

**SELECTED LEGAL ASPECTS OF MONEY-LAUNDERING CONTROL
IN TRADE-FINANCE INSTRUMENTS**

by

TSANANGURAI MAKUYANA

Submitted in accordance with the requirements for the degree of

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SUPERVISOR: PROF WG SCHULZE

CO-SUPERVISOR: PROF GTS EISELEN

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DECLARATION

Name: Tsanangurai Makuyana

Student number: 49129945

Degree: LLD

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Dear: Mr Tsanangurai Makuyana

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NHREC Registration # : (if applicable)
Ref #: 2427
Name: Mr Tsanangurai Makuyana
Student #: 49129945

Researcher: Mr Tsanangurai Makuyana

University of South Africa, Department of Mercantile Law
Pretoria

49129945@mylife.unisa.ac.za +263775103952

Supervisor: Professor Wilhelm Schulze schulwg@unisa.ac.za

Selected Legal Aspects of Money-Laundering Control in Trade-Finance Instruments

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Prof Rehana Cassim
Deputy Chair of College of Law_RERC
E-mail: cassir@unisa.ac.za



Executive Dean / By delegation from the Executive Dean of College of Law_RERC
E-mail: koleoj@unisa.ac.za

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CO-SUPERVISOR: PROF GTS EISELEN

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DEDICATION

I dedicate this thesis to my late father Sevenza Lyson, my mother Celia, my late brother Tiyani, and my sister Ndaiziyei. Your inspiration has been tremendous. Your boy has done it for you and for posterity.

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Soli Deo Gloria

Tsanangurai Makuyana,

Mutare, August 2024

SUMMARY

The traditional perception that trade-finance instruments are less susceptible to the risk of money laundering has changed due to the increasing threat of trade-based money laundering (TBML). In the process of facilitating trade-finance transactions, financial institutions may be entrapped in the dangers of TBML and be abused for criminal gains. In this regard, the institutions play a significant role in ensuring that only legitimate trade is facilitated through trade finance without being tainted by TBML. Despite that, vulnerabilities for the vice have been discovered in the trade-finance sector. This study employs a macro-comparative approach in examining how selected jurisdictions respond to the problem of TBML in trade-finance instruments. It analyses the vulnerabilities of documentary credits, documentary collections, demand guarantees and standby letters of credit to the potential risk of TBML. The thesis compares the response of the South African AML regime with that of the English, the US and Singapore AML regimes to the threat of TBML in the selected trade-finance instruments. The study reveals, *inter alia*, that there is not much difference between the South African AML regime and the AML regimes of the comparative jurisdictions in terms of the legislative response to the challenge of TBML in trade-finance transactions. However, the difference is apparent when it comes to the varied institutional responses to the problem within the jurisdictions considered in this thesis. While South African AML authorities have not made any official pronouncement against TBML in trade finance, those from other comparative jurisdictions have done so. The latter have also gone a step further to produce best practice reports on TBML for banks and other financial institutions involved in trade-finance transactions to enable the institutions to prepare for the challenge. However, similar to the South African position, there has not been any legislative change in the comparative jurisdictions to provide for TBML in specific terms. This means that these jurisdictions also deal with TBML using current AML legislation, which was designed originally for cash-based money-laundering operations. Therefore, the institutions and laws under the South African AML regime are relevant in the combatting of TBML. However, they may require some modifications to appropriately counter the challenge. The study makes various policy and best practice recommendations to strengthen the South African AML regime against TBML in trade-finance transactions.

KEY TERMS

AML Regime; Bankers Association for Finance and Trade; Black Market Peso Exchange; Customer Due Diligence; Demand Guarantees; Documentary Collections; Documentary Credits; English AML Regime; Financial Action Task Force; Financial Intelligence Centre Act 38 of 2001; Financial Intelligence Unit; FinCEN; International Best Practices; International Chamber of Commerce; International Trade; Money Laundering; Money-Laundering Control; Prevention of Organised Crime Act 121 of 1998; Red-Flag Indicators; RBA; SAMLIT; Singapore AML Regime; South African AML Regime; Standby-Letters of Credits; TBML; the Wolfsberg Group; Trade Finance; Trade-Based Money Laundering; Trade-Finance Instruments; Trade-Finance Principles; Trade-Finance Transactions; US AML Regime; World Customs Organisation.

LIST OF ABBREVIATIONS AND ACRONYMS

ABA	American Bankers Association
ABS	Association of Banks in Singapore
ACIP	Anti-Money Laundering/Counter Financing of Terrorism Industry Partnership (Singapore)
AGC	Attorney General's Chambers (Singapore)
AML	Anti-Money Laundering
AMLA	Anti-Money Laundering Act of 2020 (USA)
AMLID	Anti-Money Laundering International Database (UN)
APG	Asia-Pacific Group
BAFT	Bankers Association for Finance and Trade
BASA	Bankers Association South Africa
BIS	Bank for International Settlements
BMPE	Black Market Peso Exchange
BSA	Bank Secrecy Act of 1970 (USA)
BSAAG	Bank Secrecy Act Advisory Group (USA)
CAD	Commercial Affairs Department (Singapore)
CCA	Crime and Courts Act of 2013 (England)
CDD	Customer Due Diligence
CDSA	Corruption, Drug Trafficking and other Serious Crimes (Confiscation of Benefits) Act 1992 (2020 Ed) (Singapore)
CFATF	Caribbean Financial Action Task Force
CIB	Counterfeiting Intelligence Bureau (ICC)
CIP	Customer Identification Programme
COSMIC	Collaborative Sharing of Money laundering/terrorism financing Information and Cases (Singapore)
CPS	Crown Prosecution Service (England)
DARTT	Data Analysis and Research for Trade Transparency
DEA	Drug Enforcement Administration (US)
DNFBPs	Designated Non-Financial Businesses and Professions
DPCI	Directorate for Priority Crimes Investigations (South Africa)
ECA	European Communities Act (Europe)
ECB	European Central Bank

ESAAMLG	Eastern and Southern Africa Anti-Money Laundering Group
ESAs	European Supervisory Authorities
EU	European Union
FATF	Financial Action Task Force on Money Laundering
FBI	Federal Bureau of Investigation (USA)
FCA	Financial Conduct Authority (England)
FFIEC	Federal Financial Institution Examination Council (USA)
FIB	Financial Investigation Bureau (ICC)
FIC	Financial Intelligence Centre (South Africa)
FICA	Financial Intelligence Centre Act 38 of 2001 (South Africa)
FinCEN	Financial Crimes Enforcement Network (USA)
FIUs	Financial Intelligence Units
FRSA	Financial Sector Regulation Act 9 of 2017 (South Africa)
FSCA	Financial Sector Conduct Authority (South Africa)
FSMA	Financial Services and Markets Act 2000 (England)
FTZs	Free Trade Zones
GDP	Gross Domestic Product
GFI	Global Financial Integrity
GFSI	Global Financial Secrecy Index
GPML	Global Programme against Money Laundering (UN)
GTO	Geographic Targeting Order (USA)
HMRC	His Majesty's Revenue and Customs (England)
HSI-ICE	Homeland Security Investigations, Immigration and Customs Enforcement (USA)
ICC	International Chamber of Commerce
IFFs	Illicit Financial Flows
IFSA	International Financial Services Association
IMB	International Maritime Bureau (ICC)
IMF	International Monetary Fund
IMoLIN	International Money-Laundering Information Network (UN)
ISP	International Standby Practices
ITFA	International Trade and Forfeiting Association
JMLIT	Joint Money Laundering Intelligence Taskforce (England)

JMLSG	Joint Money Laundering Steering Group (England)
KPCS	Kimberley Process Certification Scheme
KYC	Know Your Customer
MAS	Monetary Authority of Singapore
MAS Act	Monetary Authority of Singapore Act, 1970 (Singapore)
MLCA	Money Laundering Control Act of 1986 (USA)
MLRO	Money Laundering Reporting Officer
MLRs	Money Laundering, Terrorist Financing, and Transfer of Funds (Information on the Payer) Regulations (England)
NCA	National Crime Agency (England)
NECC	National Economic Crime Centre (England)
NPA	National Prosecuting Authority (South Africa)
NPA Act	National Prosecuting Authority Act 32 of 1998 (South Africa)
NTP	Networked Trade Platform (Singapore)
OCC	Office of the Comptroller of the Currency (USA)
OECD	Organisation for Economic Co-operation and Development
OFAC	US Office of Foreign Asset Control
PA	Prudential Authority of the SARB (South Africa)
POCA	Prevention of Organised Crime Act 121 of 1998 (South Africa)
POCAE	Proceeds of Crime Act 2002 (England)
POCDATARA	Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 (South Africa)
PRA	Prudential Regulation Authority (England)
RBA	Risk-Based Approach
RMCP	Risk Management and Compliance Programme
SABRIC	South African Banking Risk Information Centre
SACCI	South African Chamber of Commerce and Industry
SADC	Southern African Development Community
SADPMR	South African Diamond and Precious Metals Regulator
SADTI	South African Department of Trade and Industry
SAMLIT	South African Money Laundering Intelligence Taskforce
SAPS	South African Police Service
SAPS Act	South African Police Service Act 68 of 1995 (South Africa)

SARB	South African Reserve Bank
SARB Act	South African Reserve Bank Act 90 of 1989 (South Africa)
SARS	South African Revenue Service
SARS Act	South African Revenue Services Act 34 of 1997 (South Africa)
SEOCID	Serious Economic, Organised Crime and International Directorate (England)
SEZ	Special Economic Zones
SEZ Act	Special Economic Zones Act 16 of 2014 (South Africa)
SFO	Serious Fraud Office (England)
SPF	Singapore Police Force
STRO	Suspicious Transaction Reporting Office (Singapore)
SWIFT	Society for Worldwide Interbank Financial Telecommunication
TBML	Trade-Based Money Laundering
TEU	Treaty on European Union
TFC	Trade Finance Compliance (Singapore)
TFR	Trade Finance Registry (Singapore)
TTUs	Trade Transparency Units (USA)
UCC	Uniform Commercial Code
UCP	Uniform Customs and Practices for Documentary Credits
UK	United Kingdom
UN	United Nations
UNECA	United Nations Economic Commission for Africa
UNODC	United Nations Office on Drugs and Crime
URC	Uniform Rules for Collections
URDG	Uniform Rules for Demand Guarantees
US	The United States of America
USA PATRIOT Act	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001(USA)
USGAO	United States of America Government Accountability Office
VAT	Value Added Tax
WCO	World Customs Organisation
WINGS	Web-based Intelligence Analytical and Graphical Visualisation Systems (Singapore)

TABLE OF CONTENTS

DECLARATION	i
ETHICAL CLEARANCE CERTIFICATE	ii
TURNITIN DIGITAL RECEIPT AND PERCENTAGE PAGE	iv
DEDICATION	vi
ACKNOWLEDGEMENTS	vii
SUMMARY	viii
KEY TERMS	x
LIST OF ABBREVIATIONS AND ACRONYMS	xi
TABLE OF CONTENTS	xv
CHAPTER 1: GENERAL INTRODUCTION AND THEME OF THESIS	1
1.1 GENERAL	1
1.2 PROBLEM STATEMENT	3
1.3 THEORETICAL FRAMEWORK	4
1.3.1 General	4
1.3.2 The Theoretical Background and Challenge of TBML	5
1.4 CONCEPTUAL FRAMEWORK	9
1.4.1 General	9
1.4.2 The Concepts of TBML and Trade Finance	9
1.4.2.1 The Concept of TBML	10
1.4.2.2 The Concept of Value in TBML	10
1.4.2.3 The Concept of Trade in TBML	11
1.4.2.4 The Concept of Trade Finance	12
1.4.2.5 TBML in Trade Finance	13
1.5 AIMS AND OBJECTIVES OF THE STUDY	14
1.5.1 Aim of the Study	14
1.5.2 Objectives of the Study	14
1.6 RESEARCH METHODOLOGY	15
1.6.1 Methods of Legal Research Used in the Thesis	15
1.6.2 The Comparative Method of Legal Research: The Choice in Foreign Jurisdiction	17
1.6.3 Justification of the Selected Comparative Jurisdictions	18
1.6.3.1 English Law	19
1.6.3.2 American Law	20
1.6.3.3 Singapore Law	21

1.6.4 The Comparative Research Approach Used in the Thesis	24
1.7 SIGNIFICANCE OF THE STUDY	24
1.8 SCOPE OF THE THESIS.....	25
1.9 ASSUMPTIONS OF THE STUDY	26
1.10 LIMITATIONS OF THE STUDY	27
1.11 TERMINOLOGY USED IN THE THESIS.....	27
1.12 REFERENCING STYLE USED IN THE THESIS.....	29
1.13 THESIS STRUCTURE AND CHAPTER OVERVIEW	29
CHAPTER 2: THE JURISPRUDENCE OF MONEY LAUNDERING AND TBML	31
2.1 INTRODUCTION	31
2.2 THE NATURE OF MONEY LAUNDERING	32
2.2.1 General.....	32
2.2.2 The Origins of Money Laundering: A Brief Account.....	33
2.2.3 Defining Money Laundering	36
2.2.3.1 General.....	36
2.2.3.2 The Definition of Money Laundering	36
2.2.3.3 Observations from the Definitions of Money Laundering	38
2.2.3.4 Conclusion.....	40
2.2.4 The Process of Money Laundering	41
2.2.4.1 General.....	41
2.2.4.2 Placement	42
2.2.4.3 Layering.....	45
2.2.4.4 Integration	46
2.2.4.5 Conclusion.....	47
2.2.5 Methods of Laundering Money.....	48
2.2.5.1 General.....	48
2.2.5.2 Physical Movement of Illegal Cash	48
2.2.5.3 Moving Illegal Money through the Financial System.....	49
2.2.5.4 Misuse of the International Trade System	49
2.2.5.5 Conclusion.....	50
2.2.6 The Scale of the Money-Laundering Problem	51
2.2.6.1 General.....	51
2.2.6.2 Measuring Money Laundering in General	52
2.2.6.3 Criticism of the Money-Laundering Figures	53
2.2.6.4 The Scale of Money Laundering in South Africa.....	54
2.2.6.5 Conclusion.....	56
2.3 THE NATURE AND PROCESS OF TBML.....	56
2.3.1 General.....	56
2.3.2 The Definition of TBML	57
2.3.2.1 General.....	57
2.3.2.2 The Definition of TBML	57

