³ ESAAMLG 10 Year Report (2009: 14).

⁷⁴ World Bank (2009: 29-30).

⁷⁵ Article 3(1) (b)(i) of the Vienna Convention.

Furthermore, it also criminalises the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established under the Convention or from an act of participation in such an offence or offences.⁷⁶ What has been criminalised by this Convention forms the *gist* of the different definitions of money laundering given earlier in this chapter. Finally, the Convention also contains detailed provisions on international cooperation under its Article 2.⁷⁷ Following this Article, international cooperation is consequently provided for under the FATF's Recommendations 36 to 40.⁷⁸

As for the Palermo Convention, it is the first binding international instrument that deals with organised crime in a comprehensive manner.⁷⁹ Its Article 1 states that its purpose is to promote cooperation to prevent and combat transnational organised crime more effectively. It has also contributed significantly to the codification of AML standards of prevention and control.⁸⁰ Example in point is Article 7 which, among others, encourages countries to institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank institutions in order to deter and detect

⁷⁶ Article 3(1) (b)(ii) of the Vienna Convention.

⁷⁷ According to Article 2 of the Vienna Convention, the purpose of this Convention is to promote co-operation among the States Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances that have an international dimension.

⁷⁸ FATF Recommendations (2004).

⁷⁹ World Bank (2009: 30).

⁸⁰ World Bank (2009: 30).

all forms of money laundering.⁸¹ These measures are reflected under the FATF's Recommendations 4 to 25 on preventive measures.⁸²

Another Convention worth mentioning is the International Convention for the Suppression of the Financing of Terrorism (1999),⁸³ which relates to the Recommendations pertaining to CFT, the Special Eight Recommendations. However, this aspect will not be dealt with in detail, as this paper focuses only on AML Recommendations.

2.6 Eastern and Southern Africa Anti-Money Laundering Group

As pointed out, ESAAMLG is an East and Southern African regional body styled on the FATF. Following the agreement to set up such a body at the Cape Town Conference discussed earlier, ESAAMLG was launched on 27 August 1999 at a meeting of Eastern and Southern African Ministers of Finance in Arusha, Tanzania.⁸⁴ The meeting was attended by nine member countries⁸⁵ but the membership has now increased to 15 member countries.⁸⁶ The meeting was a culmination of consultations that had taken place since 1995 on the need to develop a regional mechanism to co-operate in the implementation of AML programmes.⁸⁷

⁸¹ Article 7(1)(a) of the Palermo Convention.

⁸² FATF Recommendations (2004).

⁸³ Adopted in New York on 9 December 1999, came into force on 10 April, 2002.

⁸⁴ ESAAMLG 10 Year Report (2009: 4). ESAAMLG's work is coordinated by a Secretariat based in Dar es Salaam, Tanzania.

⁸⁵ ESAAMLG 10 Year Report (2009: 7). The nine member countries were Botswana, Kenya, Mauritius, Mozambique, South Africa, Tanzania, Uganda, Zambia and Zimbabwe.

⁸⁶ Botswana, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Seychelles, Swaziland, Tanzania, Uganda, Union of Comoros, Zambia and Zimbabwe.

⁸⁷ ESAAMLG 10 Year Report (2009: 7).

It was agreed at the meeting that, given the threat of cross-border crime and money laundering in the region, there was a need to cooperate with other States in combating money laundering by implementing AML international instruments.⁸⁸ The meeting therefore adopted a Memorandum of Understanding (MOU)⁸⁹ as an instrument that would enable the members to forge the process of cooperation for implementing the Recommendations.⁹⁰ By signing the ESAAMLG MOU at this meeting, member countries endorsed the Recommendations and affirmed their commitment to implement them in order to combat money laundering at a national level.⁹¹ The MOU therefore stands as a symbol of commitment by ESAAMLG members, and serves as a frame of reference for the operations of ESAAMG.

2.6.1 National Initiatives Undertaken by ESAAMLG Member States.

Apart from the international and regional AML initiatives discussed earlier, ESAAMLG member countries are encouraged to domestically implement the objectives stated in the ESAAMLG MOU. These objectives include an undertaking to adopt and implement the Recommendations; apply AML measures to all serious crimes; and to implement any other measures contained in multilateral agreements and initiatives to which they subscribe, for the prevention and control of the laundering of the proceeds of crime.⁹²

⁸⁸ ESAAMLG 10 Year Report (2009: 8).

⁸⁹ ESAAMLG MOU (2008).

⁹⁰ ESAAMLG 10 Year Report (2009: 8).

⁹¹ ESAAMLG 10 Year Report (2009: 5).

⁹² ESAAMLG MOU (2008: 3).

The work of the member countries at national level is coordinated by national multi-disciplinary committees drawn from three sectors, namely Finance, Justice and Law enforcement.⁹³ At present, each member country has its own national committee.

Most of the member countries have also enacted AML laws.⁹⁴ Six member countries have functioning FIUs,⁹⁵ which are central points for national AML programs because they are agencies that provide for the exchange of information between financial institutions and law enforcement at both national and international level.⁹⁶ They act as a link between the private and public sector in the fight against money Laundering, by analysing suspicious transaction reports (STRs) they get from financial institutions, and eventually disseminating their analysis to law enforcement authorities for further action, in cases where money laundering activities are suspected.⁹⁷

The nature of both National Committees and FIUs show the importance of coordination and cooperation among different players from different sectors in the AML discourse, even at national level.

2.7 Conclusion

Given the cross-border and complex nature of money laundering, there are initiatives both at the international, regional as well as national levels to prevent and fight it.

The FATF (created by the G7 countries) is an umbrella body responsible for setting

⁹³ ESAAMLG 10 Year Report (2009: 8).

⁹⁴ ESAAMLG 10 Year Report (2009: 24).

⁹⁵ ESAAMLG 10 Year Report (2009: 8). Members with functioning FIUs are South Africa, Malawi, Namibia, Seychelles, Mauritius and Zimbabwe.

⁹⁶ Allan (2006: III-19).

AML standards, while ESAAMLG, among other FSRBs, is a regional body, diffusing the FATF initiatives in the Eastern and Southern African region. The FATF's standards are in form of Recommendations, which were exclusively drafted and developed by developed countries. Developing countries such as ESAAMLG members were only invited to endorse and implement them later on through the FATF's regional mobilisation and outreach programs. Some countries like Malawi adopted the AML standards even before being convinced of their relevance to their local contexts.

The FATF works in collaboration with various international bodies such as the World Bank, IMF and the UN. Some of the Recommendations were inspired by and rest on international legal instruments such as the Vienna and Palermo Conventions. The FATF monitors enforcement of its Recommendations through mutual evaluations, self assessment exercises and the ICRG process. These monitoring mechanisms put pressure on countries to adopt and implement the Recommendations.

Finally, ESAAMLG countries have themselves launched their own respective initiatives aimed at implementing the FATF standards under the guidance of the ESSAMLG Secretariat. Examples are the establishing of National Committees, the enactment of AML legislation as well as the setting up of FIUs.

CHAPTER 3

THE SCALE AND EFFECTS OF MONEY LAUNDERING

3.1 Introduction

This chapter discusses how money laundering manifests itself at both the global and ESAAMLG level. It focuses on how money laundering affects on the development of the ESAAMLG member countries and shows the relevance of the FATF Recommendations in this respect.

3.2 The Global Scale of Money Laundering

In 1996, the IMF estimated that the money laundered annually is between 2 and 5 percent of the world's gross domestic product.⁹⁸ This translates into an amount between \$590 billion and \$1.5 trillion. The FATF estimates that the \$590 billion is roughly equivalent to the value of the total output of an economy the size of Spain's. But it is impossible to produce a reliable estimate of the amount of money laundered, and therefore the FATF does not publish any figures in this regard.⁹⁹

Walker, the first analyst who attempted to quantify how much money is laundered, suggested in his 1999 study that \$2,85 trillion is laundered globally per year.¹⁰⁰ This was almost twice the estimated \$1.7 trillion federal budget of the USA in 1999.¹⁰¹

⁹⁸ Simser (2006: 294).

⁹⁹ FATF Money Laundering FAQ.

¹⁰⁰ Unger *et al.* (2006: 5).

¹⁰¹ A citizen's guide to the federal budget of the United States Government fiscal year (1999: iii).

These estimates show how much money criminals would cream away as proceeds of crime if there are no measures to take away such profit from them.

3.3 Money Laundering in Eastern and Southern Africa

This study makes no pretences at precisely quantifying how much money is laundered in the Eastern and South African region, for no data exists on the nature, varieties and extent of money laundering in the region.¹⁰² However, Walker estimated that the total amount laundered internally and brought into the ESAAMLG region during 1999 was equal to just over US\$18,07 billion.¹⁰³ Nevertheless, in order to get a broader picture of the problem in the region, it is imperative to look at the predicate offences for money laundering that are prevalent in the region. This will indicate which crimes constitute the basis of money laundering in the region, as most of them are profitable to the criminals, and it is this profit that AML initiatives target. Using such indications is acceptable, given that the clandestine nature of money laundering makes it difficult to obtain statistics on its scale and frequency.¹⁰⁴

3.3.1 Drug Trafficking

Drug trafficking is associated with money laundering everywhere in the region.¹⁰⁵ It generates huge proceeds that go undetected, due mainly to the generally low levels of AML/CFT implementation in the region.¹⁰⁶ This makes the region a low-risk-high

¹⁰² Goredema (2003: 1).

¹⁰³ Goredema (2003: 206).

¹⁰⁴ Goredema (2003: 3).

¹⁰⁵ Goredema (2003: 3). For instance Dagga from Malawi is exported to foreign jurisdictions mainly Zimbabwe, Namibia and Republic of South Africa for sale. Furthermore, the drug market in Republic of South Africa is the largest in the region such that in 2007 the seized drugs had a value equivalent to \$270 million.