2.3.3 The Magnitude of TBML	63
2.3.3.1 <i>General</i>	63
2.3.3.2 <i>Considerations in Measuring the Magnitude of TBML</i>	63
2.3.3.3 <i>Estimations of the Magnitude of TBML in Africa and South Africa</i>	64
2.3.3.4 <i>Factors against Accurate Measurements of TBML</i>	66
2.3.3.5 <i>Conclusion</i>	68
2.3.4 Basic Methods Used in TBML	69
2.3.4.1 <i>General</i>	69
2.3.4.2 <i>Over- and Under-Invoicing of Goods or Services</i>	69
2.3.4.3 <i>Multiple-Invoicing of Goods or Services</i>	73
2.3.4.4 <i>Falsely or Inaccurately Described Goods or Services</i>	73
2.3.4.5 <i>Over-and Short-Shipping of Goods or Services</i>	75
2.3.4.6 <i>Conclusion</i>	76
2.3.5 Complex Methods of TBML	77
2.3.5.1 <i>General</i>	77
2.3.5.2 <i>Black Market Peso Exchange (BMPE) as a Method of TBML</i>	78
2.3.5.2.1 <i>General</i>	78
2.3.5.2.2 <i>A Brief Account of The Origins of BMPE</i>	78
2.3.5.2.3 <i>The Operation of BMPE</i>	79
2.3.5.3 <i>The Hawala System as a Method of TBML</i>	81
2.3.5.3.1 <i>General</i>	81
2.3.5.3.2 <i>The Hawala System Explained</i>	82
2.3.5.3.4 <i>Characteristics of the Hawala System</i>	83
2.3.5.3.5 <i>The Operation of the Hawala System</i>	84
2.3.5.4 <i>Acquisition and Sale of Intangibles as a Method of TBML</i>	85
2.3.5.4.1 <i>General</i>	85
2.3.5.4.2 <i>Why TBML through Services Also Matter</i>	85
2.3.5.5 <i>Conclusion</i>	86
2.4 ENVIRONMENTS AND VULNERABILITIES POSING THE RISK OF TBML	87
2.4.1 General	87
2.4.2 Barter and Countertrade Transactions	87
2.4.2.1 <i>General</i>	87
2.4.2.2 <i>Countertrade</i>	88
2.4.2.3 <i>The Vulnerability of Barter and Countertrade to TBML</i>	89
2.4.2.4 <i>Conclusion</i>	90
2.4.3 High-Risk Jurisdictions and the Risk of TBML	91
2.4.3.1 <i>General</i>	91
2.4.3.2 <i>The Use of Transshipment Centres</i>	92
2.4.3.3 <i>Presence of A Weak AML Framework</i>	93
2.4.3.4 <i>High-Crime Rate and Organised-Crime Prevalence</i>	94
2.4.3.5 <i>Conclusion</i>	96

2.4.4 The International Gold Trade and the Risk of TBML	97
2.4.4.1 General	97
2.4.4.2 Gold as a Medium of Exchange in Criminal Transactions	98
2.4.4.3 Gold Offers Anonymity	98
2.4.4.4 Gold May Be Immune to Asset Freezes	99
2.4.4.5 Gold Can Be Altered in Form	99
2.4.4.6 Porosity in the Gold Market	100
2.4.4.7 Conclusion	102
2.4.5 The International Diamond Trade and the Risk of TBML	102
2.4.5.1 General	102
2.4.5.2 The Kimberley Process Certification Scheme	103
2.4.5.3 The Appeal of Diamonds to TBML	104
2.4.5.4 The Physical Features of Diamonds	104
2.4.5.4.1 Diamonds as a Parallel Currency	105
2.4.5.4.2 Diamonds are Unmarked and Untraceable	106
2.4.5.4.3 The Subjectivity of Valuation in Diamonds	106
2.4.5.5 The Diamond Industry as a Vulnerability	107
2.4.5.5.1 Diamonds Can Be Traded Outside the Formal Financial System	108
2.4.5.5.2 Limited AML Record Keeping in the Diamond Industry	108
2.4.5.5.3 Absence of Guidelines to Monitor the Import/Export of Diamonds	109
2.4.5.6 The KPCS Governance as a Vulnerability	109
2.4.5.7 Conclusion	110
2.4.6 The Art Trade and the Risk of TBML	111
2.4.6.1 General	111
2.4.6.2 Art Theft and Its Vulnerability to Money Laundering	111
2.4.6.3 Speculative Price of Art	113
2.4.6.4 Difficulty in Authenticating Prices of Art	113
2.4.6.5 The Regulatory Arbitrage in the Art Market	114
2.4.6.6 Secrecy in the Illegal Art Market	114
2.4.6.7 Absence of AML Rules for the Art Market	115
2.4.6.8 Conclusion	117
2.4.7 Cryptocurrencies and the Risk of TBML	117
2.4.7.1 General	117
2.4.7.2 The Meaning and Operation of Cryptocurrencies	118
2.4.7.3 Cryptocurrencies as a Means of Payment	119
2.4.7.4 Cryptocurrencies in South Africa	120
2.4.7.5 The Risk of TBML in Cryptocurrencies	121
2.4.7.6 Conclusion	124
2.4.8 Free-Trade Zones and the Risk of TBML	125
2.4.8.1 General	125
2.4.8.2 Definition of FTZs	125
2.4.8.3 The Risk of TBML in FTZs	126

2.4.8.4 The Use of Cash in FTZs	127
2.4.8.5 Relaxed Oversight and Lack of Transparency	127
2.4.8.6 Types of Goods Vulnerable to TBML	128
2.4.8.7 Conclusion.....	128
2.4.9 Tax Havens and the Risk of TBML	129
2.4.9.1 General.....	129
2.4.9.2 Definition of a Tax Haven.....	130
2.4.9.3 Vulnerability of Tax Havens to TBML.....	130
2.4.9.4 The Secrecy of Tax Havens.....	131
2.4.9.5 Conclusion.....	132
2.5 EFFECTS OF TRADE-BASED MONEY LAUNDERING	132
2.5.1 General.....	132
2.5.2 Short-Term Effects	133
2.5.2.1 Losses to the State and Gains to the Money Launderer	133
2.5.2.2 Distortion of Consumer Spending and Savings	134
2.5.2.3 Distortion of Pricing Models and Influencing Price Increases	134
2.5.2.4 Creation of Unfair Competition.....	135
2.5.2.5 Affecting Imports and Exports	136
2.5.2.6 Impact on the Revenues for the Public Sector.....	136
2.5.2.7 Volatility of Interest Rates and Exchange Rates	137
2.5.2.8 Creating Higher Capital In- and Outflows	137
2.5.2.9 Distortion of Economic Statistics.....	138
2.5.3 Long-Term Effects	139
2.5.3.1 Threatening of Privatisation of Industries.....	139
2.5.3.2 Affects Foreign Direct Investment	140
2.5.3.3 Distortion of Solvency and Liquidity in the Financial Sector	141
2.5.3.4 Harming of Financial-Sector Reputation	141
2.5.3.5 Threatening the Existence and Profitability of Legitimate Businesses	143
2.5.3.6 Promotion of Corruption and Bribery	144
2.5.3.7 Undermining of Political Institutions	144
2.5.3.8 Creating Multiplier Effects on Crime	145
2.6 CONCLUSION	145
CHAPTER 3: TBML IN TRADE-FINANCE INSTRUMENTS	148
3.1 GENERAL	148
3.2 THE ROLE OF FINANCIAL INSTITUTIONS IN TRADE FINANCE	149
3.2.1 General.....	149
3.2.2 The Threat of TBML in Trade-Finance Transactions.....	149
3.2.3 The Role of Financial Institutions in International Trade	150
3.2.4 Conclusion	156
3.3 THE RISK OF TBML IN SELECTED TRADE-FINANCE INSTRUMENTS.....	156
3.3.1 General.....	156

3.3.2 Documentary Credits	157
3.3.2.1 <i>General</i>	157
3.3.2.2 <i>Types of Documentary Credits</i>	159
3.3.2.2.1 General	159
3.3.2.2.2 Transferable Documentary Credits	159
3.3.2.2.3 Back-to-back Documentary Credits	160
3.3.2.2.4 Revolving Documentary Credits	161
3.3.2.3 <i>Governance of Documentary Credits</i>	162
3.3.2.4 <i>Potential Risks of TBML in Documentary Credits</i>	163
3.3.2.4.1 General	163
3.3.2.4.2 The Vulnerability of Documentary Credits to TBML	163
3.3.2.4.3 The Nature of the UCP and the Risk of TBML	165
3.3.2.4.4 The Independence Principle and the Risk of TBML	167
3.3.2.4.5 The Possibility of Missing TBML in Document Examination	168
3.3.2.4.6 The Abuse of Documentary Credits by Organised Crime Groups	169
3.3.2.4.7 Documentary Credits as a Layering Method in TBML	169
3.3.2.4.8 Type of Documentary Credit as a Vulnerability for TBML	170
3.3.2.7 <i>Conclusion</i>	171
3.3.3 Demand Guarantees	172
3.3.3.1 <i>General</i>	172
3.3.3.2 <i>Types of Demand Guarantee</i>	174
3.3.3.2.1 General	174
3.3.3.2.2 Tender Guarantee	175
3.3.3.2.3 Performance Guarantee	175
3.3.3.2.4 Advance Payment Guarantee	176
3.3.3.2.5 Money Retention Guarantee	176
3.3.3.3 <i>Governance of Demand Guarantees</i>	177
3.3.3.4 <i>Possible Risks of TBML in Demand Guarantees</i>	178
3.3.3.4.1 General	178
3.3.3.4.2 The Nature of the URDG and the Risk of TBML	178
3.3.3.4.3 The Independence of Demand Guarantees as a Vulnerability for TBML	178
3.3.3.4.4 The Abuse of Demand Guarantees by Organised Crime Groups	179
3.3.3.4.5 Contrived Demand-Guarantees Transactions for TBML	179
3.3.3.4.6 Collusion to Abuse Demand Guarantees for TBML	180
3.3.3.4.7 Type of Demand Guarantee as a Vulnerability for TBML	180
3.3.3.5 <i>Conclusion</i>	182
3.3.4 Documentary Collections	183
3.3.4.1 <i>General</i>	183
3.3.4.1.1 A Generic Documentary-Collection Process	185
3.3.4.2 <i>Types of Payments in Collections</i>	185
3.3.4.2.1 General	185
3.3.4.2.2 Documents against Payment	185

3.3.4.2.3 Documents against Acceptance	186
3.3.4.3 Governance of Documentary Collections	186
3.3.4.4 Possible Risks of TBML in Documentary Collections	187
3.3.4.4.1 General	187
3.3.4.4.2 The URC and the Risk of TBML	188
3.3.4.4.3 Documentary Collections as Facilitation Tools for TBML.....	188
3.3.4.4.4 The Process of Documentary Collections as a Vulnerability for TBML	189
3.3.4.4.5 Banks' Preoccupation with Complying Collections as a Vulnerability for TBML ...	190
3.3.4.5 Conclusion.....	190
3.3.5 The Standby Letter of Credit	192
3.3.5.1 General.....	192
3.3.5.2 Types of the Standby Letter of Credit	193
3.3.5.2.1 General	193
3.3.5.2.2 Bid or Tender Standby Letter of Credit.....	193
3.3.5.2.3 Performance Standby Letter of Credit.....	194
3.3.5.2.4 Commercial Standby Letter of Credit	194
3.3.5.2.5 Financial Standby Letter of Credit	195
3.3.5.2.6 Direct Pay Standby Letter of Credit.....	195
3.3.5.3 Governance of the Standby Letter of Credit	195
3.3.5.4 Possible Risks of TBML in the Standby Letter of Credit	197
3.3.5.4.1 General	197
3.3.5.4.2 The Nature of the ISP and the Risk of TBML	197
3.3.5.4.3 Some ISP98 Provisions as a Vulnerability for TBML	198
3.3.5.4.4 Banks Generally Obligated to Pay on Compliant Claim	198
3.3.5.4.5 Transferability of a Standby Letter of Credit as a Vulnerability for TBML	199
3.3.5.4.6 The Possibility of Fictitious Transactions to Facilitate TBML	199
3.3.5.4.7 Payment Arrangement as a Vulnerability for TBML	200
3.3.5.4.8 Collusion by Organised Crime Groups in TBML	200
3.3.5.5 Conclusion.....	201
3.4 GENERAL DEFENCE FRAMEWORK AGAINST TBML	202
3.4.1 General.....	202
3.4.2 Designing an Appropriate Response to TBML for Financial Institutions	202
3.4.2.1 General.....	202
3.4.2.2 Considerations in Designing the Framework against TBML	204
3.4.2.3 Adopting Financial-Sector AML Framework for TBML.....	205
3.4.2.4 Modification of the General AML Framework for TBML	206
3.5 CONCLUSION	206
CHAPTER 4: INTERNATIONAL INITIATIVES AND ORGANISATIONAL RESPONSES TO TBML IN TRADE-FINANCE INSTRUMENTS	209
4.1 GENERAL	209
4.2 THE NEED FOR A GLOBAL RESPONSE TO TBML IN TRADE-FINANCE INSTRUMENTS.....	210
4.3 INTERNATIONAL STANDARD-SETTING BODIES AGAINST TBML.....	211