¹⁰⁶ ESAAMLG 10 Year Report (2009: 24).

premium destination for generating proceeds of crime and laundering them with relative ease.¹⁰⁷ The most recent United Nations Office on Drugs and Crime (UNODC) world drug report has revealed that East Africa is reportedly the main intermediary target for drug trafficking activities, while the Southern African region registers the largest amounts of African heroin seizures.¹⁰⁸

The first example in Southern Africa is Malawi where the biggest crime challenge is the production and trade in Indian hemp, and reports indicate that the production is increasing steadily and the trade is worth millions of US dollars.¹⁰⁹ In the Seychelles, drug trafficking is also considered a major source of illicit money, such that over the recent past, several Seychellois nationals have been arrested in Kenya, India, Mauritius and Tanzania on charges of drug trafficking.¹¹⁰

Namibia is a route for hard drugs that come from South America and Asia into Southern Africa, and some of the hard drugs destined for Europe from these regions come through South Africa for re-routing to the European region and sometimes to Canada.¹¹¹ Some of the drugs are routed to South Africa through Luanda and Dar es Salaam.¹¹² Zambia also faces drug trafficking as one of the major predicate offences that give rise to money laundering.¹¹³ Zimbabwe is associated with trade of illicit

¹⁰⁷ ESAAMLG 10 Year Report (2009: 24). See also Goredema (2004: 3) who says drug trafficking is identified most readily with money laundering in all parts of Southern Africa.

¹⁰⁸ UNODC World drug Report (2011: 42).

¹⁰⁹ MER for Malawi (2008: 13).

¹¹⁰ MER for Seychelles (2007: 24).

¹¹¹ MER for Namibia (2007: 10).

¹¹² MER for the Namibia (2007: 10).

¹¹³ MER for Zambia (2008): 22).

drugs in which the country is used as a transit point for cannabis and South Asian heroin, mandrax and methamphetamines destined for the South African and European markets.¹¹⁴ In Eastern Africa, drug trafficking is a major problem in Uganda.¹¹⁵

3.3.2 Corruption

Corruption is regarded as a serious offence, which contributes to money laundering in all member countries.¹¹⁶ The link between corruption and money laundering has been expressed in the preamble of the United Nations Convention against Corruption.¹¹⁷ Generally, corruption in Africa is known to be rife.¹¹⁸ Within ESAAMLG, the Transparency International's (TI) 2010 Corruption Perception Index shows that on a scale of zero and ten, six out of the 15 ESAAMLG member countries scored less than three out of ten, where ten indicates a very clean jurisdiction in terms of corruption and zero represents a highly corrupt jurisdiction.¹¹⁹ Only Botswana and Mauritius scored above five, i.e. 5.8 and 5.4, respectively. The other countries fall between 3.8 and 4.8. These scores indicate the magnitude of corruption in the region.

By way of illustration, in Tanzania as of 30th September 2008, 4768 corruption cases were reported out of which 360 were prosecuted and 30 convictions secured.¹²⁰ In

¹¹⁴ MER for Zimbabwe (2007: 6). Zimbabwe is mainly used by drug traffickers as a transshipment country.

¹¹⁵ MER for Uganda (2007: 7).

¹¹⁶ Goredema and Madzima (2009: 7).

¹¹⁷ UN General Assembly resolution 58/4. Entered into force on 14 December 2005. All ESAAMLG members are parties to this Convention.

¹¹⁸ Goredema and Madzima (2009: 7).

¹¹⁹ TI Corruption Perceptions Index (2010: 3).

¹²⁰ MER for Tanzania (2009: 25).

Zambia, too, corruption is considered one of the serious predicate offences giving rise to money laundering.¹²¹ The same applies to Zimbabwe, in particular corrupt practices in the fuel industry involving both private and public institutions.¹²²

3.3.3 Human Trafficking

Human trafficking into and out of the South-Eastern African region is regarded as the third most problematic form of syndicate crime in Southern Africa, after drug trafficking and motor vehicle theft.¹²³ A survey conducted by the International Organisation for Migration (IOM) shows that Botswana, Lesotho, Malawi, Mozambique, Tanzania, Zambia, Zimbabwe, South Africa and Swaziland are all affected by human trafficking either as source, transit or as destination countries.¹²⁴ All these countries, except South Africa but including Kenya, Rwanda and Uganda are also affected by trafficking of under-age children who are used for sex tourism in South Africa.¹²⁵

3.3.4 Other Major Activities that Yield Illegal Proceeds

Other criminal activities prevalent in the region are the following: fraud; under invoicing of exports; theft and smuggling of motor vehicles within and into the region through East Africa and the Eastern seaboard of Southern Africa; currency externalisation, which may use fraudulent documentation and shell companies;

¹²¹ MER for Zambia (2008: 22).

¹²² MER for Zimbabwe (2007: 6).

¹²³ Goredema (2004: 5).

¹²⁴ Goredema (2004: 5). See also UNODC Global Report on Trafficking in Persons (2009:115-127) which indicates that Mauritius investigated about 100 cases of trafficking between 2003 and 2008. Uganda registered 441 victims of trafficking in persons and related offences in Kampala, its capital city, alone, between 2004 and 2007. South Africa recorded 115 victims of trafficking in persons between 2004 and 2006.

¹²⁵ Allais (2006: 7). See also Loubser (2009: 46).

cross- border smuggling of cash; the abuse of currency exchanges; illicit dealings in precious resources; as well as cash in transit robberies.¹²⁶ Weak AML systems make these crimes thrive undetected, leaving criminals to enjoy the proceeds derived from them.

In Malawi for instance, the most cases, apart from drug trafficking, involve armed robbery of vehicles and fraud.¹²⁷ In Uganda, income generating crimes such as duty fraud and smuggling have increased sharply in recent years, and the proceeds are laundered through the acquisition of land, buildings, houses, cars, shops and other forms of businesses.¹²⁸ In the Seychelles, parallel market operations, theft and fraud are considered as the major source of illegal proceeds.¹²⁹ For South Africa, major profit-generating crimes include fraud, theft, corruption, racketeering, precious metals smuggling, abalone poaching, the “419” Nigerian-type economic/investment frauds and pyramid schemes, with increasing numbers of sophisticated and large-scale economic crimes and crimes through criminal syndicates.¹³⁰

3.4 Effects of Money Laundering

Money laundering can undermine the integrity and stability of financial institutions and systems, discourage foreign investment, and distort international capital flows.¹³¹ It may have negative consequences for a country’s financial stability and

¹²⁶ Goredema (2004: 5).

¹²⁷ MER for Malawi (2008: 13).

¹²⁸ MER for Uganda (2007: 7).

¹²⁹ MER for Seychelles (2008: 24).

¹³⁰ ESAAMLG 10 Year Report (2009: 82-83).

¹³¹ IMF Factsheet (2011: 1).

macroeconomic performance, resulting in draining of resources from more productive economic activities and even having spill-over destabilizing effects on the economies of other countries. This applies to both the developed and developing worlds, but the effects are more adverse in developing countries as will be illustrated in the discussion below.

3.4.1 Weakens Financial Systems

Money laundering weakens the financial systems which are the main players for global financial transactions.¹³² This is so because the integrity of the banking and financial services marketplace depends heavily on the perception that it functions within a framework of high legal, professional and ethical standards.¹³³ Now if a bank is too complacent and lets criminals launder money through it, it is perceived as being in cahoots with criminals and their activities. This negatively affects the way it is perceived by other financial intermediaries, regulators and even ordinary clients.¹³⁴ In this way, money laundering can undermine the health of the financial system through the erosion of credibility, which is a fundamental concept in the modern financial economy.¹³⁵ This raises another critical concern as regards economic development of jurisdictions with such complacent financial institutions, as will be discussed below.

¹³² Vaithilingam and Nair (2007: 353).

¹³³ FAFT Money Laundering FAQ.

¹³⁴ FATF Money Laundering FAQ.

¹³⁵ Araujo (2008: 67).

3.4.2 Affects Economic Growth

A broad range of recent economic analyses point to the conclusion that in developing countries, strong financial institutions such as banks, non-bank financial institutions (NBFIs) and equity markets is critical to economic growth.¹³⁶

Particularly in developing countries, investor confidence is diminished by money laundering activity, and this plays a special role in the linkage between financial institutions and economic growth.¹³⁷ If these institutions are negatively affected by money laundering, it means countries will hardly benefit from the investment opportunities which sound banking systems attract. The weakening effects of money laundering on financial institutions are thus detrimental to developing countries like ESAAMLG members, which are at crucial stages of socio-economic development.

3.4.3 Facilitates Crime and Corruption

Money laundering also facilitates crime and corruption within developing economies, which is incompatible with sustainable economic growth.¹³⁸ Corruption and all other economic crimes affect economic growth in the sense that money laundering reduces the criminals' cost of crime, thereby increasing the level of crime. Most importantly, targeting the money laundering aspect of criminal activity and depriving criminals of their ill-gotten gains means hitting them where they feel the pain most, which is their pockets. Without a usable profit, the criminal activity will not continue.¹³⁹ Furthermore, where AML measures are ineffective, criminals have a

¹³⁶ Bartlett (2002: 10).

¹³⁷ Bartlett (2002: 10).

¹³⁸ Bartlett (2002: 19).

¹³⁹ FATF Money Laundering FAQ.

field-day. They are therefore especially attracted to jurisdictions with weak or ineffective controls where they can move their funds in and out with impunity.¹⁴⁰ The effects of such crimes cannot be ignored.¹⁴¹

Corruption has damaging economic effects facilitated by money laundering and these effects are particularly acute in the public sector in many developing countries because of the larger role the government often plays in providing goods and services.¹⁴² The societal costs of corruption are that it weakens confidence in public institutions, damages the private investment climate, and ruins delivery mechanisms for such poverty alleviation programs as public health and education.¹⁴³

If corruption goes undetected and unchecked, it can among others, impede the adoption and implementation of effective AML measures by interfering with the capacity of institutions or officials who are entrusted with such adoption and implementation.¹⁴⁴ It can therefore be inferred that in an inherently corrupt system, laws, systems and procedures adopted to fight money laundering and its underlying offences cannot function effectively.¹⁴⁵ Given the interconnectedness between money laundering and corruption and their combined effects upon developing countries, ESAAMLG needs to step up its prophylactic actions to avoid member states lapsing into lax jurisdictions with porous systems.

¹⁴⁰ IMF Factsheet (2011: 1).

¹⁴¹ Bartlett (2002: 19).

¹⁴² Bartlett (2002: 23).

¹⁴³ Brun *et al* (2011: 18).

¹⁴⁴ Goredema and Madzima (2009: 7).

¹⁴⁵ Mugarura (2010: 274)

3.4.4 Loss of Revenue

Money laundering also reduces the tax base of a country, thereby causing a decline in tax revenues collected by governments.¹⁴⁶ As a result governments have to levy higher taxes in order to provide necessary services to their citizens.¹⁴⁷ This happens because money launderers disguise their proceeds in various ways and as such they are not openly available or accounted for. Consequently, revenue authorities hardly have access to such funds for tax purposes. Lack of revenue is detrimental to developing countries as they rely on them to provide the much-needed infrastructure and amenities for the public, such as schools, hospitals, roads, houses, and a host of other basic facilities that are indispensable for socio-economic development.