4.3.1 The United Nations (UN)	211
4.3.1.1 <i>General</i>	211
4.3.1.2 <i>The UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances</i>	212
4.3.1.3 <i>The UN Convention against Transnational Organised Crime</i>	213
4.3.1.4 <i>The UN Global Programme against Money Laundering (GPML)</i>	214
4.3.1.5 <i>The UN International Money-Laundering Information Network (IMoLIN)</i>	215
4.3.1.6 <i>The UN Contribution to the Control of TBML in Trade-Finance Instruments</i>	216
4.3.1.7 <i>Conclusion</i>	217
4.3.2 The Financial Action Task Force	217
4.3.2.1 <i>General</i>	217
4.3.2.2 <i>The FATF Standards</i>	219
4.3.2.3 <i>The FATF Country Mutual Evaluations</i>	220
4.3.2.4 <i>The Contribution of the FATF to the Control of TBML in Trade-Finance Instruments</i>	221
4.3.2.4.1 <i>The 2006 FATF Typologies Report on TBML</i>	221
4.3.2.4.2 <i>The 2008 FATF Best Practice Guidance on TBML</i>	222
4.3.2.4.3 <i>The 2020 FATF & Egmont Group Report on TBML Trends and Developments</i>	225
4.3.2.4.4 <i>The 2021 FATF-Risk Indicators for TBML</i>	227
4.3.2.4.5 <i>Other Significant and Relevant FATF Reports against TBML in Trade-Finance Instruments</i>	228
4.3.2.5 <i>Conclusion</i>	229
4.3.3 The Eastern Southern Africa Anti-Money Laundering Group (ESAAMLG)	229
4.3.3.1 <i>General</i>	229
4.3.3.2 <i>The Role the ESAAMLG</i>	230
4.3.3.3 <i>The Contribution of the ESAAMLG to the Control of TBML in Trade-Finance Instruments</i>	231
4.3.3.4 <i>Conclusion</i>	231
4.3.4 The Asia-Pacific Group (APG)	232
4.3.4.1 <i>General</i>	232
4.3.4.2 <i>The Contribution of the APG to the Control of TBML in Trade-Finance Instruments</i>	232
4.3.4.3 <i>Conclusion</i>	233
4.4 SOME INDUSTRY ASSOCIATIONS AND BODIES RELEVANT TO TBML CONTROL	234
4.4.1 The Basel Committee on Banking Supervision	234
4.4.1.1 <i>General</i>	234
4.4.1.2 <i>Statement of Principles</i>	235
4.4.1.3 <i>Basel Core Principles</i>	236
4.4.1.4 <i>Customer Due Diligence (CDD)</i>	236
4.4.1.5 <i>General Guide to Account Opening and Customer Identification</i>	237
4.4.1.6 <i>The Contribution of the Basel Committee to the Control of TBML in Trade-Finance Instruments</i>	237
4.4.1.7 <i>Conclusion</i>	238
4.4.2 The International Chamber of Commerce (ICC)	238
4.4.2.1 <i>General</i>	238

4.4.2.2 <i>The Origins and Structure of the ICC</i>	238
4.4.2.3 <i>The Operations of the ICC</i>	239
4.4.2.4 <i>The ICC Commercial Crime Services</i>	240
4.4.2.4.1 <i>International Maritime Bureau (IMB)</i>	240
4.4.2.4.2 <i>Financial Investigation Bureau (FIB)</i>	241
4.4.2.4.3 <i>Counterfeiting Intelligence Bureau (CIB)</i>	242
4.4.2.5 <i>The Contribution of the ICC to the Control of TBML in Trade-Finance Instruments</i>	242
4.4.2.6 <i>Conclusion</i>	243
4.4.3 The World Customs Organisation (WCO)	244
4.4.3.1 <i>General</i>	244
4.4.3.2 <i>The Role of the WCO in Combatting Money Laundering</i>	245
4.4.3.3 <i>The Contribution of the WCO to the Control of TBML in Trade-Finance Instruments</i> .	246
4.4.3.4 <i>Conclusion</i>	247
4.4.4 The Egmont Group	248
4.4.4.1 <i>General</i>	248
4.4.4.2 <i>The Egmont Group Concept of FIUs</i>	249
4.4.4.3 <i>The Egmont Principles for Information Exchange</i>	249
4.4.4.4 <i>The Contribution of the Egmont Group to the Control of TBML in Trade-Finance Instruments</i>	250
4.4.4.5 <i>Conclusion</i>	251
4.4.5 The Wolfsberg Group	252
4.4.5.1 <i>General</i>	252
4.4.5.2 <i>The Wolfsberg Group AML Principles</i>	253
4.4.5.2.1 <i>AML Principles for Private Banking 2002</i>	253
4.4.5.2.2 <i>AML Principles for Correspondent Banking 2014</i>	253
4.4.5.3 <i>The Contribution of the Wolfsberg Group to the Control of TBML in Trade-Finance Instruments</i>	254
4.4.5.3.1 <i>Guidance on the Risk-Based Approach (RBA) on Money Laundering 2006</i>	254
4.4.5.3.2 <i>Guidance on Money-Laundering Risks in Trade Finance 2011 and 2019</i>	255
4.4.5.4 <i>Conclusion</i>	256
4.4.6 Bankers Association for Finance and Trade (BAFT)	256
4.4.6.1 <i>General</i>	256
4.4.6.2 <i>The Contribution of BAFT to the Control of TBML in Trade-Finance Instruments</i>	257
4.4.6.2.1 <i>Guidance for Identifying Potentially Suspicious Activity</i>	257
4.4.6.2.2 <i>Guidance on Combatting TBML in Trade-Finance: Rethinking the Approach</i>	259
4.4.6.2.3 <i>The Wolfsberg Group, ICC and BAFT Trade-Finance Principles 2019</i>	262
4.4.6.3 <i>Conclusion</i>	265
4.5 CONCLUSION	266
CHAPTER 5: THE CONTROL OF TBML IN TRADE-FINANCE INSTRUMENTS UNDER SOUTH AFRICAN LAW	270
5.1 GENERAL	270
5.2 OVERVIEW OF THE THREAT OF TBML IN SOUTH AFRICA	271

5.3 SOUTH AFRICAN AML LEGAL FRAMEWORK FOR TBML	275
5.3.1 General	275
5.3.2 Overview of AML Legislation in South Africa	275
5.3.2.1 <i>General</i>	275
5.3.2.2 <i>The Prevention of Organised Crime Act (POCA)</i>	276
5.3.2.3 <i>The Financial Intelligence Centre Act (FICA)</i>	277
5.3.2.4 <i>The Crime of Money Laundering and Scope for TBML</i>	279
5.3.2.5 <i>Scope of the POCA for TBML in Trade-Finance Instruments</i>	279
5.3.3 Conclusion	282
5.3.4 Preventive AML Obligations for Banks in South Africa	283
5.3.4.1 <i>General</i>	283
5.3.4.2 <i>AML Governance and Oversight</i>	283
5.3.4.3 <i>Scope of the AML Governance for TBML in Trade-Finance Instruments</i>	285
5.3.4.4 <i>The Risk-Based Approach (RBA)</i>	286
5.3.4.5 <i>Scope of the RBA for TBML in Trade-Finance Instruments</i>	288
5.3.4.6 <i>The Obligation to Conduct Customer Due Diligence (CDD)</i>	289
5.3.4.7 <i>Scope of the CDD Measures for TBML in Trade-Finance Instruments</i>	292
5.3.4.8 <i>The Obligation to Keep Records</i>	293
5.3.4.9 <i>Scope of the Record Keeping Duty in the Context of TBML in Trade-Finance Instruments</i>	294
5.3.4.10 <i>The Obligation to Report Suspicious Transactions</i>	295
5.3.4.11 <i>Scope of the Duty to Report for TBML in Trade-Finance Instruments</i>	297
5.3.4.12 <i>Obligation to Train Staff on Money Laundering</i>	298
5.3.4.13 <i>Scope of the Staff Training Duty for TBML in Trade-Finance Instruments</i>	299
5.3.5 Conclusion	299
5.4 INSTITUTIONAL AML FRAMEWORK FOR TBML IN TRADE FINANCE	301
5.4.1 General	301
5.4.2 The Financial Intelligence Centre (FIC)	301
5.4.3 Conclusion	304
5.4.4 The South African Money Laundering Integrated Task Force (SAMLIT)	305
5.4.5 Conclusion	306
5.4.6 The National Prosecuting Authority (NPA)	307
5.4.7 Conclusion	309
5.4.8 South African Police Service (SAPS)	310
5.4.9 Conclusion	312
5.4.10 South African Revenue Service (SARS)	312
5.4.11 Conclusion	314
5.5 SOME INITIATIVES BY THE FINANCIAL-SECTOR BODIES AGAINST TBML	315
5.5.1 General	315
5.5.2 The South African Reserve Bank (SARB)	316
5.5.2.1 <i>General</i>	316

5.5.2.2 <i>The SARB's Prudential Authority</i>	316
5.5.2.3 <i>The SARB's Financial Surveillance Department</i>	319
5.5.3 Conclusion	320
5.5.4 The Banking Association South Africa (BASA)	320
5.5.5 Conclusion	321
5.5.6 The South African Banking Risk Information Centre (SABRIC)	321
5.5.7 Conclusion	323
5.6 CONCLUSION	323
CHAPTER 6: THE CONTROL OF TBML IN TRADE-FINANCE INSTRUMENTS UNDER ENGLISH LAW	327
6.1 GENERAL	327
6.2 OVERVIEW OF THE THREAT OF TBML IN ENGLAND	327
6.3 ENGLISH AML LEGAL FRAMEWORK FOR TBML	330
6.3.1 <i>General</i>	330
6.3.2 <i>Overview of AML Legislation in England</i>	330
6.3.2.1 <i>General</i>	330
6.3.2.2 <i>The Proceeds of Crime Act 2002 (POCAE)</i>	331
6.3.2.3 <i>The Money-Laundering Regulations (MLRs)</i>	331
6.3.2.4 <i>The Crime of Money Laundering and Scope for TBML</i>	333
6.3.2.5 <i>Scope of the POCAE for TBML in Trade-Finance Instruments</i>	336
6.3.3 <i>Conclusion</i>	338
6.3.4 <i>Preventive AML Obligations for Banks in England</i>	338
6.3.4.1 <i>General</i>	338
6.3.4.2 <i>AML Governance and Oversight</i>	339
6.3.4.3 <i>Scope of the AML Governance for TBML in Trade-Finance Instruments</i>	340
6.3.4.4 <i>The Risk-Based Approach (RBA)</i>	341
6.3.4.5 <i>Scope of the RBA for TBML in Trade-Finance Instruments</i>	342
6.3.4.6 <i>The Obligation to Conduct Customer Due Diligence</i>	343
6.3.4.7 <i>Scope of the CDD Measures for TBML in Trade-Finance Instruments</i>	345
6.3.4.8 <i>The Obligation to Keep Records</i>	348
6.3.4.9 <i>Scope of the Record Keeping Duty for TBML in Trade-Finance Instruments</i>	348
6.3.4.10 <i>The Obligation to Report Suspicious Transactions</i>	349
6.3.4.11 <i>Scope of the Duty to Report for TBML in Trade-Finance Instruments</i>	350
6.3.4.12 <i>Obligation to Train Staff on Money-Laundering Issues</i>	351
6.3.4.13 <i>Scope of the Staff Training Duty for TBML in Trade-Finance Instruments</i>	352
6.3.5 <i>Conclusion</i>	354
6.4 INSTITUTIONAL AML FRAMEWORK FOR TBML IN TRADE FINANCE	355
6.4.1 <i>General</i>	355
6.4.2 <i>The National Crime Agency (NCA)</i>	355
6.4.3 <i>Conclusion</i>	358
6.4.4 <i>National Economic Crime Centre (NECC)</i>	358

6.4.5 Conclusion	359
6.4.6 The Joint Money-Laundering Intelligence Taskforce (JMLIT).....	360
6.4.7 Conclusion	363
6.4.8 The Crown Prosecution Service (CPS).....	363
6.4.9 Conclusion	365
6.4.10 The Serious Fraud Office (SFO)	365
6.4.11 Conclusion	367
6.4.12 His Majesty's Revenue and Customs (HMRC).....	367
6.4.13 Conclusion	369
6.5 SOME INITIATIVES BY THE FINANCIAL-SECTOR BODIES AGAINST TBML.....	370
6.5.1 General.....	370
6.5.2 The Financial Conduct Authority (FCA)	370
6.5.3 Conclusion	373
6.5.4 The Joint Money-Laundering Steering Group (JMLSG)	373
6.5.5 Conclusion	376
6.5.6 UK Finance	376
6.5.7 Conclusion	378
6.6 CONCLUSION	379
CHAPTER 7: THE CONTROL OF TBML IN TRADE-FINANCE INSTRUMENTS UNDER US LAW	382
7.1 GENERAL	382
7.2 OVERVIEW OF THE THREAT OF TBML IN THE US	382
7.3 US AML LEGAL FRAMEWORK FOR TBML.....	385
7.3.1 General.....	385
7.3.2 Overview of AML Legislation in the US.....	386
7.3.2.1 General.....	386
7.3.2.2 Currency and Foreign Transactions Reporting Act of 1970.....	387
7.3.2.3 Money Laundering Control Act of 1986 (MLCA)	389
7.3.2.4 The USA PATRIOT Act of 2001	390
7.3.2.5 Anti-Money Laundering Act of 2020 (AMLA)	391
7.3.2.6 The Crime of Money Laundering and Scope for TBML	393
7.3.2.6.1 The Money-Laundering Offence under Section 1956	394
7.3.2.6.2 The Money-Laundering Offence under Section 1957	395
7.3.2.7 Scope of the MLCA for TBML in Trade-Finance Instruments.....	396
7.3.3 Conclusion	397
7.3.4 Preventive AML Obligations for Banks in the US.....	398
7.3.4.1 General.....	398
7.3.4.2 AML Governance and Oversight.....	398
7.3.4.3 Scope of the AML Governance for TBML in Trade-Finance Instruments.....	400
7.3.4.4 The Risk-Based Approach (RBA)	401
7.3.4.5 Scope of the RBA for TBML in Trade-Finance Instruments.....	403