3.4.5 Risk to Privatisation Efforts

Money launderers threaten the efforts of many countries to reform their economies through privatisation.¹⁴⁸ They can pose as a risk to privatisation efforts by purchasing institutions previously owned by government, not for business purposes but for use as fronts for their criminal activities.¹⁴⁹ The risk is higher in developing countries which are keen to attract direct foreign investment, yet risk dealing with money launderers who are likely to have the financial power to out-bid legitimate investors.¹⁵⁰

¹⁴⁶ Fundanga (2003: 7).

¹⁴⁷ Moodley (2008: 19).

¹⁴⁸ Allan (2006: II-7).

¹⁴⁹ Moodley (2008:19).

¹⁵⁰ Fundanga (2003: 7).

When illicit proceeds are invested in this manner, criminals increase their potential for more criminal activities as well as depriving the country of what should be a legitimate, market-based, tax-paying enterprise.¹⁵¹ This proves detrimental especially for developing countries since such institutions are no longer run for the common good of a country and its citizens or its economy, but for laundering proceeds of crime. The whole purpose of privatisation is therefore defeated and its benefits to a developing country trampled on.

3.4.6 Reputational Risk

Investments are good for developing countries. However, it may be hard for a country to attract legitimate investments if there is a perception that the country has a poor track record of dealing with money laundering or is seen to be a centre for money laundering.¹⁵² This is because legitimate investors do not want to be associated with any country that has a negative reputation for fear of negatively affecting their reputation as well. Sound financial systems are essential for private entrepreneurs to emerge, for business to flourish, and for local people and investors from abroad to find the confidence to invest, and create wealth, income, and jobs.¹⁵³

Investment is hence hard to attract where investors' confidence is eroded by the negative reputation of a country's financial systems occasioned by money laundering. The IMF has also cautioned against these risks, pointing to the concomitant adverse consequences.¹⁵⁴

¹⁵¹ Allan (2006: II-7).

¹⁵² Moodley (2008: 19).

¹⁵³ Bartlett (2002: 11).

¹⁵⁴ IMF Background Paper (2001: 8-9).

For instance the Seychelles, in order to attract foreign investors, passed a law in 1995¹⁵⁵ that was perceived to be attractive to criminals and money launderers because it assured investors immunity from prosecution for any criminal activities to all whose investment was not less than 10,000,000 US dollars.¹⁵⁶ Consequently, the FATF explicitly condemned the Seychelles and this law and according to its Recommendation 21, the FATF urged its members to apply special scrutiny to all transactions involving the Seychelles.¹⁵⁷ Eventually the law was withdrawn and the Seychellois blacklist was withdrawn by the FATF, but despite the withdrawal, the reputational effect on the Seychelles lingered.¹⁵⁸

3.4.7 Facilitates Capital flight

Money laundering can be seen as a key element in illicit capital flight from throughout the developing world. Each of the major episodes of rapid, large –scale illicit capital flight from developing (and transition) countries has been facilitated with identifiable centres of money laundering activity.¹⁵⁹ In this regard, money launderers move their money in and out of jurisdictions, sometimes rapidly, to obscure the audit trail. The rapid movement of large amounts of money in and out of a country can

¹⁵⁵ Seychelles Economic Development Act of 1995 (No. 20 of 1995).

¹⁵⁶ Sections 5&7 of the Seychelles Economic Development Act of 1995 (No. 20 of 1995).

¹⁵⁷ Sharman (2006: 16).

¹⁵⁸ Sharman (2006: 16). For example, several years afterwards, the British Broadcasting Corporation attempted to pay the Seychellois power company for electricity used in the BBC's relay station in the country through HSBC bank. The transaction failed, but HSBC was at first unable to explain why. After some investigation it turned out that a junior employee in the bank had read about the controversial Act in the newspapers years before and had decided to impose a ban on all transactions with the Seychelles. Although this ban was revoked, this example illustrates the 'half-life' of blacklists, and the longer term effects of the reputational damage they can cause. In a 2004 report, the IMF explained the relatively slow growth of the offshore sector in the Seychelles by lingering negative associations with the Economic Development Act. See IMF Seychelles (2004: 11).

¹⁵⁹ Bartlett (2002: 25).

destabilize small developing economies¹⁶⁰ such as the economies of most of the ESAAMLG members.

3.4.8 Defeats the Rule of Law

The Rule of law presumes that there is a transparent system of clear and certain rules that is applied consistently to all subjects. Most importantly, establishing a legal system based on the Rule of Law is considered a precondition for economic development because markets need reliable institutions to be able to function.

However, money laundering threatens the Rule of Law directly.¹⁶¹ This is so because it provides organised crime with its cash flow, investment capital and the incentive to commit more proceeds-generating crime, both nationally and internationally.¹⁶²

Where criminals have enormous economic power and capacity to commit such crimes with impunity because their proceeds go undetected, it has already been argued above that crime increases. In this way, money laundering allows criminals to defeat law enforcement and to escape the consequences of their acts.¹⁶³ Pervasive money laundering therefore undermines the rule of law in the society.¹⁶⁴

¹⁶⁰ World Bank (2009: 19).

¹⁶¹ Opening Address by Vasil Kirov, MONEYVAL Chairman, at Joint FATF/MONEYVAL Experts Meeting on Typologies.

¹⁶² Opening Address by Vasil Kirov, MONEYVAL Chairman, at Joint FATF/MONEYVAL Experts Meeting on Typologies.

¹⁶³ World Bank (2009: 20).

¹⁶⁴ World Bank (2009: 20).

3.5 Why Should ESAAMLG Members Fight Money Laundering?

Having looked at the effects of money laundering on developing countries, the relevance of the fight against money laundering within ESAAMLG cannot be ignored for the following reasons.

3.5.1 Fights Crime and Corruption

Crime and corruption are both counter-productive and destabilising for developing countries. A strong AML institutional framework that includes a broad scope of predicate offences for money laundering helps to fight crime and corruption in general.¹⁶⁵ ESAAMLG member countries are faced with a number of predicate offences for money laundering, most of which have different negative effects on the countries in different ways as already discussed. As stated earlier, corruption is regarded as a serious offence, which contributes to money laundering in all member countries.¹⁶⁶

Generally, a well-functioning AML system makes it difficult for corrupt officials to expatriate their ill-gotten funds and it also allows such funds to be repatriated in cases where they have been deposited abroad.¹⁶⁷ This is because AML measures create channels of information that help to trace the fleeing funds and also enable cooperation among law enforcement officers in different countries.¹⁶⁸

¹⁶⁵ Allan (2006: II-7).

¹⁶⁶ Goredema and Madzima (2009: 7).

¹⁶⁷ World Bank (2009: 22).

¹⁶⁸ World Bank (2009: 22).

Apart from corruption, ESSAMLG member countries face many other crimes like fraud, armed robbery, drug trafficking and human trafficking. In this regard, an effective AML regime is a deterrent to criminal activities in and of itself since such a regime makes it more difficult for criminals to benefit from their acts.¹⁶⁹

3.5.2 Attracts Productive Investment and Taxable Revenue

As discussed above, criminals can take over economic activities for purposes of concealing the profit they gain from criminal activities. Strong AML regimes provide a disincentive for the criminal involvement in the economy.¹⁷⁰ This permits investments to be put to productive purposes that respond to consumer needs and help the productivity of the overall economy.¹⁷¹ Such investment can be by both local and foreign players, which is good for growing economies.

By virtue of the lack of criminality in this kind of investment, governments are most likely to levy tax because the profits are available for tax purposes, unlike criminals' funds that are mostly concealed and out of reach of revenue authorities. Revenue is vital for many state operations, so the importance of such clean investment cannot be overemphasized.

3.5.3 Enhances Stability of Financial Institutions

Given the damaging effects of money laundering on financial institutions and the importance of such institutions in the economic development of developing countries, the fight against money laundering is very vital. One of the effects outlined earlier

¹⁶⁹ Allan (2006: II-7).

¹⁷⁰ Allan (2006: II-9).

¹⁷¹ Allan (2006: II-9).

was that money laundering can affect the public's confidence in a bank that is apparently complicit to criminal activities. However, public confidence in financial institutions, and hence their stability, is enhanced by sound banking practices that reduce financial risks to their operations.¹⁷² These risks include the potential that either individuals or financial institutions will experience loss as a result of fraud from direct criminal activity, lax internal controls or violations of laws and regulations.¹⁷³ It is this public that constitutes the client base hence sound AML systems benefit both the institutions and the public at large.

Furthermore, an effective AML regime reduces the potential that the institutions could experience losses from fraud.¹⁷⁴ Where the risk of fraud is minimized, the continued operations of these institutions are undoubted and therefore a country benefits from their services, tax as well as attraction of more investments.

3.6 Conclusion

The global scale of money laundering is frightening as it suggests how much criminals are benefitting from criminal activities. Though there is no precise quantification of money laundering in the eastern and southern parts of Africa, its magnitude is evident from the prevalence of income generating crimes in the regions.

A highlight of the effects of money laundering on developing countries justifies why ESAAMLG countries, being developing countries, should intensify the fight against

¹⁷² Allan (2006: II-8).

¹⁷³ Allan (2006: II-8).

¹⁷⁴ Allan (2006: II-8).

money laundering. The effects are that money laundering undermines financial systems, facilitates increase of crime and corruption, loss of revenue, capital flight, reputational risks and that is undermines the rule of law. All these effects are detrimental to developing countries such as ESAAMLG members hence the need for a strong AML system.

The benefits of having in place strong and effective AML systems make the implementation of the Recommendations undeniably relevant. The benefits include deterrence of corruption and other crimes, the attraction productive investment and taxable revenue and the enhancement of the stability of financial institutions.

CHAPTER 4

OBSTACLES FACED BY ESAAMLG MEMBERS IN THE IMPLEMENTATION OF THE FATF FORTY RECOMMENDATIONS AND THEIR POSSIBLE CAUSES

4.1 Introduction

Despite the relevance of having a strong AML system as discussed in the previous chapter, ESAAMLG member countries are struggling with the implementation of the FATF Forty Recommendations on money laundering. Even the FATF has admitted that the implementation of its Recommendations challenges all countries, regardless of their economic development levels.¹⁷⁵

This chapter will explore the obstacles faced by ESAAMLG member countries in the implementation of the Recommendations. These include competing priorities for scarce government resources; acute shortage of material, technical and skilled human resources; poor record keeping frameworks; dominant informal sectors; cash-based economies; porous borders; lack of or insufficient political will and political interference.

All the obstacles discussed in this chapter lead to weak legal and institutional frameworks within the ESAAMLG member countries, thereby exposing the eastern and southern African region to money laundering risks.

¹⁷⁵ Guidance on Capacity Building for Mutual Evaluations and Implementation of the FATF Standards within Low Capacity Countries (Hereafter referred to as Guidance for LCCs) (2008: 4).

4.2 Competing Priorities for Scarce Government Resources

The implementation of the Recommendations demands a lot of resources, and the situation is very bad for developing countries with limited resources, where the AML efforts compete for limited resources with high priority issues that affect basic living conditions in such countries.¹⁷⁶ Even the 2009 FATF President acknowledged the prevalence of this problem within ESAAMLG member countries in his address at the ESAAMLG 9th Council of Ministers meeting.¹⁷⁷

Case in point is Botswana where, during the mutual evaluation that was conducted there, assessors noted that, despite being a middle income country, Botswana still faces significant development challenges, particularly given the HIV/AIDS situation.¹⁷⁸ They further commented that the overall resources and budget constraints make it even more important for Botswana to mobilize efficiently and effectively the resources it can dedicate to AML.¹⁷⁹ This shows the competition between national crucial priorities like Botswana's HIV crisis on one hand and AML efforts on the other hand, in terms of resource allocation.

¹⁷⁶ Guidance for LCCs (2008: 4).

¹⁷⁷ Speech by the 2009 FATF President Paul Vlaanderen at the ESAAMLG 9th Council of Ministers Meeting, Maseru, Lesotho, 21 August 2009. In his speech on the point of competing priorities, Vlaanderen said '...I have to call for your continued attention and support that is needed for the fight against money laundering and terrorist financing... I do this in the full understanding that ESAAMLG member countries have many pressing priorities and often very limited resources.'

¹⁷⁸ MER for Botswana (2007:10).

¹⁷⁹ MER for Botswana (2007: 10). Page 12 of the report indicates that HIV/AIDS infection rate in Botswana is one of the highest in the world. The enormous direct costs of care and treatment are accompanied by the indirect loss to the economy, as well as the devastating human and social effects.

As for Malawi, its broad goals under the Millennium Development Goals (MDGs)¹⁸⁰ set to be achieved by 2015 include the fight against corruption, reforms in public and private sectors, safeguarding human rights and the rule of law, increasing social protection for vulnerable groups and developing infrastructure for development.¹⁸¹ However, bearing in mind the limited financial and human resources, Malawi identified six “priorities within priorities” which include agricultural development and food security, irrigation and water development, transport and communication infrastructure development, energy and power, integrated rural development as well as the management and prevention of HIV and AIDS.¹⁸²

The above-mentioned priority areas were outlined in 2007, which is almost a year after Malawi enacted its AML legislation and eight years since it committed itself to the implementation of the Recommendations by joining ESAAMLG in 1999. Be that as it may, AML efforts, which fall under the sub-theme of security,¹⁸³ did not feature as a priority at all by 2007, yet the evaluating team made some recommendations whose implementation would demand both financial and human resources.¹⁸⁴

¹⁸⁰ MDGs are intended to engender national initiatives and strategies geared towards alleviating poverty and improving the standard of living of the poorest of the poor across the globe. Although the global challenge to alleviate poverty is overwhelming, leaders of such poor countries decided to concentrate on eight crucial goals that touch upon available income and food, education, gender equality, child mortality, maternal health, HIV/AIDS and other major diseases, environmental sustainability, and global partnerships.

¹⁸¹ Malawi and the MDGs statement by the incumbent President of the Republic of Malawi to the sixty second session of the UN General Assembly, New York, (2007: 3).

¹⁸² Malawi and the MDGs statement by the incumbent President of the Republic of Malawi to the sixty second session of the UN General Assembly, New York, (2007: 4).

¹⁸³ Security is the fifth sub-theme of the improved governance theme. See Malawi Growth and Development Strategy: From poverty to prosperity 2006-2011 (2006: 66).

¹⁸⁴ MER for Malawi (2008:89-92) assessors recommended awareness raising campaigns for the private sector (Recommendation 31 and 32), enhancement of the capacity of Registrar General's

Even in Malawi's national budget for 2011-2012, priority has been given to issues like Public Service Reforms, Agriculture and Food Security, Green Belt Irrigation and Water Development, Education, Science and Technology, Transport Infrastructure, Integrated Rural Development, Public Health, Sanitation and HIV/AIDS Management.¹⁸⁵ These are the pressing needs in Malawi, demanding priority in terms of attention and resource allocation. However, Malawi has to make an allocation for financial, technical and material resources and train more personnel on AML as soon as possible¹⁸⁶ so as to fully comply with Recommendation 30.¹⁸⁷ This just shows how the Recommendations may come to compete with national immediate needs.

Finally, this problem was also expressed by most ESAAMLG countries during a typology study on corruption, when they attributed the low rate of successful corruption prosecutions to insufficient budget allocations in the face of other competing national needs.¹⁸⁸ The reality of this situation is therefore crucial to the implementation of AML standards.

officers (Recommendation 33); training for the FIU and other supervisors responsible for AML/CTF compliance supervision and enforcement (Recommendations 33,30,29,17, 32 and 25).

¹⁸⁵ 2011/12 Budget Statement delivered in the National Assembly of the Republic of Malawi by the former Minister of Finance (2011: 3).

¹⁸⁶ ESAAMLG 10 Year Report (2009: 56).

¹⁸⁷ MER for Malawi (2008: 89). Recommendation 30 requires countries to provide their competent authorities involved in AML/CFT efforts with adequate financial, technical and material resources.

¹⁸⁸ Goredema and Madzima (2009: 51).

4.3 Acute Shortage of Material, Technical and Skilled Human Resources

An effective AML system demands finances, technical resources such as computers and skilled people to carry out AML responsibilities such as prosecutors, investigators and judges. Unfortunately, there is shortage of skilled personnel within ESAAMLG, except for South Africa and Mauritius where shortage of the skills base in AML is not so acute.¹⁸⁹ Furthermore, there is also severe lack of material and technical resources for countries to implement AML standards effectively.¹⁹⁰

In Tanzania, for example, all relevant government agencies lack qualified and skilled human resources as well as funding and other technical resources to meet their AML requirements.¹⁹¹ Malawi also suffers the same shortcoming.¹⁹² As for Botswana, its courts face significant challenges and there are long delays in conducting prosecutions, not least due to the insufficient number of judges available.¹⁹³ Uganda too, is faced with limited resources in all law enforcement agencies, which include computer hardware and analytical software.¹⁹⁴

These deficiencies lead to weaknesses in the institutions or competent authorities that are responsible for the implementation of the Recommendations. The institutions range from FIUs, law enforcement agencies, and supervisory bodies under Recommendations 26, 27, 30 and 31. For instance, Recommendation 26

¹⁸⁹ ESAAMLG 10 Year Report (2009: 35).

¹⁹⁰ ESAAMLG Ten Year Report (2009: 17).

¹⁹¹ MER for Tanzania (2009: 20).

¹⁹² MER for Malawi (2008: 11).

¹⁹³ MER for Botswana (2007: 129).

¹⁹⁴ MER for Uganda (2007: 26).

requires countries to establish an FIU to receive, analyse and disseminate intelligence on suspicious transaction reports (STRs) from financial institutions, on suspected money laundering activities.¹⁹⁵ In order to carry out these functions, an important factor in the FIU's functioning is an efficient information technology (IT) system, which can receive, analyse and distribute STRs and other intelligence as quickly and effectively as possible.¹⁹⁶

However, given the limited resources in most ESAAMLG members, the establishment of FIUs is a big challenge; hence very few members have functional FIUs¹⁹⁷ i.e. only Malawi, Mauritius, South Africa, Zimbabwe, Namibia and Seychelles. Notably, they all received technical assistance in one way or another to set up the FIU's given the complexities involved in the process. For instance, South Africa used an advisory group of key stakeholders to help build an IT structure for its FIU and indicated in 2002 that it would need technical assistance in training its FIU's staff and analysts.¹⁹⁸

Kenya, which is yet to establish an FIU after the coming into force of its AML legislation, indicated in 2002 that it would need technical assistance to set up databases and develop appropriate infrastructure and networks for an effective

¹⁹⁵ FATF Recommendations (2004).

¹⁹⁶ FATF Annual Report (2001: 13).

¹⁹⁷ ESAAMLG 10 Year Report (2009: 17).

¹⁹⁸ AML and CFT *Regional* Videoconference: Eastern and Southern Africa Region (2002: 27-28).

FIU.¹⁹⁹ Lesotho too is yet to set up its FIU with the assistance of the US Treasury, which has offered to setup the FIU.²⁰⁰

The reliance on technical assistance is an indication of the countries' capacity limitations, but this paper questions how technical assistance may solve problems such as shortage of personnel as is the case in Botswana.

4.4 Dominant Informal Sectors, Cash-Based Economies and Porous Borders

The FATF standards presume a level of formality in the economies of countries implementing them.²⁰¹ However contrary to this presumption, all ESAAMLG countries have dominant informal sectors since very few people access formal financial services offered by financial institutions like banks. For instance, Tanzania has a limited banking access, with only 10% of the population accessing formal financial services.²⁰² In Malawi only 10% of the population has access to the financial sector as 90% is unbanked.²⁰³ Uganda is also a largely cash-based economy, where only a small proportion of the population has bank accounts and the percentage having insurance policies or owning securities is even lower.²⁰⁴ Zambia is also

¹⁹⁹ AML and CFT *Regional* Videoconference: Eastern and Southern Africa Region (2002: 20).

²⁰⁰ ESAAMLG 10 Year Report (2009: 38).

²⁰¹ Guidance for LCCs (2008: 5).

²⁰² MER for Tanzania (2009: 26). The 10% is based on the 2007 population estimate of 39,384,223. There are 34 banking institutions comprising 24 banks and 10 financial institutions.

²⁰³ MER for Malawi (2008: 13).