7.3.4.6 The Obligation to Conduct Customer Due Diligence (CDD)	404
7.3.4.7 Scope of the CDD Measures for TBML in Trade-Finance Instruments	405
7.3.4.8 The Obligation to Keep Records	407
7.3.4.9 Scope of the Record Keeping Duty for TBML in Trade-Finance Instruments	408
7.3.4.10 The Obligation to Report Suspicious Transactions	409
7.3.4.11 Scope of the Duty to Report for TBML in Trade-Finance Instruments	411
7.3.4.12 Obligation to Train Staff on Money-Laundering Issues	413
7.3.4.13 Scope of the Staff Training Duty for TBML in Trade-Finance Instruments	414
7.3.5 Conclusion	414
7.4 INSTITUTIONAL AML FRAMEWORK FOR TBML IN TRADE FINANCE	415
7.4.1 General	415
7.4.2 The Financial Crimes Enforcement Network (FinCEN)	416
7.4.3 Conclusion	419
7.4.4 Bank Secrecy Act Advisory Group (BSAAG)	420
7.4.5 Conclusion	421
7.4.6 FinCEN Exchange	422
7.4.7 Conclusion	422
7.4.8 US Attorney General's Offices	423
7.4.9 Conclusion	424
7.4.10 Federal Bureau of Investigation (FBI)	424
7.4.11 Conclusion	426
7.4.12 Homeland Security Investigations, Immigration and Customs Enforcement (HSI-ICE)	427
7.4.13 Conclusion	430
7.5 SOME INITIATIVES BY THE FINANCIAL-SECTOR BODIES AGAINST TBML	430
7.5.1 General	430
7.5.2 Federal Bank Regulators	431
7.5.3 Conclusion	433
7.5.4 Federal Financial Institutions Examination Council (FFIEC)	433
7.5.5 Conclusion	435
7.5.6 American Bankers Association (ABA)	436
7.5.7 Conclusion	438
7.6 CONCLUSION	438
CHAPTER 8: THE CONTROL OF TBML IN TRADE-FINANCE INSTRUMENTS UNDER SINGAPORE LAW	441
8.1 GENERAL	441
8.2 OVERVIEW OF THE THREAT OF TBML IN SINGAPORE	442
8.3 SINGAPORE AML LEGAL FRAMEWORK FOR TBML	444
8.3.1 General	444
8.3.2 Overview of AML Legislation in Singapore	444
8.3.2.1 General	444

8.3.2.2 <i>The Corruption, Drug Trafficking and other Serious Crimes (Confiscation of Benefits) Act (CDSA)</i>	445
8.3.2.3 <i>Monetary Authority of Singapore Act (MAS Act)</i>	446
8.3.2.4 <i>The Crime of Money Laundering and Scope for TBML</i>	447
8.3.2.5 <i>Scope of the CDSA for TBML in Trade-Finance Instruments</i>	448
8.3.3 Conclusion	449
8.3.4 Preventive AML Obligations for Banks in Singapore	450
8.3.4.1 <i>General</i>	450
8.3.4.2 <i>AML Governance and Oversight</i>	451
8.3.4.3 <i>Scope of the AML Governance for TBML in Trade-Finance Instruments</i>	451
8.3.4.4 <i>The Risk-Based Approach (RBA)</i>	453
8.3.4.5 <i>Scope of the RBA for TBML in Trade-Finance Instruments</i>	453
8.3.4.6 <i>The Obligation to Conduct Customer Due Diligence</i>	454
8.3.4.7 <i>Scope of the CDD Measures for TBML in Trade-Finance Instruments</i>	455
8.3.4.8 <i>The Obligation to Keep Records</i>	457
8.3.4.9 <i>Scope of the Record Keeping Duty for TBML in Trade-Finance Instruments</i>	458
8.3.4.10 <i>The Obligation to Report Suspicious Transactions</i>	458
8.3.4.11 <i>Scope of the Duty to Report for TBML in Trade-Finance Instruments</i>	459
8.3.4.12 <i>Obligation to Train Staff on Money-Laundering Issues</i>	461
8.3.4.13 <i>Scope of the Staff Training Duty for TBML in Trade-Finance Instruments</i>	461
8.3.5 Conclusion	463
8.4 INSTITUTIONAL AML FRAMEWORK FOR TBML IN TRADE FINANCE	464
8.4.1 <i>General</i>	464
8.4.2 <i>Suspicious Transactions Reporting Office (STRO)</i>	464
8.4.3 <i>Conclusion</i>	469
8.4.4 <i>Anti-Money Laundering/Counter Financing of Terrorism Industry Partnership (ACIP)</i>	469
8.4.5 <i>Conclusion</i>	471
8.4.6 <i>Attorney General's Chambers (AGC)</i>	471
8.4.7 <i>Conclusion</i>	472
8.4.8 <i>Commercial Affairs Department (CAD)</i>	473
8.4.9 <i>Conclusion</i>	475
8.4.10 <i>Singapore Customs</i>	476
8.4.11 <i>Conclusion</i>	478
8.5 SOME INITIATIVES BY THE FINANCIAL-SECTOR BODIES AGAINST TBML	479
8.5.1 <i>General</i>	479
8.5.2 <i>Monetary Authority of Singapore (MAS)</i>	479
8.5.3 <i>Conclusion</i>	484
8.5.4 <i>Association of Banks in Singapore (ABS)</i>	484
8.5.5 <i>Conclusion</i>	488
8.6 CONCLUSION	488

CHAPTER 9: A COMPARATIVE ANALYSIS OF THE LEGAL SYSTEMS INVESTIGATED IN RELATION TO TBML CONTROL IN TRADE-FINANCE INSTRUMENTS	491
9.1 GENERAL	491
9.2 COUNTRY AWARENESS OF THE THREAT OF TBML IN TRADE-FINANCE INSTRUMENTS	491
9.2.1 General	491
9.2.2 The Current Position in South Africa	492
9.2.3 Insights from the Comparative Jurisdictions	493
9.2.3.1 <i>England</i>	493
9.2.3.2 <i>The US</i>	494
9.2.3.3 <i>Singapore</i>	495
9.3 COVERAGE OF THE OFFENCE OF TBML IN TRADE-FINANCE INSTRUMENTS UNDER AML LEGISLATION	496
9.3.1 General	496
9.3.2 The Current Position in South Africa	496
9.3.3 Insights from the Comparative Jurisdictions	497
9.3.3.1 <i>England</i>	497
9.3.3.2 <i>The US</i>	498
9.3.3.3 <i>Singapore</i>	499
9.4 INVESTIGATION OF TBML IN TRADE-FINANCE INSTRUMENTS BY LAW ENFORCEMENT AGENCIES	500
9.4.1 General	500
9.4.2 The Current Position in South Africa	500
9.4.3 Insights from the Comparative Jurisdictions	501
9.4.3.1 <i>England</i>	501
9.4.3.2 <i>The US</i>	503
9.4.3.3 <i>Singapore</i>	503
9.5 PROSECUTION OF TBML IN TRADE-FINANCE INSTRUMENTS	504
9.5.1 General	504
9.5.2 The Current Position in South Africa	504
9.5.3 Insights from the Comparative Jurisdictions	505
9.5.3.1 <i>England</i>	505
9.5.3.2 <i>The US</i>	507
9.5.3.3 <i>Singapore</i>	507
9.6 GOVERNANCE OF TBML IN TRADE-FINANCE INSTRUMENTS UNDER AML FRAMEWORKS	508
9.6.1 General	508
9.6.2 The Current Position in South Africa	509
9.6.3 Insights from the Comparative Jurisdictions	510
9.6.3.1 <i>England</i>	510
9.6.3.2 <i>The US</i>	511
9.6.3.3 <i>Singapore</i>	512

9.7 PRESENCE AND APPLICATION OF THE RBA TO TBML IN TRADE-FINANCE INSTRUMENTS.....	513
9.7.1 General.....	513
9.7.2 The Current Position in South Africa	513
9.7.3 Insights from the Comparative Jurisdictions	514
9.7.3.1 <i>England</i>	514
9.7.3.2 <i>The US</i>	514
9.7.3.3 <i>Singapore</i>	515
9.8 GUIDANCE FOR CDD MEASURES FOR TBML IN TRADE-FINANCE INSTRUMENTS	515
9.8.1 General.....	515
9.8.2 The Current Position in South Africa	516
9.8.3 Insights from the Comparative Jurisdictions	517
9.8.3.1 <i>England</i>	517
9.8.3.2 <i>The US</i>	518
9.8.3.3 <i>Singapore</i>	519
9.9 GUIDANCE FOR REPORTING SUSPICIOUS ACTIVITIES RELATED TO TBML IN TRADE-FINANCE INSTRUMENTS.....	520
9.9.1 General.....	520
9.9.2 The Current Position in South Africa	520
9.9.3 Insights from the Comparative Jurisdictions	521
9.9.3.1 <i>England</i>	521
9.9.3.2 <i>The US</i>	522
9.9.3.3 <i>Singapore</i>	523
9.10 GUIDANCE ON RECORD KEEPING FOR TBML IN TRADE-FINANCE INSTRUMENTS... 524	524
9.10.1 General.....	524
9.10.2 The Current Position in South Africa	525
9.10.3 Insights from the Comparative Jurisdictions	525
9.10.3.1 <i>England</i>	525
9.10.3.2 <i>The US</i>	526
9.10.3.3 <i>Singapore</i>	527
9.11 GUIDANCE ON STAFF TRAINING ON TBML IN TRADE-FINANCE INSTRUMENTS.....	528
9.11.1 General.....	528
9.11.2 The Current Position in South Africa	528
9.11.3 Insights from the Comparative Jurisdictions	529
9.11.3.1 <i>England</i>	529
9.11.3.2 <i>The US</i>	530
9.11.3.3 <i>Singapore</i>	531
9.12 SOME INITIATIVES AGAINST TBML IN TRADE-FINANCE INSTRUMENTS BY THE FIU 532	532
9.12.1 General.....	532
9.12.2 The Current Position in South Africa	532
9.12.3 Insights from the Comparative Jurisdictions	534
9.12.3.1 <i>England</i>	534

9.12.3.2 <i>The US</i>	535
9.12.3.3 <i>Singapore</i>	536
9.13 SOME INITIATIVES AGAINST TBML IN TRADE-FINANCE INSTRUMENTS BY THE CUSTOMS AUTHORITY	536
9.13.1 General	536
9.13.2 The Current Position in South Africa	537
9.13.3 Insights from the Comparative Jurisdictions	538
9.13.3.1 <i>England</i>	538
9.13.3.2 <i>The US</i>	538
9.13.3.3 <i>Singapore</i>	539
9.14 PLATFORM FOR INFORMATION SHARING AGAINST TBML IN TRADE-FINANCE INSTRUMENTS	540
9.14.1 General	540
9.14.2 The Current Position in South Africa	540
9.14.3 Insights from the Comparative Jurisdictions	541
9.14.3.1 <i>England</i>	541
9.14.3.2 <i>The US</i>	542
9.14.3.3 <i>Singapore</i>	542
9.15 SOME FINANCIAL-SERVICES INDUSTRY EFFORTS AND INITIATIVES AGAINST TBML IN TRADE-FINANCE INSTRUMENTS	543
9.15.1 General	543
9.15.2 The Current Position in South Africa	544
9.15.3 Insights from the Comparative Jurisdictions	546
9.15.3.1 <i>England</i>	546
9.15.3.2 <i>The US</i>	547
9.15.3.3 <i>Singapore</i>	549
9.16 COUNTRY INITIATIVES IN THE ABSENCE OF FATF RECOMMENDATION AGAINST TBML	551
9.16.1 General	551
9.16.2 The Current Position in South Africa	551
9.16.3 Insights from the Comparative Jurisdictions	552
9.16.3.1 <i>England</i>	552
9.16.3.2 <i>The US</i>	553
9.16.3.3 <i>Singapore</i>	554
9.17 CONCLUSION	554
CHAPTER 10: CONCLUSIONS AND RECOMMENDATIONS	557
10.1 GENERAL	557
10.2. ABSENCE OF AML RISK ASSESSMENT AND RESEARCH ON TBML IN SOUTH AFRICA	557
10.2.1 Conclusion	557
10.2.2 Recommendation	558
10.3 SOUTH AFRICAN AML LEGISLATION AND SCOPE FOR TBML	559
10.3.1 Conclusion	559

10.3.2 Recommendation.....	559
10.4 INVESTIGATION OF TBML IN SOUTH AFRICA BY LAW ENFORCEMENT AGENCIES ..	560
10.4.1 Conclusion	560
10.4.2 Recommendation.....	560
10.5 PROSECUTION OF TBML IN SOUTH AFRICA	561
10.5.1 Conclusion	561
10.5.2 Recommendation.....	561
10.6 PREVENTIVE FRAMEWORK FOR TBML IN TRADE FINANCE UNDER THE FICA	562
10.6.1 AML Governance for TBML Control.....	562
10.6.1.1 Conclusion.....	562
10.6.1.2 Recommendation	563
10.6.2 The RBA Application in TBML Control	563
10.6.2.1 Conclusion.....	563
10.6.2.2 Recommendation	564
10.6.3 CDD for TBML Control in Trade-Finance Instruments.....	564
10.6.3.1 Conclusion.....	564
10.6.3.2 Recommendation	565
10.6.4 Reporting of Suspicious TBML in Trade-Finance Transactions.....	565
10.6.4.1 Conclusion.....	565
10.6.4.2 Recommendation	566
10.6.5 Record-keeping Obligation for TBML Control	567
10.6.5.1 Conclusion.....	567
10.6.5.2 Recommendation	567
10.6.6 Staff Training for TBML Control	568
10.6.6.1 Conclusion.....	568
10.6.6.2 Recommendation	568
10.7 SOME INITIATIVES AGAINST TBML BY THE FIC.....	569
10.7.1 Conclusion	569
10.7.2 Recommendation.....	569
10.8 SOME INITIATIVES AGAINST TBML BY THE SARS	570
10.8.1 Conclusion	570
10.8.2 Recommendation.....	571
10.8.2.1 Creation of Trade-Finance Platforms focused on TBML Control.....	571
10.8.2.2 Creation of a Special Unit under the SARS for TBML Control.....	572
10.9 INFORMATION SHARING AS A KEY STRATEGY AGAINST TBML	572
10.9.1 Conclusion	572
10.9.2 Recommendation.....	573
10.9.2.1 Improving Initiatives of the SAMLIT against TBML	573
10.9.2.2 Close Cooperation between the SARS, FIC and the WCO and the Egmont Group ..	573
10.10 SOME FINANCIAL-SERVICES INDUSTRY EFFORTS AND INITIATIVES AGAINST TBML	575

10.10.1 Conclusion	575
10.10.2 Recommendation.....	575
10.11 SOUTH AFRICA’S AML INITIATIVES IN THE ABSENCE OF FATF RECOMMENDATION ON TBML	576
10.11.1 Conclusion	576
10.11.2 Recommendation.....	576
10.13 VALEDICTORY NOTE ON RECOMMENDATIONS	577
10.14 AREAS FOR FURTHER RESEARCH.....	577
10.15 CONCLUDING REMARKS	578
BIBLIOGRAPHY	579
TEXTBOOKS	579
BOOK CHAPTERS	583
JOURNAL ARTICLES	590
DISSERTATIONS & THESES	612
CASE LAW.....	614
English Cases	614
Singapore Cases	614
South African Cases	615
US Cases	616
LEGISLATION	617
English Legislation	617
Singapore Legislation	617
South African Legislation	617
US Legislation	618
UN CONVENTIONS	618
ICC RULES AND OTHER CODES	619
FATF STANDARDS, MUTUAL EVALUATIONS & OTHER REPORTS.....	619
OTHER INDUSTRY REPORTS, PRINCIPLES AND GUIDANCE NOTES.....	621
INTERNET SOURCES	623

CHAPTER 1: GENERAL INTRODUCTION AND THEME OF THESIS

1.1 GENERAL

This thesis examines the problem of money laundering in trade-finance instruments, which is commonly known as trade-based money laundering (TBML).¹ The extent of TBML in trade-finance transactions in South Africa, just like that of money laundering in general, is not clearly known but various anti-money laundering (AML) authorities estimate it to be substantial.² This thesis submits that the South African economy is in danger of being harmed by TBML in trade-finance transactions if adequate measures are not put in place.³ The global challenge of money laundering also affects South Africa.⁴ The country has a comparably developed financial system in the African region.⁵ This has made it highly susceptible to the challenge of money laundering.⁶ A

¹ Thus, the terms 'TBML' and 'money laundering' will be used constantly and interchangeably in this thesis to mean the same concept. Where there is a need to distinguish the two, an attempt will be made to make such distinction clear. It should be noted that the term 'TBML' was first expressed as such by the Caribbean Financial Action Task Force (CFATF) in its 2000 to 2001 annual report while conducting a money-laundering typology exercise in the region's free-trade zones. The term was popularised by the FATF in its reports of 2006 and 2008 where it is formally defined. CFATF is an organisation of states and territories of the Caribbean basin which have agreed to implement common countermeasures against money laundering, see <https://www.fatf-gafi.org> [Accessed on 2 June 2020]. For a detailed discussion of TBML and how it may affect the selected trade-finance instruments, see Ch 2 para 2.3 et seq and Ch 3 para 3.3 et seq below.

² See Ch 2 para 2.3.3 below. See also Ch 3 para 3.3 et seq below; and Ch 5 para 5.2 below.

³ For a discussion of the South African AML regime, see Ch 5 para 5.2 et seq below. See also Ch 3 para 3.3 et seq below and Ch 10 para 10.2 et seq below.

⁴ See Charles Goredema 'Confronting Money Laundering in South Africa: An Overview of Challenges and Milestones' in: Charles Goredema (ed) *Confronting the Proceeds of Crime in Southern Africa: An Introspection* (2007), (hereinafter Goredema 'Confronting Money Laundering in South Africa') 73; Maiendra Moodley *The Extent and Security Implications of Money Laundering in South Africa* (published mini-dissertation Master of Security Studies, University of Pretoria, 2008) 66; Louis de Koker 'Money Laundering in South Africa' in: Charles Goredema (ed) *Profiling Money Laundering in Eastern and Southern Africa* (2003), (hereinafter De Koker 'Money Laundering in South Africa') 83; Bernd Schlenther 'The Taxing Business of Money Laundering: South Africa' (2013) 16 *Journal of Money Laundering Control* 126-141 at 127; and Izelde Louise van Jaarsveld *Aspects Money Laundering in South African Law* (unpublished LLD Thesis University of South Africa, 2011) passim. See also Ch 4 para 4.2 et seq below.

⁵ See De Koker 'Money Laundering in South Africa' 92; WG Schulze 'Banks and Banking Law' in: Robert Sharrock (ed) *The Law of Banking and Payment in South Africa* (2016) (hereinafter Schulze 'Banks and Banking Law') 2; Vivienne Lawack 'The South African Banking System' in: Robert Sharrock (ed) *The Law of Banking and Payment in South Africa* (2016) (hereinafter Lawack 'The South African Banking System') 63; FATF & Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) (2009) *South Africa Mutual Evaluation Report* at 4 note that [South Africa] "has a first-world banking sector characterised by well-established infrastructure and technology".

⁶ See Zain Jadewin Sujee *A Study of the Anti-Money Laundering Framework of South Africa and the United Kingdom* (Unpublished LLM Dissertation, University of Pretoria, 2016) 4; De Koker Louis 'The Money Laundering Risk Posed by Low-Risk Financial Products in South Africa: Findings and Guidelines' (2009) 12 *Journal of Money Laundering Control* 323-339 at 324; Moodley *Extent of Money Laundering* 65. See also Ch 5 para 5.2 et seq below.

well-developed financial system is ideal for money-laundering purposes because it facilitates a fast transfer of illicit funds across the globe.⁷ Due to the well-developed financial network, fast transfers of illegal funds from South Africa to offshore tax havens have been made possible.⁸ Organised crime groups have been reported to abuse the financial system and other facilities such as debit or credit card services to move proceeds of crime across the borders of South Africa.⁹ Besides undermining the rule of law, money laundering fuels criminality in South Africa by allowing criminals to gain from their illicit activities.¹⁰ To that end, significant crimes in South Africa that generate profits linked to money laundering include fraud, theft, corruption, tax evasion, racketeering, precious metals smuggling, and abalone poaching.¹¹ South Africa also remains a major conduit for drug trafficking and trade.¹² The drug market in South Africa is reportedly the largest in the Southern African region.¹³

⁷ See Raymond W Baker *Capitalism's Achilles Heel: Dirty Money and How to Renew the Free-Market System* (2005) (hereinafter 'Baker Capitalism') 24; De Koker 'Money Laundering in South Africa' 92.

⁸ See M Kersop & SF du Toit 'Anti-Money Laundering Regulations and the Effective Use of Mobile Money in South Africa – Part 1' (2015) 18 *Potchefstroom Electronic Law Journal* (2015) 1603-1635 at 1621; Lynley Main 'The Secret Underworld of Tax Havens' (2016) 28 *Tax Professional* 1-30 at 5; Schlenker (2013) 16 *JMLC* 126 at 128; and Izelde Van Jaarsveld 'Following the Money Across Cyber Highways: A Herculean Task or International Challenge? Some Thoughts on Money Laundering on the Internet' (2004) 16 *South African Mercantile Law Journal* 685-702 at 690.

⁹ See De Koker 'Money Laundering in South Africa' 92. Regarding the abuse of bank accounts belonging to family members for money-laundering purposes in South Africa, see the unreported cases of *S v Dustigar* (Case no CC6/2000, DCLD); and *S v Van Zyl* (Case no 27/180/98, RCCT). These cases also represent the first two convictions that were handed down for statutory money laundering in South Africa.

¹⁰ Izelde Louise van Jaarsveld *Aspects of Money Laundering in South African Law* (unpublished LLD Thesis University of South Africa, 2011) 4; Kotie Geldenhuys 'Is South Africa a Paradise for Organised Crime Groups?' (April 2016) 109 *Servamus* 10-13 at 10. For a discussion of the effects of TBML, see Ch 2 para 2.5 et seq below.

¹¹ See FATF& ESAAMLG (2009) *South Africa Mutual Evaluation Report* 6; Charles Goredema 'Money Laundering in Southern Africa Incidence, Magnitude and Prospects' (2004) 92 *Institute for Security Studies* 1-12 at 2. Geldenhuys (April 2016) 109 *Servamus* 10 at 12 has described South Africa as a "paradise of organised crime groups" where "... dozens of international criminal syndicates ... can launder their wealth and expand into new markets through the well-run local criminal underworld". For a detailed discussion of the South African AML regime against TBML in trade-finance instruments, see Ch 5 para 5.2 et seq below.

¹² See Abraham John Hamman *The Impact of Anti-Money Laundering Legislation on the Legal Profession in South Africa* (unpublished LLD Thesis University of the Western Cape 2015) 5; FATF & ESAAMLG (February 2009) *Anti-Money Laundering and Combatting the Financing of Terrorism: South Africa Mutual Evaluation Report* 6; and Geldenhuys (April 2016) 109 *Servamus* 10 at 12. See also Ch 5 para 5.2 et seq below.

¹³ See Goredema (2004) 92 *Institute for Security Studies* 1 at 3; Geldenhuys (April 2016) 109 *Servamus* 10 at 12.

1.2 PROBLEM STATEMENT

South Africa is a member of the Financial Action Task Force (FATF).¹⁴ Consequently, in order to implement the FATF's Recommendations, it has passed legislation to combat money laundering.¹⁵ The main AML laws South Africa has enacted are the Prevention of Organised Crime Act¹⁶ (POCA), the Financial Intelligence Centre Act¹⁷ (FICA), and the Protection of Constitutional Democracy against Terrorist and Related Activities Act¹⁸ (POCDATARA). It is worth noting that South Africa adopts an 'all-crimes approach' when dealing with money laundering. This means that the money-laundering offences extend to the proceeds of any crime under South African law.¹⁹

Significant to this study, it should be noted that the FATF has no specific Recommendation dealing with TBML in trade-finance instruments.²⁰ Similarly, the South African AML legislation does not specifically recognise TBML in trade-finance instruments as a distinct form of money laundering. This may not come as a surprise

¹⁴ The FATF is an inter-governmental body established in 1989. As regards the role of the FATF in greater detail and a discussion of its specific responses to TBML, see Ch 4 para 4.3.2 below. Regionally, South Africa is a member of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG). ESAAMLG is a FATF-Style Regional Body whose purpose is "to combat money laundering by implementing the FATF Recommendations". The organisation also "enables regional factors to be taken into account in the implementation of AML measures", See <https://esaamlg.org> [Accessed on 26 July 2020]. See also Ch 4 para 4.3.3 below.

¹⁵ South Africa became the thirtieth member of the FATF in June 2003, see Schlenther (2013) 16 *JMLC* 126 at 127; Charl Hugo & Wynand Spruyt 'Money Laundering, Terrorist Financing and Financial Sanctions: South Africa's Response by Means of the Financial Intelligence Centre Amendment Act 1 of 2017' (2018) 2 *TSAR* 227-255 at 232. See also Ch 4 para 4.3.2 et seq below.

¹⁶ 121 of 1998. See also Van Jaarsveld *Money Laundering* 461; Marine *Burdette Is the Reporting Obligation of Attorneys in Terms of Section 29 of the Financial Intelligence Centre Act 38 of 2001: A Myth or a Reality?* (Unpublished LLM Dissertation, University of Pretoria, 2010) 4.

¹⁷ 38 of 2001. See also Van Jaarsveld *Money Laundering* 461; Burdette *Reporting Obligations* 4. For the origins of this piece of legislation see De Koker 'Money Laundering in South Africa' 97 et seq.

¹⁸ 33 of 2004. See also Van Jaarsveld *Money Laundering* 461; Burdette *Reporting Obligations* 4. For a brief discussion of South African AML laws, see Ch 5 para 5.3.2 et seq.

¹⁹ See De Koker 'Money Laundering in South Africa' 84 et seq; FATF& ESAAMLG (2009) *South Africa Mutual Evaluation Report* 34. For a discussion of the crime of money laundering under the South African AML regime, see Ch 5 para 5.3.2.4 below.