²⁰⁴ MER for Uganda (2007: 7).

categorised as a predominantly cash-based economy,²⁰⁵ and the same applies to Swaziland as well.²⁰⁶

In relation to the above overview, a study conducted by ESAAMLG in 2008 revealed that cash courier money laundering takes place in all ESAAMLG member countries due to their predominantly cash based economies and porous borders.²⁰⁷ Vast and porous borders within the ESAAMLG region make the task of detecting and combating cash couriers even more difficult.²⁰⁸ Furthermore, such borders render border control check points ineffective as cash couriers use various alternative routes such as land border crossing by foot.²⁰⁹

Furthermore, cash-based economies pose a big money laundering risk in the sense that they facilitate the physical movement of money, making it easy for criminals to physically move their illicit proceeds in what is termed courier-based money laundering.²¹⁰

The movement of money may be across borders, as criminals try to hide their money abroad and couriers²¹¹ will, inter alia, travel by road, through airports, by lake or sea with loads of cash, often stuffed into boxes, suitcases and concealed compartments

²⁰⁵ AML and CFT Country Strategy Paper (2010- 2012) for Zambia (2010: 6).

²⁰⁶ MER for Swaziland (2011: 13).

²⁰⁷ ESAAMLG Report on Cash Courier–Based Money Laundering (2008: 3).

²⁰⁸ ESAAMLG Report on Cash Courier–Based Money Laundering (2008: 7).

²⁰⁹ ESAAMLG Report on Cash Courier–Based Money Laundering (2008: 13).

²¹⁰ ESAAMLG Report on Cash Courier–Based Money Laundering (2008: 3).

²¹¹ ESAAMLG Report on Cash Courier–Based Money Laundering (2008: 7). The report defines a cash courier as an individual who physically transports, mails, ships, or causes to be physically transported, mailed, shipped currency or monetary instruments. This term is not intended to include persons engaged in money remittances as licensed business.

in vehicles and on persons.²¹² In this regard, the FATF's Special Recommendation IX (SR IX) on cash couriers requires countries to have in place legal and institutional frameworks that facilitate the detection of physical cross-border transportation of currency and bearer negotiable instruments.²¹³

The cash courier money laundering risk is further underscored through results of the mutual evaluations of each of the mentioned countries. Tanzania was found non-compliant on SR IX as it had not implemented its requirements at all.²¹⁴ Malawi was found partially compliant because even though it had the law in place, the implementation of the declaration or disclosure system was limited to foreign exchange violations in Malawi when travellers leave the country.²¹⁵

Uganda was found to be non-compliant because it does not have a law regulating cash couriers.²¹⁶ The assessors reiterated that Uganda's position as regards this Special Recommendation poses a big money laundering risk considering that it is largely a cash-based economy and the movement of cash across the border was a frequent event.²¹⁷ Zambia's was rated non-compliant for reasons such as the absence of provisions in Zambian laws directly regulating the cross border transfer of

²¹² ESAAMLG Report on Cash Courier-Based Money Laundering (2008: 7).

²¹³ ESAAMLG Report on Cash Courier-Based Money Laundering (2008: 3). The recommended measures include a declaration system or other disclosure obligations requiring all people crossing borders with cash or negotiable instruments, to declare how much they are taking out of a jurisdiction.

²¹⁴ MER for Tanzania (2009: 98).

²¹⁵ MER for Malawi (2008: 44).

²¹⁶ MER for Uganda (2007: 34).

²¹⁷ MER for Uganda (2007: 34).

currency related to money laundering and terrorist financing.²¹⁸ Swaziland is non-compliant too for not having any declaration measures to comply with this Special Recommendation.²¹⁹

The author thus agrees with the findings of the ESAAMLG study, which showed that most member countries have limited or no legislation to deal with the cash movement and cash-courier money laundering.²²⁰ The study also revealed that countries are challenged by the shortage of technical expertise and resources required to deal with the problem of cash couriers.²²¹

4.5 Poor Record Keeping Systems

There are poor record-keeping systems in ESAAMLG member countries as will be shown below. Record-keeping is captured under Recommendation 10. It requires financial institutions to maintain for at least five years, all necessary transaction records to enable them to comply swiftly with information requests from competent authorities.²²² Failure to keep such records affects the implementation of key Recommendations such as Recommendation 3 on confiscation, freezing and seizing of the proceeds of crime.²²³ Confiscation of illicit proceeds relies heavily on identification records of criminals, records of transactions that they conduct with

²¹⁸ MER for Zambia (2008: 71). The assessors also said that Zambia's laws had no provisions specifically addressing declarations by passengers in transit.

²¹⁹ MER for Swaziland (2010: 96).

²²⁰ ESAAMLG Report on Cash Courier-Based Money Laundering (2008: 4).

²²¹ ESAAMLG Report on Cash Courier-Based Money Laundering (2008: 4).

²²² FATF Recommendations (2004).

²²³ FATF Recommendations (2004)

financial institutions, registration of businesses and transfer of assets. This is so because the core element of Recommendation 3 is that there should be measures in place to identify, trace and evaluate property which is subject to confiscation.²²⁴ As such, a successful confiscation is not possible where there are no records use for the identification, tracing and evaluation of illicit property which, in most cases, passes through financial institutions.

Within ESAAMLG, Tanzania has no effective provisions pertaining to the retention of transaction records and neither does it impose sanctions for failure to comply with record keeping requirements under its AML Act.²²⁵ Tanzania also has no specific retention period for which the required records must be kept.²²⁶ In Botswana, too, there is no effective implementation of the record keeping requirements by designated bodies other than banks and *bureaux de change*.²²⁷ There are also inconsistencies in Botswana, with regard to the timeframe requirement under the Banking (AML) Regulation on record keeping after the completion of the transaction.²²⁸

²²⁴ FATF Guidance document: Best Practices Confiscation (Recommendations 3 and 38) 19 (2010: 3).

²²⁵ MER for Tanzania (2009: 234).

²²⁶ MER for Tanzania (2009: 235).

²²⁷ MER for Botswana (2007: 133).

²²⁸ MER for Botswana (2007: 133).

4.6 Political Will and its Effects

Implementation of the FATF Recommendations requires strong political will or commitment to begin and sustain the process and pace of reforms without which it is very difficult to identify and commit the resources required for effective AML/CFT implementation.²²⁹ As stated earlier on, all ESAAMLG members showed their commitment to implementing the FATF Recommendations by joining ESAAMLG and signing the ESAAMLG MOU. However, the ESAAMLG Secretariat has stated that obtaining and sustaining political will among ESAAMLG members is the major underlying factor that impedes the implementation of the AML/CFT legal and institutional framework.²³⁰ This paper has also shown that the members are affected by lack of resources and the capacity to effectively implement the Recommendations effectively.

However, the delays in implementing some of the Recommendations that do not demand the deployment of significant financial and human resources suggest the lack or insufficiency of political will on the part of member countries to have in place an effective AML/CFT system. Such lack or insufficiency of political will results into crucial consequences in the AML regime, such as delays in enacting or amending AML and AML related legislation, as discussed below.

²²⁹ Guidance for LCCs (2008: 6).

²³⁰ ESAAMLG 10 Year Report (2009: 17).

4.6.1 Unreasonable Delays to Enact AML/CFT Legislation

The effectiveness of an AML regime is premised on the existence of a legal and institutional framework that provides for the criminalisation of money laundering.²³¹ This means that having in place legislation that adequately criminalises money laundering an offence is vital. However, the ESAAMLG Secretariat has expressed that the lack of political will impedes the implementation of the AML/CFT legal and institutional framework as some of the members still have to enact AML/CFT legislation.²³² This means that for such countries, money laundering has not yet been criminalised; hence they have weak AML legal frameworks.

The first example on this is Uganda which despite being an ESAAMLG founding member in 1999,²³³ has not yet passed AML legislation. The Ugandan authorities clearly stated during a mutual evaluation that they had the necessary political will and support from the Cabinet of Ministers to pass legislation that will meet the 40+9 FATF Recommendations, yet by that time the bill had not even been tabled in Parliament.²³⁴ This was said in 2007, and Uganda had agreed to enact AML legislation in 1996 at the Cape Town conference mentioned earlier on in this paper. Uganda's political will is therefore debatable in this respect.

²³¹ Shehu (2010: 142).

²³² ESAAMLG 10 Year Report (2009: 17).

²³³ ESAAMLG 10 Year Report (2009: 7).

²³⁴ MER for Uganda (2007: 9).

Similarly, despite being an ESAAMLG founding member, Kenya too passed its AML legislation only in 2010 following a series of condemnations by the FATF.²³⁵ One wonders why it had to take such public condemnation to make Kenya pass a law, whose enactment was one of the issues it committed to do by pledging to implement the FATF Recommendations in 1999. Kenya also agreed to enact its AML legislation in 1996 at the Cape Town conference. The reasons for the delay will be dealt with later in the discussion, but the main one was that parliament itself was not keen to pass this law.²³⁶ There was thus no sufficient political will on the part of this important arm of the Kenyan Government, the legislature.

4.6.2 Unreasonable Delays to Amend AML/CFT and Related Legislation

Apart from the actual enactment of legislation, lack of political will is evidenced by unreasonable delays displayed by countries in amending existing AML/CFT and related laws, so as to bring their respective legal systems in harmony with the FATF Recommendations. The first case in point is Malawi, whose AML legislation has not yet been tabled in Parliament for amendments proposed by the assessment team in 2008.²³⁷

²³⁵ FATF 'Improving Global AML/CFT Compliance: On-Going Process' (2010: 1). Kenya made a commitment to implement FATF Recommendations in February 2010. Since then, Kenya has demonstrated progress in improving its AML/CFT regime by finally enacting its AML Act on 28 June 2010.

²³⁶ International Narcotics Control Strategy Report (2009).

²³⁷ Malawi National AML/CFT Strategy (2009: 17).

As of March 2010, Zimbabwe was also yet to amend its AML legislation²³⁸ as recommended by assessors during its 2006 mutual evaluation.²³⁹ Despite being evaluated in 2005, Namibia is also yet to review the provisions of its International Co-operation in Criminal Matters Act of 2000 to ensure that it continues to meet the mutual legal assistance (MLA) requirements of Namibia and the international community.²⁴⁰ It should be noted from the years given above it has taken all these three countries more than three years to amend their existing laws. The question here would be where is the political will to have an effective AML legal system through amendments as recommended by assessors?

4.7 Political and Personal Concerns by Parliamentarians

Politics plays a big role in the implementation of various government policies and programs. The most notable forum for such is the parliament, where members vote in order to pass legislation. Political divisions between the ruling and opposition parties have played a crucial role especially in the passing of important laws, including AML/CFT laws.

This is true for Malawi, whose AML Act²⁴¹ took about four years to be passed since its introduction in parliament because of concerns raised by the opposition members of parliament. Among the objections raised, the opposition on several occasions refused to pass the law for fear that it was meant to target and persecute them.²⁴²

²³⁸ The Serious Offences (Confiscation of Profits) (amendment) Act of 2001.

²³⁹ The National AML and CFT Strategic Plan: 2010 - 2012 for Zimbabwe (2010: 11).

²⁴⁰ Namibia's National Strategy on Money Laundering and Terrorist Financing (2010: 10).

²⁴¹ Money Laundering Proceeds of Serious Crime and Terrorist Financing Act of 2006.

²⁴² Banda (2007: 2-3).

Ironically, the chairman of the Parliamentary Legal Affairs Committee Mr Atupele Muluzi, son Malawi's former president Dr Bakili Muluzi, strongly opposed the passing of the Bill fearing that it was targeting his father who was facing embezzlement charges.²⁴³ As a compromise, the opposition members of parliament demanded that they could only pass this law on condition that provisions on civil forfeiture should be struck off the Bill for fears that they could be used arbitrarily against them by the incumbent government.²⁴⁴

In Uganda, too, parliamentarians expressed fear that the proposed AML Act could be used against political opponents.²⁴⁵ The parliamentarians also questioned how the law would be enforced against the "strong" and "untouchables" both in politics and business, how to handle retired politicians who have ceased to be politically exposed, and proposed a provision for compensation of victims of unsuccessful prosecution of the law.²⁴⁶ When the Bill finally made it to Parliament in 2009, the Governor of the Bank of Uganda lamented that it had taken ten years to have the Bill endorsed and ready for parliamentary discussion.²⁴⁷ All this was happening despite Uganda's 1996 agreement to pass the law, as well as an indication to the World Bank, ESAAMLG and other AML international bodies in 2002 that it had already drafted the bill and that it was under discussion.²⁴⁸

²⁴³ Banda (2007: 3).

²⁴⁴ MER for Malawi (2008: 24). The fears were based on the arbitrary use of civil forfeiture by the Malawi government against any opposing forces during Malawi's first State President, Kamuzu Banda's era.

²⁴⁵ Olanyo and Mpumwire (2010).

²⁴⁶ Olanyo and Mpumwire (2010).

²⁴⁷ Olanyo and Mpumwire (2010).

²⁴⁸ AML and CFT *Regional* Video conference: Eastern and Southern Africa Region (2002: 20).

A similar problem arose in Kenya where some parliamentarians delayed in passing the AML law since 2004, out of fears that it was trying to target the Muslim community.²⁴⁹ Presenting this argument in November 2009 was an Assistant Minister for Public Service who further argued that implementing the Bill would be bowing to the interests of external pressure and said that Kenya by then had adequate laws in place to deter money laundering.²⁵⁰ While supporting the Bill, the Defence Minister also echoed the same concern but the Bill was passed, after the Prime Minister Raila Odinga assured those concerned that the law did not intend to victimise the Muslim community.²⁵¹ The Bill was finally passed by parliament in 2010 after provisions against terrorist financing were removed as a compromise reached to pass it since that was the main concern of the Muslim community both within and outside parliament.²⁵² All this was happening despite an indication made on 11 September 2002 that by then Kenya had already drafted a bill based on the United Nations model.²⁵³

Zambia also experienced an episode of selfish concerns by politicians. It is believed that the government delayed the enactment of the AML law out of the self-interest of influential high-ranking government officials in the administration of Dr Frederick Chiluba who, at the time, were involved in alleged laundering of funds corruptly obtained from the state.²⁵⁴

²⁴⁹ Anyangu-Amu (2009).

²⁵⁰ Anyangu-Amu (2009).

²⁵¹ Anyangu-Amu (2009).

²⁵² Juma and Sunday (2010).

²⁵³ AML and CFT *Regional* Videoconference: Eastern and Southern Africa Region (2002: 20).

²⁵⁴ Munyoro (2007: 43).

All these concerns show how politicians prioritise their political or personal concerns instead of prioritising the benefits of such laws for the people and society they serve. Going by the concerns raised in Malawi, Kenya and Uganda, it is doubtful that these parliamentarians had embraced or cared about the benefits of having AML legislation in the first place.

4.8 Political Interference and its Impact on the Independence of AML

Authorities and Institutions

As stated earlier on, politics plays a huge role in the implementation of government policies. Politics has a way of undermining the independence of crucial law enforcement agencies, whose independence is vital for the creation of an effective AML regime. For instance, the independence of an FIU would guarantee that FIUs can effectively analyse and disseminate to law enforcement suspicious information concerning any person, including influential government officials, without any undue influence. However, where such independence is compromised by political interference from government leadership, an FIU's work will be limited to those that have no links to the government. This is why Recommendation 26 emphasises the independence of FIUs.

The same argument applies to prosecution and investigative authorities, whose decisions on who to investigate and prosecute is not supposed to depend on the suspect's links to the political leadership. The independence of the judiciary, too, is of paramount importance as it guarantees that courts can make decisions against anyone in a society, including those in power. In this regard, merely having the AML laws in place and excellent compliance with the reporting obligations by the financial

institutions would mean nothing to an AML regime without independent and efficient law enforcement or judicial authorities.

Political interference appears to be a major problem within most ESAAMLG countries, where cases of politically linked persons suspected of mere predicate offence charges are hardly pursued. The first example is Zambia, where in 2006 the prosecution of a former permanent secretary in the Ministry of health, Dr Kashiwa Bulaya on three corruption charges, was withdrawn by the Director of Public Prosecutions who issued a *nolle prosequi*.²⁵⁵ There was no good explanation for the withdrawal, only for the public to realise later that the suspect had actually testified favourably for the then Zambian President Mwanawasa in his election petition.²⁵⁶ The sudden withdrawal sharply contradicted Mwanawasa's zero tolerance campaign against corruption, hence the public did not approve of the move but successfully pushed for the reopening of the case against Dr Bulaya.²⁵⁷

Furthermore, the Zambian Anti-Corruption Commission was under strong political influence of the Fredrick Chiluba regime (immediately preceding Mwanawasa's) because most government officials, including President Chiluba himself, were allegedly involved in widespread corruption.²⁵⁸ This was happening even though the Commission was said to be independent.

²⁵⁵ Munyoro (2007: 32). *Nolle prosequi* means unwillingness to proceed with a prosecution.

²⁵⁶ Munyoro (2007: 32).

²⁵⁷ Munyoro (2007: 32).

²⁵⁸ Munyoro (2007: 35).

The second example is Swaziland where, under the Constitution²⁵⁹ King Nswati III virtually controls the executive, the judiciary and the legislature through his powers to appoint and fire members of these three arms of government.²⁶⁰ In essence, before dismissing or disciplining judicial officers, the King is supposed to consult the Judicial Services Commission.²⁶¹ However, the King is not bound by the recommendations of the Commission, and the independence of the Commission itself is not guaranteed when all the six members are appointed by him.²⁶²

The first example of political interference is the forced resignation of the Swaziland Director of Public Prosecutions, Lincoln Ng'arua in 2002, who faced considerable pressure from the government after he instituted criminal charges against the then Attorney General, on sedition and defeating ends of justice.²⁶³ He was eventually called to a meeting one night by government officials who forced him to withdraw the charges against the Attorney General.²⁶⁴ His resistance to the suggestion resulted into more acts of intimidation perpetrated among others, by the Attorney General

²⁵⁹ Act 1 of 2005. Came into force in February 2006.

²⁶⁰ The King has power to appoint the Prime Minister under S.94(3), Ministers under S.95(1)(b), Judicial officers under S.153(1) and all other Senior government officials such as the Director of Public Prosecutions under S.162(2).

²⁶¹ S.159 (1) & (2) of the Swaziland Constitution of 2005. The members are the Chief Justice, two practitioners, chairman of the Commission and two more persons, all appointed by the King.

²⁶² Fombad (2007: 108).

²⁶³ Amnesty International (2004: 30). See also Maroleng C (2003: 5). The charges followed the Attorney General, Chiefs of staff the Army, Police and Prison instructing the Chief Justice and High Court judges to stop hearing a case by a young woman who was secretly abducted by the King's agents.

²⁶⁴ Amnesty International (2004: 30).

himself and members of the Swazi National Council, thus forcing him to resign and leave Swaziland.²⁶⁵

Political interference was also felt in the judiciary in the same year, 2002, when a High Court Judge, Justice Thomas Masuku, was harassed for his stance to uphold human rights in his rulings and also for his resistance to the government's pressure and influence on the judiciary.²⁶⁶ He was transferred from the High Court to the Industrial Court and the then Prime Minister justified this by saying that it was evident from his rulings that Masuku was anti-government hence was transferred to the Industrial Court where he would be less political.²⁶⁷

Masuku was fired on 29th September 2001 following a claim by the Swazi Chief Justice that Masuku had insulted the King in one of his rulings, among other allegations.²⁶⁸ Amnesty International condemned the way the Chief Justice conducted and controlled the dismissal proceedings against Masuku.²⁶⁹

In a related issue, a Minister of Justice was also suspended for refusing to authorise Masuku's dismissal.²⁷⁰ All this shows the tense political atmosphere in Swaziland where all the interests of the King are protected by his "hand-picked" officials such as

²⁶⁵ Amnesty International (2004: 30).

²⁶⁶ Masikare (2011).

²⁶⁷ Amnesty International (2004: 33).

²⁶⁸ Masikare (2011).

²⁶⁹ Amnesty International Public Statement (2011: 1) The proceedings were being chaired by the Chief Justice, who appeared in the case in two capacities, being the complainant against Masuku and also heading the proceedings as chair of the Judicial Services Commission. He refused to recuse himself as pleaded by the defence in fear of lack of impartiality and independence in both the proceedings and the outcome. The Chief Justice also refused to allow a public hearing of the proceedings and denied the defence a chance to cross examine a key prosecution's witness.

²⁷⁰ Masikare (2011).

the Chief Justice in this case, and all who try to resist political interference face suspension as did the Minister of Justice or dismissal through the ‘Kangaroo’ dismissal proceedings Masuku went through.

Furthermore, the King holds the power to appoint a Commissioner of police, who is responsible for the administration and discipline of the Swazi Police Service.²⁷¹ The significance of the Police service is that it is responsible for the preservation of peace, prevention and detection of crime, as well as the apprehension of offenders.²⁷² It is also primarily responsible for the investigation of money laundering offences through its Fraud and Commercial Unit.²⁷³ Given the level of political interference by the executive, the independence of the police service to effectively investigate a money laundering case against people connected to the government is almost an illusion.