²⁰ Ramandeep Kaur Chhina 'Managing Money Laundering Risks in Commercial Letters of Credit: Are Banks in Danger of Non-Compliance? A Case Study of the United Kingdom' (2016) 19 *Journal of Money Laundering Control* 158-168 at 161. Ross S Delston & Stephen C Walls 'Strengthening our Security: A New International Standard on Trade-Based Money Laundering is Needed Now' (2012) 44 *Case Western Reserve Journal of International Law* 737-746 at 740 believe that the FATF missed an opportunity to address TBML in 2012 when it revised its Recommendations. See also Ch 4 para 4.3.2 et seq below; Ch 9 para 9.16 et seq below; and Ch 10 para 10.2.18 below.

since TBML is generally regarded as an emerging concept that has had little attention from academic scholars and regulatory authorities.²¹ However, the Financial Intelligence Centre (FIC) in South Africa mentioned TBML in one of its reported case studies.²² The FATF has urged member jurisdictions across the world to do more research on TBML in order to determine its magnitude and impact for specific countries.²³ This thesis comes against such a background. It examines how TBML in trade-finance transactions in the South African banking sector could be controlled.²⁴ The research attempts this through an exploration of international best practice and AML regimes across selected jurisdictions for comparative insights.²⁵ It is the contention of this study that the current South African AML legislation is principally designed for money laundering in general and does not work perfectly for other types of money laundering such as money laundering through cryptocurrencies²⁶ and TBML in trade-finance instruments.²⁷

1.3 THEORETICAL FRAMEWORK

1.3.1 General

A theoretical framework provides the context for the research by giving a systematised and orderly body of knowledge that is based on earlier research.²⁸ Generally, the theoretical framework gives a justification of the research question by demonstrating

²¹ See Clare Sullivan & Evan Smith 'Trade-Based Money Laundering: Risks and Regulatory Responses' (2012) *Australian Institute of Criminology* 1-27 at 2. See also Ch 2 para 2.3 et seq below.

²² See FIC <https://www.fic.gov.za> [Accessed on 22 August 2020]. The FIC is the South Africa's FIU and as regards a discussion of its role in money-laundering issues, see Ch 5 para 5.4.2.

²³ See Sullivan & Smith (2012) *Australian Institute of Criminology* ix; FATF (2006) *Trade-Based Money Laundering Report* (hereinafter 'FATF (2006) TBML Report') 6; FATF (2008) *Best Practices on Trade-Based Money Laundering Guidance Document* (hereinafter 'FATF (2008) Best Practices on TBML') 2. See also Ch 4 para 4.3.2 et seq below.

²⁴ The use of the term 'controlled' is in line with current AML-legislation diction. See Chapter 3 heading of FICA and section 6 of FICA (Amendment). See also De Koker 'Money Laundering in South Africa' 97 et seq; and Van Jaarsveld *Money Laundering* at 205 who use the phrases 'money-laundering control' or 'money-laundering control framework'. The assumption under the term 'control' is that money laundering as a crime can only be managed or minimised but cannot be eliminated. See also Ch 3 para 3.3 et seq below; and Ch 5 para 5.2 et seq below.

²⁵ For the comparative jurisdictions in this study and justification of their choices, see para 1.6.3 below. See also Ch 4; Ch 5; Ch 6; Ch 7; Ch 8; and Ch 9 below generally.

²⁶ This study does not intend to focus on money laundering through cryptocurrencies. For a brief discussion of money laundering through cryptocurrencies and its associated links with TBML, see Ch 2 para 2.4.7 below.

²⁷ See Ch 3 para 3.3 et seq and Ch 5 para 5.2 et seq below.

²⁸ See Sanne Taekema 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice' (2018) *Law and Method* 1-17 at 1.

how the question emerges from the gaps or conflicts in existing research.²⁹ Most legal studies do not use an explicit theoretical framework.³⁰ In such studies, the legal system of the country being investigated and the attendant legal questions sought to be answered are regarded as the theoretical framework.³¹ However, an explicit theoretical framework is essential in clearly setting the tone, background, and concepts of the research being carried out.³² The following is a theoretical framework underpinning this study.

1.3.2 The Theoretical Background and Challenge of TBML

According to the FATF, there are three main methods³³ by which organised crime groups move money to disguise its origins and integrate it back into the formal economy.³⁴ The first one is by using the financial system. This entails the transfer of money by using such payment methods as bills of exchange and wire transfers.³⁵ The second method entails moving money physically through, for example, couriers for cash or smuggling.³⁶ The third method involves the transfer of value through the

²⁹ Ibid.

³⁰ See Pauline C Westerman 'Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law' in: Mark van Hoecke (ed) *Methodologies of Legal Research* (2011) (hereinafter Westerman 'The Debate on Legal Methodology') 87 et seq; Walter Kamba 'Comparative Law: A Theoretical Framework' (1974) 23 *The International and Comparative Law Quarterly* 485-519 at 485.

³¹ See Westerman 'The Debate on Legal Methodology' 90.

³² See Taekema (2018) *Law and Method* 1 at 1.

³³ It should be noted from the onset that, in practice these methods can be used in combined form, see Christine Jojarth 'Money Laundering: Motives, Methods, Impact, and Countermeasures' in: Heinrich-Böll-Stiftung & Regine Schönenberg (eds) *Transnational Organised Crime: Analyses of a Global Challenge to Democracy* (2014) (hereinafter Jojarth 'Money Laundering Methods') 21; and Jonathan E Turner *Money Laundering Prevention: Deterring, Detecting, and Resolving Financial Fraud* (2011) (hereinafter 'Turner Money Laundering Prevention') 47 et seq.

³⁴ See FATF (2006) *TBML Report* 5. See also Ch 2 para 2.2.5 below; and Ch 4 para 4.3.2.4 et seq below.

³⁵ Although the study is about how money laundering affects trade-finance instruments, wire transfers and cheques can also be employed in conjunction with such instruments in the scheme, see Miller, Rosen & Jackson *Trade-Based Money Laundering: Overview and Policy Issues* (2016) 1; Truman & Reuter *Chasing Dirty Money: The Fight Against Money Laundering* (2004) 25. A distinction of the methods of money laundering is being given here by way of a general foundation and as per the categorisation of the FATF, see FATF (2006) *Trade-Based Money Laundering TBML Report* 5; FATF (2008) *Best Practices on TBML* 1. See also Ch 2 para 2.2.5.3 below.

³⁶ See Ramandeep Kaur Chhina 'Trade-Based Money Laundering: Ever Increasing Threat with Little Regulation' (2014) 29 *Journal of International Banking Law and Regulation* 665-671 at 665. See also Turner *Money Laundering Prevention* 48, who notes that cash is preferred in most money-laundering schemes because it leaves no paper trail for criminal investigators to follow the money. See also Ch 2 para 2.2.5.2 below.

exchange of goods.³⁷ This third method of laundering money is commonly known as TBML and is the focus of this thesis in relation to selected trade-finance instruments.³⁸

The FATF defines TBML as the act of concealing and shifting value through trade transactions in an effort to justify the illegal source of such value.³⁹ Thus, TBML occurs through trade transactions and their related financing component to launder money.⁴⁰ It entails the transfer of value⁴¹ through using false documents and a fraudulent declaration of traded goods.⁴² The global community and policymakers have generally disregarded TBML.⁴³ Although the FATF has identified it as an emerging-risk area, the typologies used under this method are much older.⁴⁴ Capital movements in international trade have in the past been associated with tax evasion and tax avoidance to escape tax obligations and capital export rules.⁴⁵ However, little is known

³⁷ See Samuel McSkimming 'Trade-Based Money Laundering: Responding to an Emerging Threat' (2010) 15 *Deakin L Rev* 37-63 at 39; Jasper Liao & Arabinda Acharya 'Transshipment and Trade-Based Money Laundering' (2011) 14 *Journal of Money Laundering Control* 79-92 at 81; FATF (2006) *TBML Report* 5; and Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at viii. See also Ch 2 para 2.2.5.4 and para 2.3 et seq below.

³⁸ For a discussion of TBML in general, see Ch 2 para 2.3.2 et seq below and in relation to selected trade-finance instruments, see Ch 3 para 3.3 et seq below.

³⁹ See FATF (2006) *TBML Report* 5; FATF (2008) *Best Practices on TBML* 1. To date this is the definition of TBML that has been replicated in various scholarly works. As for an expanded discussion of the definition and the criticism levelled against it, see Ch 2 para 2.3.2 below and Melvin R Soudijn 'A Critical Approach to Trade-Based Money Laundering' (2014) 17 *Journal of Money Laundering Control* 230-242 at 233, respectively.

⁴⁰ See McSkimming (2010) 15 *Deakin L Rev* 37 at 39; Liao & Acharya (2011) 14 *JMLC* 79 at 81; and Asia-Pacific Group (APG) (2012) *Trade-Based Money Laundering Report* 4.

⁴¹ M Loubser & Derick Swart 'Electronic Money in South African Law' (1999) 10 *Stellenbosch Law Review* 354-369 at 355 use the term 'value' interchangeably with 'money'. The word 'value' is significant in understanding TBML in that it connotes money is some kind of format, see para 1.4.2.2 below.

⁴² See John S Zdanowicz 'Trade-Based Money Laundering and Terrorist Financing' (2009) 5 *Review of Law and Economics* 856-878 at 856; Mohammed Ahmad Naheem 'Trade-Based Money Laundering: Towards a Working Definition for the Banking Sector' (2015) 18 *Journal of Money Laundering Control* 513-524 at 514; FATF (2006) *TBML Report* 5; and John A Cassara *Trade-Based Money Laundering: The Next Frontier in International Money Laundering Enforcement* (2016) (hereinafter 'Cassara Next Frontier') 4.

⁴³ See Cassara *Next Frontier* 3; Chhina (2014) 29 *JIBLR* 665 at 665; and Rena S Miller, Liana W Rosen & James K Jackson *Trade-Based Money Laundering: Overview and Policy Issues* (2016) (hereinafter 'Miller et al *TBML: Overview and Policy Issues*') 4.

⁴⁴ See McSkimming (2010) 15 *Deakin L Rev* 37 at 40; Chhina (2014) 29 *JIBLR* 665 at 665.

⁴⁵ See Chhina (2014) 29 *JIBLR* 665 at 667; McSkimming (2010) 15 *Deakin L Rev* 37 at 40; Maria E de Boyrie, Simon J Pak & John S Zdanowicz 'Money Laundering and Income Tax Evasion: The Determination of Optimal Audits and Inspections to Detect Abnormal Prices in International Trade' (2005) 12 *Journal of Financial Crime* 123-130 at 125; and Maria E de Boyrie, James A Nelson & Simon J Pak 'Capital Movement through Trade Misinvoicing: The Case of Africa' (2007) 14 *Journal of Financial Crime* 474-489 at 476.

about TBML.⁴⁶ It is complex and cuts across, not only sectors of trade and finance but also national borders.⁴⁷ The complexity is further compounded by the fact that most jurisdictions lack awareness and training on the nature and operation of TBML.⁴⁸ Typologies used in TBML also vary from simple techniques such as fraudulent invoicing to complex-financial arrangements meant to integrate the proceeds of crime into the legitimate economy.⁴⁹ The idea would be to make it challenging for law enforcement authorities to uncover the criminal activity.⁵⁰ Furthermore, there is little research⁵¹ dedicated to examining TBML as a specific threat to the role of banks in trade-finance transactions.⁵²

The increase in scrutiny and reporting of financial transactions because of AML initiatives has made international trade⁵³ more attractive to money launderers than before.⁵⁴ Other factors enhancing the attractiveness of international trade for TBML are growth in world trade and the easiness of disguising the true nature of trade and

⁴⁶ See Miller *et al* *TBML: Overview and Policy Issues* 4; Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at iii.

⁴⁷ See APG (2012) *Typology Report on Trade-Based Money Laundering* 4; Zdanowicz (2009) 5 *Review of Law & Economics* 856 at 856. See also Delston & Walls (2012) 44 *Case W Res Int'l L* 737 at 738 opined that 'TBML is widely regarded as a global threat'.

⁴⁸ See Todd Hataley 'Trade-Based Money Laundering: Organised Crime, Learning and International Trade' (2020) *Journal of Money Laundering Control* 1-11 at 1; Miller *et al* *TBML: Overview and Policy Issues* 1; Chhina (2014) 29 *JIBLR* 665 at 665; and APG (2012) *Trade-Based Money Laundering Report* 5.

⁴⁹ See Chhina (2014) 29 *JIBLR* 665 at 666; Ross S Delston & Stephen C Walls 'Reaching Beyond Banks: How to Target Trade-Based Money Laundering and Terrorist Financing Outside the Financial Sector' (2009) 41 *Case Western Reserve Journal of International Law* 85 -118 at 87. See also Ch 2 para 2.3.4 below.

⁵⁰ See Chhina (2014) 29 *JIBLR* 665 at 666. See also McSkimming (2010) 15 *Deakin L Rev* 37 at 40 who argues that 'detecting and prosecuting TBML is much like finding a needle in a pile of other needles' due to the level of complexity that may be involved.

⁵¹ See, in general, FATF (2006) *Trade-Based Money Laundering Report*; Cassara *Next Frontier*; Chhina (2014) 29 *JIBLR* 665 at 665; APG (2012) *Trade-Based Money Laundering*; Naheem *Exploring TBML*; Soudijn (2014) 17 *JMLC* 230 at 230; Chhina (2016) 19 *JMLC* 158 at 158; Naheem 'TBML Suspicious Activity Reports — a Financial Intelligence Unit Perspective' (2018) 25 *Journal of Financial Crime* 721-733; Delston & Walls (2009) 41 *Case W Res Int'l L* 85-118; and Naheem 'Anti-Money Laundering/Trade-Based Money Laundering Risk Assessment Strategies — Action or Re-action Focused?' (2019) 22 *Journal of Money Laundering Control* 721-733.

⁵² See Mohammed Ahmad Naheem *Trade-Based Money Laundering: Exploring the Implications for International Banks* (unpublished PhD Thesis University of Wolverhampton, 2017) 28; Soudijn (2014) 17 *JMLC* 230 at 231. See also Ch 3 para 3.2 et seq below.

⁵³ TBML can occur at domestic trade level, see Soudijn (2014) 17 *JMLC* 230 at 233; APG (2012) *Trade-Based Money Laundering Report* 9.

⁵⁴ See FATF (2006) *TBML Report* 6; McSkimming (2010) 15 *Deakin L Rev* 37 at 37; and Liao & Acharya (2011) 14 *JMLC* 79 at 80.

related-financing options.⁵⁵ There is growing concern that, as international trade expands, the more it becomes attractive to criminals wishing to move illicit funds through TBML.⁵⁶ Unless the relevant AML institutions such as the legislature and law enforcement authorities address TBML, it is likely to grow and become entrenched in the operations of criminal organisations.⁵⁷ It is unknown how widespread TBML is and how it affects jurisdictions such as South Africa.⁵⁸ I submit that this becomes an even more compelling reason to explore the control of TBML in trade-finance instruments under the South African AML regime.⁵⁹

It should be noted that there is a thin line between TBML and other forms of money laundering in general due to an overlap of the methods in practical terms.⁶⁰ In this regard, most jurisdictions, including South Africa, do not differentiate between TBML and other types of money laundering.⁶¹ Even within those jurisdictions that mention or identify TBML as a distinct type of money laundering, there is a need to expand research in this area.⁶² The outcome of such research would inform a proper regulatory response against TBML.⁶³ The relative newness of TBML as an emerging risk means that banks are likely to be currently relying on generic AML programmes

⁵⁵ See McSkimming (2010) 15 *Deakin L Rev* 37 at 41; Chhina (2014) 29 *JIBLR* 665 at 665; and Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at viii. See also Ch 2 para 2.3 et seq below.

⁵⁶ See APG (2012) *Trade-Based Money Laundering Report* 4; Chhina (2014) 29 *JIBLR* 665; McSkimming (2010) 15 *Deakin L Rev* 37.

⁵⁷ Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at viii.

⁵⁸ See Ch 2 para 2.3.3 below.

⁵⁹ See Ch 3 para 3.3 et seq and Ch 5 para 5.3.2 et seq below.

⁶⁰ See Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at viii. See also Ch 2 para 2.3 et seq below.

⁶¹ See APG (2012) *Trade-Based Money Laundering Report* 5; Financial Crimes Enforcement Network (FinCEN) (2010) *Advisory to Financial Institutions on Filing Suspicious Activity Reports Regarding Trade-Based Money Laundering* (hereinafter '*FinCEN (2010) Advisory on TBML*'); the Monetary Authority of Singapore's (MAS) *Best Practices for Countering Trade-Based Money Laundering*; Australian Transaction Reports and Analysis Centre (2013) *Typologies and Case Studies Report*; South Africa's Financial Intelligence Centre (2018) *Trade-Based Money Laundering Report* on <https://www.fic.gov.za> [Accessed on 22 August 2020]; and England's (2017) *National Risk Assessment of Money Laundering and Terrorist Financing* generally. See also Ch 2 para 2.2 et seq below.

⁶² See Sullivan & Smith (2012) *Australian Institute of Criminology* ix; FATF (2008) *Best Practices on TBML* 2; FATF (2006) *TBML Report* 6. See also Ch 9 para 9.2 et seq below; and Ch 10 para 10.2.1 below.

⁶³ Sullivan & Smith (2012) *Australian Institute of Criminology* ix.

for protection.⁶⁴ These may not be adequate since they were not designed with emerging threats such as TBML in mind.⁶⁵

1.4 CONCEPTUAL FRAMEWORK

1.4.1 General

A conceptual framework is used to demonstrate relationships between ideas and concepts and how they relate to the study at hand.⁶⁶ It is a significant component of qualitative research. Most legal research projects do not explicitly delineate a conceptual framework, leaving it to readers to find on their own.⁶⁷ However, stating the conceptual framework explicitly helps in creating the bridge between context, the theoretical framework and the manner in which the study is structured.⁶⁸ Thus, a conceptual framework serves as the connecting piece of the study in that it assists the researcher to integrate their understanding of various concepts and ideas to be examined.⁶⁹ The following section outlines the concepts, ideas and approaches used in this study and how they are interconnected.

1.4.2 The Concepts of TBML and Trade Finance

This thesis deals with four major concepts, namely, TBML,⁷⁰ value in TBML,⁷¹ trade,⁷² trade finance,⁷³ and TBML in trade-finance instruments.⁷⁴ These are briefly explained below to delineate the context in which they are used.

⁶⁴ See Naheem (2018) 25 *Journal of Fin Crime* 721; Naheem (2019) 22 *JMLC* 721. FATF (2008) *Best Practices on TBML* at 2. See also Ch 2 para 2.3 et seq below; Ch 5 para 5.3.2 et seq below; Ch 6 para 6.3.2 et seq below; Ch 7 para 7.3.2 et seq below; and Ch 8 para 8.3.2 et seq below.

⁶⁵ See Naheem (2018) 25 *Journal of Fin Crime* 721. See also Sullivan & Smith (2012) *Australian Institute of Criminology* at iii.

⁶⁶ See John Bell 'Legal Research and the Distinctiveness of Comparative Law' in: Mark van Hoecke (ed) *Methodologies of Legal Research* (2011) (hereinafter Bell 'Legal Research') 162.

⁶⁷ Shosh Leshem & Vernon Trafford 'Overlooking the Conceptual Framework' (2007) 44 *Innovations in Education and Teaching International* 93-105.

⁶⁸ See Bell 'Legal Research' 12; Jaakko Husa 'Comparative Law, Legal Linguistics and Methodology of Legal Doctrine in: Mark van Hoecke (ed) *Methodologies of Legal Research* (2011) 210.

⁶⁹ See Leshem & Trafford (2007) 44 *Innovations in Education and Teaching International* 93 at 99.

⁷⁰ See para 1.4.2.1 below. See also Ch 2 para 2.3 et seq below.

⁷¹ See para 1.4.2.2 below. See also Ch 2 para 2.3.4 et seq below.

⁷² See para 1.4.2.3 below. See also para 1.8 below.

⁷³ See para 1.4.2.4 below. See also Ch 3 para 3.3 et seq below.

⁷⁴ See para 1.4.2.5 below. See also Ch 3 para 3.3 et seq below.

1.4.2.1 The Concept of TBML

As a concept, TBML is broad.⁷⁵ It can affect various portions of the international-trade chain,⁷⁶ and other sectors of the economy such as the art trade,⁷⁷ free-trade zones (FTZs),⁷⁸ international gold trade,⁷⁹ and international diamond trade.⁸⁰ The FATF gives a broad definition of the concept where it affects various sectors beyond trade finance.⁸¹ Additionally, TBML may also be considered broadly in relation to the financing of terrorism.⁸² This study adopts a narrower definition of TBML as it affects trade-finance instruments and excludes its other uses such as the financing of terrorism.⁸³ The thesis discusses the broader view of the concept of TBML only to give context to the narrow scope it adopts in Chapter 3 in relation to selected trade-finance instruments.⁸⁴ This is also done to give a jurisprudential background to the problem of TBML, its methods in general, and the environments vulnerable to it as perceived by various research findings.⁸⁵

1.4.2.2 The Concept of Value in TBML

A key concept in this study is that of 'value' in TBML.⁸⁶ A significant attribute of money is that it is something that is perceived to be of value.⁸⁷ The term 'value' is a recurrent feature in the definition of money. Simmel defines money as an expression of 'value' relations between other objects.⁸⁸ Mellor defines money as "a means of recognising

⁷⁵ See para 1.3 above. See also Ch 2 para 2.3 below for a general discussion of the concept of TBML.

⁷⁶ See APG (2012) *Trade-Based Money Laundering Report* 9; The Wolfsberg Group, ICC & BAFT (2019 Amendment) *Trade-Finance Principles* 8.

⁷⁷ See Ch 2 para 2.4.6 below.

⁷⁸ See Ch 2 para 2.4.8 below.

⁷⁹ See Ch 2 para 2.4.4 below.

⁸⁰ See Ch 2 para 2.4.5 below.

⁸¹ See again para 1.3 above. See also Ch 2 para 2.3 below. For a discussion of how TBML may affect the operations of selected trade-finance instruments, see Ch 3 para 3.3 et seq below.

⁸² See APG (2012) *Trade-Based Money Laundering Report* 9.

⁸³ For the scope of this thesis, see para 1.8 below. For a broader discussion of the concept of TBML and a narrow examination of how TBML may affect selected trade-finance instruments, see Ch 2 para 2.3 et seq below and Ch 3 para 3.3 et seq below, respectively.

⁸⁴ For such a broad discussion, see Ch 2 para 2.3 below. For the narrow scope in relation to trade-finance instruments, see Ch 3 para 3.3 et seq below.

⁸⁵ See Ch 2 para 2.3 et seq below and para 2.4 et seq below.

⁸⁶ See Ch 2 para 2.3.2 below.

⁸⁷ See Mary Mellor *Money: Myths, Truths and Alternatives* (2019) (hereinafter 'Mellor *Money Myths*') 8.

⁸⁸ George Simmel *The Philosophy of Money* 4 ed (2011) 157.

and transferring value”.⁸⁹ Proctor defines money as a representation of both purchasing power and a store of wealth or value.⁹⁰ In the context of this study, the FATF defines TBML as the act of concealing the proceeds of crime and shifting *value*⁹¹ through trade transactions in an effort to give legitimacy to such proceeds.⁹² Cassara notes that the pertinent word in the definition of TBML as given by the FATF is ‘value’ and not necessarily ‘money’, which can come in various formats.⁹³ It has been said that anything of ‘value’ can be laundered in a typical money-laundering scheme.⁹⁴ In order to fully appreciate the mechanics of TBML there is a need to appreciate the concept of ‘value’ because this type of money laundering relies on the transfer of ‘value’ through goods or services.⁹⁵ Generally, what is laundered in TBML is ‘money’ not in its traditional physical sense but through ‘value’, which is often represented by goods or services.⁹⁶

1.4.2.3 The Concept of Trade in TBML

TBML can affect domestic or international trade.⁹⁷ This study focuses on TBML in trade-finance instruments in the context of international trade.⁹⁸ This does not mean that TBML cannot affect domestic trade. The framework adopted for investigating TBML in the selected trade-finance instruments that are commonly used in international trade leaves domestic trade out of scope.⁹⁹ Conceptually, international trade can be split into various components that may be overlapping. These elements of the international trade may relate to an arrangement to trade goods, steps to finance or insure the goods, transportation of goods or financial account settlement.¹⁰⁰ This

⁸⁹ Mellor *Money Myths* 8.

⁹⁰ See Charles Proctor *Mann on the Legal Aspect of Money* 7 ed (2012) (hereinafter ‘Proctor *Mann on Money*’) 36.

⁹¹ Emphasis added.

⁹² See FATF (2006) *TBML Report* 3. More about the nature of TBML, see Ch 2 para 2.3.2 below.

⁹³ See Cassara *Next Frontier* 4. For a discussion of the definition of TBML, see para Ch 2 para 2.3.2 below.

⁹⁴ See Cassara *Next Frontier* 4; Baker *Capitalism* 25. See also Ch 2 para 2.2 et seq below.

⁹⁵ See Ch 2 para 2.3.2 et seq below.

⁹⁶ See Ch 2 para 2.3.2 et seq below.

⁹⁷ See APG (2012) *Trade-Based Money Laundering Report* 9. See also Ch 2 para 2.3 et seq below.

⁹⁸ See para 1.8 below. See also Ch 3 para 3.3 et seq below.

⁹⁹ See para 1.8 below. See also Ch 3 para 3.3 et seq below.

¹⁰⁰ See APG (2012) *Trade-Based Money Laundering Report* 9.

thesis focuses on the financing component of trade, which, for convenience purposes, is termed 'trade finance'.¹⁰¹

1.4.2.4 The Concept of Trade Finance

This study examines how the risk of TBML may affect selected trade-finance instruments.¹⁰² 'Trade finance' itself is a wide concept that includes, but not limited, to the instruments selected for examination in this study.¹⁰³ In its 2008 best practices report on TBML, the FATF defines 'trade finance' as the monetary part of a trading transaction involving foreign goods under which payment for the goods and related services is managed.¹⁰⁴ It should be noted that the provision of trade finance might occur either in the domestic or international sphere.¹⁰⁵ Trade-financing transactions may include making payment in open-account trading, issuing of documentary credits, demand guarantees and standby letters of credit.¹⁰⁶ This study does not consider concepts of open account, factoring, forfaiting,¹⁰⁷ vendor financing,¹⁰⁸ and specialised structured loan-based trade finance,¹⁰⁹ in the understanding of trade finance.¹¹⁰ Thus, the study adopts a narrow understanding of trade finance insofar as it relates to

¹⁰¹ See para 1.4.2.4 below. See also Ch 3 para 3.3 et seq below.

¹⁰² See Ch 3 para 3.3 et seq below.

¹⁰³ See Ch 3 para 3.3 et seq below.

¹⁰⁴ See FATF (2008) *Best Practices on TBML* 2. See The Wolfsberg Group, ICC & BAFT (2019 Amendment) *Trade-Finance Principles* 8. See also Ch 4 para 4.3.2.4 below.

¹⁰⁵ See The Wolfsberg Group (2011) *Trade-Finance Principles* 1. See also para 1.4.2.3 above.

¹⁰⁶ See again FATF (2008) *Best Practices on TBML* 2. See also Ch 3 para 3.3 et seq.

¹⁰⁷ This is a form of trade and supply chain financing which involves the purchase of future payment obligations on a 'without recourse' basis, see The International Trade and Forfaiting Association (ITFA) <https://itfa.org/trade-forfaiting/what-is-forfaiting> [Accessed on 7 September 2018].

¹⁰⁸ Vendor financing is the advancing or lending of funds by a vendor to its customer to enable the vendor to purchase stock or services from the customer which transaction is also known as trade credit and usually takes the form of deferred loans from the vendor, see Michael J Brennan, Vojislav Maksimovic and Josef Zechner "Vendor Financing" (1988) 58 *The Journal of Finance* 1127-1141 at 1127; Jose Benedicto B Duhaylongsod *Vendor Financing and its Impact on Vendor's Optimal Policies* (unpublished Msc Dissertation, The State University of New Jersey, 2013) 1.