4.9 Conclusion

This chapter has shown that ESAAMLG member countries face many obstacles. Some of the challenges are peculiar to their economic situations, such as predominant cash-based economies and dominant informal sectors, which raises the risk of cash-courier money laundering. This can be cured by encouraging financial inclusion of the unbanked population. Obstacles such as shortage of material, technological and skilled personnel can be addressed by provision of more resources and training programs by governments and organisations that give technical assistance. Poor record keeping can be addressed through legislation.

²⁷¹ Section 189 (3) and (4) of the Swaziland Constitution of 2005.

²⁷² Section 189 (1) of the Swaziland Constitution of 2005.

²⁷³ MER for Swaziland (2010: 79).

However, governments have limited capacities to achieve this due to other national priorities that demand priority in terms of resource allocation.

There are also obstacles such as lack of political will which leads to inordinate delays in enacting or amending AML legislation; political and personal concerns by parliamentarians when making AML related decisions and political interference which undermines the independence of crucial AML institutions. Tackling these obstacles however requires other strategies other than technical assistance or allocation of more resources by governments because they are more of an attitude problem by political leaders, other than the availability of resources or the economic situations.

CHAPTER 5

THE FATF's SOLUTIONS TO THE OBSTACLES, CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter assesses the adequacy of the measures that have been taken by the FATF to address the obstacles responsible for the slow implementation of its Recommendations. After the assessment, the paper concludes with a set of recommendations to address any deficiencies in the FATF's measures vis-à-vis the peculiar situations of respective ESAAMLG member countries.

5.2 What is Being Done to Address the Obstacles in Low Capacity Countries (LCCs)?

The ultimate goal of the FATF is to see its Recommendations being implemented fully and effectively by all countries in the world.²⁷⁴ However, as already stated in the previous chapter, the FATF has recognised the challenges being faced by ESAAMLG member countries in the implementation of its Recommendations. In relation to this, the FATF has since identified countries with low capacity (LCCs), as countries that face the most challenges in implementing the Recommendations.²⁷⁵ They are generally characterised as low income countries with the following characteristics: competing priorities for scarce government resources; severe lack of resources and skilled workforce to implement Government programmes; overall

²⁷⁴Guidance for LCCs (2008: 3).

²⁷⁵Guidance for LCCs (2008: 4).

weakness in legal institutions; dominant informal sector and cash-based economies; poor documentation and data retention systems; and very small financial sectors.²⁷⁶

All these characteristics of an LCC befit the obstacles within ESAAMLG as discussed in the previous chapter, making ESAAMLG countries are essentially LCCs.

The purpose of this guidance is to help LCCs to implement the FATF Recommendations fully and effectively, bearing in mind their challenges and limitations.²⁷⁷ The guidance also seeks to help LCCs mitigate their money laundering and terrorist financing risks in a manner that is consistent with a country's peculiar situation and peculiarities.²⁷⁸ It also aims at improving the relevance and benefits of mutual evaluations in LCCs.²⁷⁹

In essence, this guidance provides principles, mechanisms and procedures necessary for the effective prioritisation and implementation of the FATF Recommendations.²⁸⁰ As such the FATF has identified 'core' and 'key' Recommendations to be prioritised by LCCs in phases, since an attempt to implement all the Recommendations has proved difficult due to resource limitations.²⁸¹ These 'core' Recommendations include the criminalisation of money

²⁷⁶ Guidance for LCCs (2008: 3).

²⁷⁷ Guidance for LCCs (2008: 3).

²⁷⁸ Guidance for LCCs (2008: 3).

²⁷⁹ Guidance for LCCs (2008: 3).

²⁸⁰ ESAAMLG 10 Year Report (2009: 17).

²⁸¹ ESAAMLG 10 Year Report (2009: 17).

laundering (R1), CDD and record keeping (R5 and R10), and STR reporting (R13).²⁸²

The 'key' Recommendations are on provisional measures and confiscation (R.3), financial institution secrecy laws (R.4), the FIU (R. 26), supervision and regulation of financial institutions (R.23), international cooperation (R.35, SRV), mutual legal assistance (R36), other forms of cooperation (R.40), and ratification and implementation of UN Instruments (SRI).²⁸³

5.2.1 Implications of Prioritisation

Prioritisation implies that, for instance, in countries with predominant cash economies, paying more attention to the informal sector than the formal sector may be preferable considering the risks it poses, such as easy movement of illicit proceeds and the non-existence of an audit trail.²⁸⁴

5.2.2 Procedures and Mechanisms of Prioritisation

The guidance proposes three themes that are relevant throughout the process of implementation of the Recommendations.

First it suggests that an LCC should develop AML Strategic plans, showing which Recommendations it has prioritised to implement and within which period. Secondly, it encourages LCCs to prepare for mutual evaluations beforehand. Thirdly, it

²⁸² Guidance for LCCs (2008: 5). There are also Core Recommendations on financing of terrorism (SRII on criminalisation of terrorist financing and SR IV on STR reporting) but this paper will not tackle those since the discussion is focused on money laundering alone.

²⁸³ ESAAMLG 10 Year Report (2009: 17).

²⁸⁴ Guidance for LCCs (2008: 5).

encourages LCCs to develop strategies implementation plans that focus on addressing issues picked up as deficiencies during a mutual evaluation.

The guidance also suggests how to obtain political commitment through cooperation and engagement, leadership and interagency cooperation and coordination, involvement of the private sector through private sector outreach and consultation, and technical assistance/engagement with FSRBs.²⁸⁵

5.3 Merits and Demerits of the LCC Guidance

The proposals made by the guidance have merits and demerits, as discussed below.

5.3.1 Prioritisation

ESAAMLG member countries are already implementing the proposal on developing AML national strategies and strategic implementation plans. This paper thus will only assess the proposed prioritisation because of its links to some of the obstacles observed in the previous chapter.

The argument is that indeed attempting to implement all the Recommendations wholesale is too ambitious given to resource restraints within ESAAMLG. However, even if countries prioritise criminalisation of money laundering, for instance, in their strategic plans, it is questionable as to how long such a phase would take given the inordinate delays occasioned by politicians.

²⁸⁵ Guidance for LCCs (2008: 5).

5.3.2 Political Commitments through Cooperation and Engagement

On cooperation and engagement, the FATF acknowledges the importance of political commitment; as such it suggests engagement and awareness for political decision makers through workshops so as to help them understand the benefits of AML policies and the resources they demand for implementation.²⁸⁶ It further suggests that ministers should be briefed particularly on the 'core' FATF Recommendations, what the commitment to implement the Recommendations demands, its implications, implementation planning and progress made.²⁸⁷

This appears to be a good approach since decision makers can only make allocations for AML policies when they are convinced of their benefits to society and the economy as discussed in chapter 3 of this paper. Nevertheless, based on the discussions in the previous chapter that parliamentarians and even cabinet ministers are driven by their political affiliations and concerns i.e. that they are targets of the AML regime; the impact of such workshops on the change of this attitude is debatable.

This suggestion presumes a situation where political decision makers are primarily concerned with the welfare of their countries and that political divisions do not play a crucial role in their decisions. The suggestion also presumes that these decision makers' lack of commitment is based on ignorance on the ignorance of the costs and benefits of having an effective AML regime.

²⁸⁶ Guidance for LCCs (2008: 5).

²⁸⁷ Guidance for LCCs (2008: 5).

However, the experience of Parliamentarians and cabinet minister objecting and delaying the passing of AML legislation in Kenya, Malawi and Uganda, purely on personal and political grounds, shows that the problem is beyond what the FATF has suggested in this guidance.

Furthermore, given the obstacle of political interference discussed in the previous chapter and the way it undermines the independence of competent AML authorities in Swaziland for example, it is questionable whether holding AML awareness workshops for the King and his political associates alone can change their political interference tendencies. They have been criticised many times by international organisations such as Amnesty International, for victimising and politically interfering with the duties of a Swazi DPP and judge Masuku in 2004; judge Masuku again and a Minister of Justice in 2011. However, the criticism did not yield any change in the system, yet criticism carries more weight in terms of publicity of the bad thing being criticised than an awareness-raising workshop, which is just informative and places no pressure to the participants.

In addition, regular briefing of ministers on the 'core' Recommendations is a good proposal because they are the backbone of the executive arm of government.

However, given the cabinet reshuffles that take place in countries, this suggestion would be inefficient when those that have been briefed are moved and new people come in.

An example would be the 2009-2011 Malawi Finance Minister, Mr Kandodo who was the head of the ESAAMLG Council of Ministers when Malawi assumed the

ESAAMLG presidency from August 2010 to September 2011.²⁸⁸ However, by the time of the 11th ESAAMLG Council of Ministers' meeting on 8 September 2011, when Malawi was supposed to hand over the presidency to Mauritius,²⁸⁹ there was no finance minister in Malawi following a dissolution of cabinet by the President on 19 August 2011.²⁹⁰ Kandodo is no longer a cabinet member, and a new finance minister, was appointed on 6 September 2011, just two days before the ESAAMLG meeting.²⁹¹ Now given the loss of a finance minister who was actively involved in AML issues and following the FATF's suggestion, it means Malawi would have to brief the new finance minister, whose tenure of office is unpredictable.

5.3.3 Leadership and Interagency Co-operation and Co-ordination

The FATF has suggested that LCCs should identify a lead governmental agency with sufficient political influence and credibility to spearhead the national AML/CFT efforts in coordination with other key stakeholders who would own certain key aspects of the AML/CFT policy.²⁹²

This is a good suggestion as it attempts to ensure that AML/CFT policies are brought to the attention of decision makers for support and resources, and this is possible if the pressure comes from a politically influential government agency.

²⁸⁸ ESAAMLG 'The Presidency' (2 October 2010).

²⁸⁹ See ESAAMLG Current information on the 11th ESAAMLG Council of Ministers' meeting and the 22nd Task Force of Senior Officials meeting (18 June 2011).

²⁹⁰ Malawi Voice 'Bingu Dissolves Cabinet, Expect a surprise' (19 Aug, 2011).

²⁹¹ See Malawi Government Official Website 'Cabinet appointment as of 6 September 2011'.

²⁹² Guidance for LCCs (2008: 6).

5.3.4 Private Sector Outreach and Consultation

The FATF further suggests that the private sector players such as financial institutions should be involved in the development of AML/CFT policies by having their representation in AML/CFT awareness programs, among others.²⁹³ This suggestion is made against the background that the financial sector is crucial in an AML regime as it can be a conduit of illicit proceeds. Furthermore, the sector should be involved because it deals with customers and thus has knowledge on practical aspects of the implementation of government policies such as the AML policy.²⁹⁴

This indeed is a good way of understanding the challenges financial institutions meet in complying with Recommendations such as R5 and R10 on CDD and record keeping, which are a problem within ESAAMLG as stated earlier. However, there is a question of costs arising on this issue again as to who will be funding these outreach programs?

5.3.5 Technical Assistance

The FATF also recommends LCCs to use technical assistance so as to meet their AML requirements in situations where they need such assistance.²⁹⁵ As stated earlier, most ESAAMLG countries rely on technical assistance on pertinent issues such as drafting of AML legislation or setting up FIUs. The use of technical assistance is not only good but also convenient for LCCs such as ESAAMLG member countries that lack the expertise to draft effective AML laws, train personnel or buy technical resources.

²⁹³ Guidance for LCCs (2008: 8).

²⁹⁴ Guidance for LCCs (2008: 8).

²⁹⁵ Guidance for LCCs (2008: 8).

However, technical assistance is limited in terms of how far it can go in making an LCC's AML system effective. For instance, there is little that technical assistance can do to the criminalisation of money laundering or amendment of AML related legislation, when the power and mandate of doing this rests with parliamentarians who may in some cases not be keen to enact or amend such laws. Essentially, therefore, technical assistance may only be relevant in addressing obstacles such as lack of material, human and technical resources. However, technical assistance may not address political interference or lack of political will.

5.4 Conclusion

Money laundering is a global and complex problem that calls for concerted global efforts and this is why the FATF issued its Recommendations as global AML standards to be applied by all countries. The Recommendations were exclusively drafted and developed by developed countries to the exclusion of the developing countries, who were merely invited to endorse and implement them. Some countries such as Malawi, adopted the Recommendations out of pressure and fear of risking foreign aid and foreign investment.

Since the Recommendations were exclusively developed by developed countries, they are expensive to implement for the developing countries and they largely reflect the economic and structural situations of the developed world,²⁹⁶ i.e. most developed countries have the capacity to meet the costs of implementation and they have digitalised identification systems that make CDD requirements easier to comply with.

²⁹⁶ Sharman (2006: 1).

Even though money laundering's effects are felt by both the developed and developing world and the implementation of the Recommendations challenges both, developing countries struggle the most. This is because most developing countries are small cash economies, have poor identification systems, limited AML capacity and under-developed democracies, among other limitations.

Developing countries such as ESAAMLG member countries are affected by very limited capacity, lack or insufficient political will and political interference, which are the main obstacles to the effective implementation of the Recommendations. As far as capacity is concerned, it would be a fallacy to conclude that ESAAMLG member countries have adopted the "adopt but do not enforce" strategy mentioned in chapter one, because their implementation is challenged by lack of resources. However, the argument would hold water when one considers the political obstacles, which have nothing to do with capacity, but more to do with the attitude of political decision makers for these countries. Their lack of political will displays unwillingness to have a vibrant AML system.

Even though ESAAMLG member countries did not take part in the development of the Recommendations, they are nevertheless under pressure to implement them. This pressure comes by way of mutual evaluation reports or publicity through the FATF's ICRG process. Be that as it may, immediate solutions to the obstacles they face during implementation are necessary, given the magnitude of income generating economic activities that are prevalent within the ESAAMLG member countries. The prevalence of such criminal activities makes the implementation of the FATF Recommendations relevant, regardless of what led a particular ESAAMLG member country to their endorsement and adoption.

In view of the challenges faced by LCCs such as ESAAMLG member countries, the FATF has issued guidance which encourages a prioritised implementation approach of the Recommendations that require immediate attention in each jurisdiction. This is to avoid wholesale attempts to implement the Recommendations at once, which has so far been proven difficult for LCCs. However, the issues suggested in this guidance are only effective in addressing capacity issues affecting most ESAAMLG member countries. The guidance falls short of addressing the politically coated obstacles that have more to do with attitudes of political decision makers, political contexts and political insecurities.

This paper argues that unless a concrete solution is found for these political obstacles, even the issue of capacity will hardly be addressed. Solutions such as awareness raising or seeking technical assistance will mean nothing if those with the power to allocate national resources, to pass or amend AML laws and to politically ensure the independence of AML institutions, are not willing to fight money laundering. They should nevertheless be taught that there are costs for adopting and implementing the AML standards, as well as costs for failure to comply with them.²⁹⁷

5.5 Recommendations

Having outlined the obstacles being faced by ESAAMLG member countries and the proposed guidance by the FATF, this paper argues that political obstacles are a bigger problem whose solution lies beyond what the guidance is suggesting.

The other obstacles that merely reflect lack of financial and human capacity can be dealt with by provision of resources by governments or technical assistance

²⁹⁷ Sharman (2008: 1).

providers. However, getting the attention and genuine support of politicians, who choose not to embrace the AML efforts for personal or political reasons, calls for an integrated approach as stated below.

5.5.1 Enhancement of the ICRG Process

First, this paper advocates for the continued use of the ICRG process mentioned in chapter two of this paper, as a tool to push political decision makers in prioritising and owning the establishment of a vibrant AML system. The political commitment and cooperation of these authorities cannot only be ultimately obtained through the awareness suggested by the FATF in its guidance for LCCs and also by applying pressure from outside rather than inside their jurisdictions. This is possible because of the FATF's call on all countries to apply counter-measures when dealing with countries identified as non-compliant or making very little progress in addressing their AML risks and deficiencies. The call also affects dealings with the identified countries' companies and financial institutions.

Such counter- measures have been proven to be effective before within ESAAMLG. For example in the case of the Seychelles which had passed a law perceived to encourage criminal activities and money laundering by investors in 1995. The FATF called upon the whole world to apply strict measures when dealing with Seychelles and its financial institutions. As explained in chapter three, the effects were detrimental and they lingered on even after Seychelles had repealed the controversial law.

This example should be taken seriously by developing countries like ESAAMLG members whose economies rely on transactions with foreign financial institutions

during imports and exports, among other things. The Seychellois example should be regularly emphasised to the political decision makers of all ESAAMLG countries, while stressing on the detrimental consequences their countries may suffer if they ever appear on the FATF Public Statement. This should be done during the workshops proposed by the FATF, among other fora.

In essence this paper recommends the use of the ICRG process on ESAAMLG members to complement the suggestions in the FATFs guidance for LCCs.

5.5.2 Enhancement of Technical Assistance

Secondly, given the cost of implementing some of the Recommendations that form the basis of the ICRG process, for example setting up functional FIUs, this paper recommends the enhancement of technical assistance. This is to avoid a situation where countries deploy resources to set up FIUs due to pressure, at the expense of priority national areas such as HIV/AIDS or food production. The technical assistance providers and the FATF need to understand this from the background that these developing countries did not take part in the development of these costly Recommendations in the first place, so the countries' limitations and immediate needs and priorities should be appreciated. The FATF and technical assistance providers should remember that developing states face significant costs in both adopting and implementing the Recommendations and also for failing to implement them. They pay the cost on non-implementation by suffering consequences of appearing on the FATF Public Statement. They should thus be helped to implement the Recommendations so as to avoid facing the costs of failure to implement, in situations where such implementation goes beyond their capacity.

5.5.3 The ICRG Process to Apply to Lax Financial Institutions

Thirdly, this paper recommends expanding the ambit of the ICRG Process. Currently it is targeting jurisdictions with strategic deficiencies on AML/CFT. However, studies have revealed that illicit proceeds valued between \$20 and \$40 billion a year from the developing and transitional countries are laundered and circulated in US and European Banks.²⁹⁸ An example is Citibank which facilitated laundering of the funds of big African, Latin American and Asian politically exposed persons despite the US AML legislation having strict CDD measures.²⁹⁹ In this regard therefore, it is only prudent if the FATF were to publicly condemn such financial institutions and call upon all other countries to apply counter measures when dealing with them because of the risk they pose to the international financial market.

Doing so would mitigate the perception that the developed world is somehow aiding and abetting money laundering through inadequate CDD measures applied on well known politically exposed persons from the developing world. This would deter complacency on European and US banks which are the most convenient destination for illicit funds from the developing world. This will show that the FATF is also willing to publicly condemn even jurisdictions and financial institutions of its own founding members.

As such, once an investigation reveals a financial institution's complacency and facilitation of money laundering, it should appear on a FATF's public statement with

²⁹⁸ Tang and Lishan (2010: 221). A study in 2001 shows that over a decade, criminal proceeds worthy between \$2.5 and \$5 trillion criminal proceeds had been laundered through the US financial circuits.

²⁹⁹ Tang and Lishan (2010: 222). Citibank was involved in laundering funds of Raul Salinas- brother of Mexico's ex-President, Asif Ali Zaidari-husband of former Prime Minister of Pakistan, El Hagj Omar Bongo-Dictator of Gabon and sons of Ex-president of Nigeria, Sani Abacha.

condemnation and a call for counter-measures. These institutions would hence suffer the effects of bad reputation as discussed in chapter three of the paper.

5.5.4 Embracing the theory of Re-socialisation

Finally, this paper argues that political will of national decision makers is vital in the building of a strong and effective AML system. The lack of political will cannot be addressed merely by technical assistance or having AML legislation in place. This political will is also needed also in the actual implementation of the AML legislation and regulations where they exist so as to avoid the problem of enforcement deficit noted in most ESAAMLG member countries.

In this respect therefore, this paper supports the FATF's suggestion on awareness - raising by borrowing Indira Carr's idea of re-socialisation.³⁰⁰ She writes in corruption terms that people should be made aware of the long-term effects of corruption on the human condition, and educating them on their central role in its prevention.³⁰¹ This, she says, should be done through public education programs facilitated by NGOs, civil society organisations and activists. The awareness should be on the impact and consequences of one's behaviour, which not only in relation to oneself or those close to him, but on the whole society, humanity and generations, both current and future.³⁰²

This theory is relevant in the AML discourse, where the public should be taught of the long term effects of money laundering as well as the benefits of having a vibrant

³⁰⁰ Carr (2007: 243).

³⁰¹ Carr (2007: 244).

³⁰² Carr (2007: 245).

AML system, as discussed in chapter two. This awareness should thus apply to government leaders (political decision makers), the private sector and the general public. The awareness should be facilitated by governments where they can, the FATF and all the technical assistance providers.

If people are taught and appreciate the consequences of money laundering, they will desist from laundering or tolerating it. Similarly, if parliamentarians appreciate such consequences and their duty not to tolerate money laundering, not only for their own sakes but for the goodness of both the current and future generations, both within their jurisdictions and beyond, they will not deliberately delay or obstruct the passing or amendment of important AML legislation, among other important AML decisions they have to make.

(18 777 words)

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