¹⁰⁹ See Ayse G Eren 'The Settlement and Financing of International Trade' in: Andrew W. Mullineux & Victor Murinde (eds) *Handbook of International Banking* (2003) (hereinafter Eren 'Financing of International Trade') 259 et seq; Tarsem Singh Bhogal & Arun Kumar Trivedi *International Trade Finance: A Pragmatic Approach* 2 ed (2019) (hereinafter 'Bhogal & Trivedi *International Trade Finance*') 9 et seq; Eric Bishop *Finance of International Trade* (2004) 22 et seq, (hereinafter 'Bishop *Finance*'); and The Wolfsberg Group, ICC & BAFT (2019 Amendment) *Trade-Finance Principles* 9.

¹¹⁰ See para 1.8 below. See also Ch 3 para 3.2 et seq below.

commonly used instruments such as documentary credits, demand guarantees, documentary collections and standby letters of credit.¹¹¹

1.4.2.5 TBML in Trade Finance¹¹²

In the trade-finance sector, TBML is a problem for banks that are involved in the financing of international trade.¹¹³ This thesis, therefore, assesses the adequacy of the South African AML regime against TBML in trade-finance transactions.¹¹⁴ The study explores the question of whether the South African AML legislation in its current state, can effectively be applied by banks in the combatting of TBML in trade-finance transactions.¹¹⁵ Thus, the research seeks to identify potential gaps and inadequacies in the current South African AML regime in the context of TBML.¹¹⁶ The rules of the International Chamber of Commerce (ICC) govern the operation of trade-finance instruments only if parties have expressly incorporated them in the contract.¹¹⁷ These rules may not be compatible with the desire to combat TBML.¹¹⁸ The rules can limit the extent to which banks may scrutinise the nature of the underlying transaction through documentary reviews.¹¹⁹ It must be noted that trade-finance instruments such as documentary credits are designed to facilitate a smooth flow of commercial activities by merchants and bankers.¹²⁰ This thesis, therefore, also explores the

¹¹¹ For a discussion of these instruments and the potential risk of TBML through them, see Ch 3 para 3.3 et seq below.

¹¹² The terms 'TBML in trade-finance instruments', 'TBML through and/or in trade-finance transactions' or 'TBML through and/or in trade-finance transactions or operations' or some such similarly phrased words, will be used interchangeably in this thesis to refer to the same concept.

¹¹³ See Ch 3 para 3.2 below.

¹¹⁴ See Ch 3 para 3.3 et seq below and Ch 5 para 5.2 et seq below.

¹¹⁵ See Ch 5 para 5.3.2 et seq below and Ch 3 para 3.3 et seq below.

¹¹⁶ See para 1.5 below. See also Ch 5 para 5.2 et seq below; Ch 9 para 9.2 et seq below; and Ch 10 para 10.2 et seq below.

¹¹⁷ See Ch 3 para 3.3.1 et seq below. For a detailed role of the ICC and its contribution to the fight against TBML in trade finance see, respectively, Ch 4 para 4.4.4 below; The Wolfsberg Group, ICC & BAFT (2019 Amendment) *Trade-Finance Principles*, passim. As regards the history of the ICC see Charl Hugo 'Letters of Credit and Demand Guarantees: A Tale of Two Sets of Rules of the International Chamber of Commerce' (2017) 1 *TSAR* 1-20 at 1-5; and Shane Robert Tomashot *Selling Peace: The History of the International Chamber of Commerce, 1919-1925* (unpublished PhD Thesis Georgia State University, 2015) passim.

¹¹⁸ See Ch 3 para 3.3 et seq below.

¹¹⁹ See Naheem *Exploring TBML* 115; Chhina (2016) 19 *JMLC* 158 at 160. See also Ch 3 para 3.2 et seq below.

¹²⁰ See Charl Francois Hugo *The Law Relating to Documentary Credits from a South African Perspective with Special Reference to the Legal Position of the Issuing and Confirming Banks* (published LLD Thesis University of Stellenbosch 1996) 1; WG Schulze 'The UCP 600: A New Law Applicable to Documentary Letters of Credit' (2009) 21 *SA Merc L J* 228 at 228; and Charl Hugo 'Protecting the Lifeblood of Commerce: A Critical Assessment of recent Judgments of the

question of how a balance could be achieved between efforts to combat TBML, on the one hand, and the need for allowing genuine international trade to flourish, on the other hand.

1.5 AIMS AND OBJECTIVES OF THE STUDY

The aim and objectives of this research are summarised below.

1.5.1 Aim of the Study

This study aims to investigate the adequacy of the South African AML regime against TBML in selected trade-finance instruments in order to recommend ways through which this problem could be solved.¹²¹

1.5.2 Objectives of the Study

In order to support the aim above, this research seeks to achieve the following nine objectives.

1.5.2.1 To investigate the South African government's level of awareness of TBML in general and TBML in the context of the selected trade-finance instruments.¹²²

1.5.2.2 To establish if the South African AML legislation adequately addresses the offence of TBML in the selected trade-finance instruments.¹²³

1.5.2.3 To determine whether responsible institutions under the South African AML regime are able to sufficiently investigate and prosecute cases of TBML in the selected trade-finance instruments.¹²⁴

1.5.2.4 To examine whether the preventive AML obligations for banks in South Africa can satisfactorily address TBML in the selected trade-finance instruments.¹²⁵

South African Supreme Court of Appeal relating to Demand Guarantees' (2014) 4 *TSAR* 661-675 at 661. See also Ch 3 para 3.2 et seq below.

¹²¹ See Ch 5 para 5.2 et seq below. See also Ch 3 para 3.3 et seq below; Ch 9 para 9.2 et seq below; and Ch 10 para 10.2 et seq below.

¹²² See Ch 5 para 5.2 below and Ch 9 para 9.2 below. See also Ch 2 para 2.3 et seq below; Ch 3 para 3.3 et seq below; and Ch 10 para 10.2 below.

¹²³ See Ch 5 para 5.3.2.4 and para 5.3.2.5 below. See also Ch 9 para 9.3 below; and Ch 10 para 10.3 below.

¹²⁴ See Ch 5 para 5.4.8 and 5.4.6 below. See also Ch 9 para 9.4 and para 9.5 below; and Ch 10 para 10.4 and para 10.5 below.

¹²⁵ See Ch 5 para 5.3.4 et seq. See also Ch 3 para 3.3 et seq below; Ch 9 para 9.6 et seq below; and Ch 10 para 10.6 et seq below.

1.5.2.5 To establish whether the South African financial intelligence unit (FIU) is adequately addressing TBML in the selected trade-finance instruments through any initiatives.¹²⁶

1.5.2.6 To examine if South Africa's customs authority plays an AML role that appropriately addresses the challenge of TBML in trade-finance instruments.¹²⁷

1.5.2.7 To establish whether there is an efficient information-sharing platform under the South African AML regime to combat TBML in the selected trade-finance instruments.¹²⁸

1.5.2.8 To determine the adequacy of AML efforts from the South African financial-services industry to effectively combat TBML in the selected trade-finance instruments.¹²⁹

1.5.2.9 To establish a way forward for the South African AML regime in the absence of a specific recommendation from the FATF against TBML in trade-finance instruments.¹³⁰

1.6 RESEARCH METHODOLOGY

1.6.1 Methods of Legal Research Used in the Thesis

This study employs a research method of purely doctrinal¹³¹ and legal comparative nature.¹³² The intention is to establish how the selected jurisdictions,¹³³ deal with the risk of TBML in trade-finance transactions so as to better understand the South African

¹²⁶ See Ch 5 para 5.4.2 below. See also Ch 9 para 9.12 et seq below; and Ch 10 para 10.7 below.

¹²⁷ See Ch 5 para 5.4.10 below. See also Ch 9 para 9.13 below; and Ch 10 para 10.8 below.

¹²⁸ See Ch 5 para 5.4.4 below. See also Ch 9 para 9.14 below; and Ch 10 para 10.9 below.

¹²⁹ See Ch 5 para 5.5 et seq below. See also Ch 9 para 9.15 below; and Ch 10 para 10.10 below.

¹³⁰ See Ch 4 para 4.3.2 et seq below; Ch 9 para 9.16 below; and Ch 10 para 10.11 below.

¹³¹ Doctrinal legal research is also known as theoretical legal research. It is that type of research which asks what the law is in a particular area through a collection and analysis of primary and secondary sources. Such exercise is often done from a historical perspective with the aim of not only describing but also of understanding how the law applies to situations, see Ian Dobinson & Francis Johns 'Qualitative Legal Research' in: Mike McConville & Wing Hong Chui (eds) *Research Methods for Law* (2007) 18-19.

¹³² For a discussion of the comparative method of law, see Konrad Zweigert & Hein Kötz *An Introduction to Comparative Law* 3 ed (1998) (hereinafter 'Zweigert & Kötz *Comparative Law*') passim; Kamba 'Comparative Law: A Theoretical Framework' (1974) 23 *The International and Comparative Law Quarterly* 485-519; Geoffrey Wilson 'Comparative Legal Scholarship' in: Mike McConville & Wing Hong Chui (eds) *Research Methods for Law* (2007) 87; and Edward J Eberle 'The Method and Role of Comparative Law' (2009) 8 *Washington University Global Studies Law Review* 451-485.

¹³³ See para 1.6.3 below. See also Ch 6; Ch 7; and Ch 9 below generally.

AML laws. Consequently, the findings may lead to the making of suggestions about the possible improvement of the South African AML regime against TBML in trade-finance instruments.

This study, therefore, employs a mixture of methods used in comparative legal research in order to achieve its stated aims and objectives.¹³⁴ Generally, there are no clearly agreed methods and approaches that one may use to conduct comparative legal research.¹³⁵ Nonetheless, this thesis uses one of the commonly used method of comparative legal research, namely, the functional method.¹³⁶ At the centre of this method, is the search for any functional similarities and differences between two or more legal systems and the provision of explanations for the findings.¹³⁷ Thus, this study relies on the functional method to examine the South African AML regime against the risk of TBML in selected trade-finance instruments and compare it with the AML regimes of three selected foreign jurisdictions.¹³⁸

The thesis also employs other secondary methods used in comparative legal research to augment the functional method. These methods are the law-in-context method,¹³⁹ the problem-solving approach,¹⁴⁰ and the historical method.¹⁴¹ In using these methods, this study relies on both primary and secondary sources of law.¹⁴² The study uses

¹³⁴ See para 1.5 above and para 1.6.2 below.

¹³⁵ See Charles Manga Fombad 'Comparative Research in Contemporary African Legal Studies' (2018) 67 *Journal of Legal Education* 984-1004 at 991.

¹³⁶ See Zweigert & Kötz *Comparative Law* 34; Ralf Michaels *The Functional Method of Comparative Law* (2006) 340.

¹³⁷ See Zweigert & Kötz *Comparative Law* 34; Michaels *The Functional Method* 340-341; and Fombad (2018) 67 *J Legal Edu* 984 at 996. See also Ch 9 para 9.2 et seq below.

¹³⁸ See para 1.6.3 below and para 1.5 above. See also Ch 3 para 3.3 et seq below; Ch 5 para 5.2 et seq below; Ch 6 para 6.2 et seq below; Ch 7 para 7.2 et seq below; Ch 8 para 8.2 et seq below; and Ch 9 para 9.2 et seq below.

¹³⁹ This method requires that social context and reality in which the law operates be taken into account when carrying out any legal comparison, see Fombad (2018) 67 *J Legal Edu* 984 at 997.

¹⁴⁰ Under this method the researcher addresses a specific problem and attempts to investigate how it is solved in different legal systems, see again Fombad (2018) 67 *J Legal Edu* 984 at 998.

¹⁴¹ This is part of the law-in-context method which seeks to understand how the present law or certain principles or institutions came to be by giving a historical overview, see Fombad (2018) 67 *J Legal Edu* 984 at 998.

¹⁴² For a further discussion of the distinction between formal and material or historical sources of the primary sources of the South African banking law, see WG Schulze 'The Nature of Banking Law and its Sources' in: Robert Sharrock (ed) *The Law of Banking and Payment in South Africa* (2016) (hereinafter Schulze 'The Nature of Banking Law') 28 et seq; and WG Schulze 'The Sources of South African Banking Law a Twenty-First Century Perspective (Part I)' (2002) 14 *South African Mercantile Law Journal* 438-461 at 443.

these sources to the extent that they aid in resolving the challenge of TBML in trade-finance instruments under the South African AML regime.¹⁴³

1.6.2 The Comparative Method of Legal Research: The Choice in Foreign Jurisdiction

This study employs comparative law¹⁴⁴ as a method¹⁴⁵ of legal research for two reasons. First, comparative law may provide answers to legal questions where neither principles of Roman-Dutch law nor modern South African banking law provide any. Secondly, comparative law may provide answers to legal questions where South African banking law is discordant with recent developments elsewhere.

Two reasons illustrate the significance of comparative law as a method of legal research. First, comparative law may result in the acquiring of knowledge and insight into a wide range of legal and cultural issues of the selected comparative jurisdictions.¹⁴⁶ Secondly, “the ultimate aim of comparative law is the improvement of one’s legal system”.¹⁴⁷ Practically, this aim is achieved by applying the knowledge that is acquired from a foreign legal system to the South African legal system.¹⁴⁸

¹⁴³ See *Standard Bank Investment Corporation Ltd v Competition Commission* [2002] (2) SA 797 (SCA) at 814F-G where the court acknowledged that foreign law may be used to aid in the interpretation of local statutes but in doing so, caution must be exercised to avoid using foreign law for the sake of it without taking into account local circumstances. See also Ch 3 para 3.3 et seq below; Ch 5 para 5.2 et seq below; and Ch 9 para 9.2 et seq below.

¹⁴⁴ The phrase ‘comparative law’ “signifies the systematic application of the comparative technique to the field of law. It means the study of, and research in, law by the systematic comparison of two or more legal systems; or of parts, branches or aspects of two or more legal system”, see Kamba (1974) 23 *International & Comparative Law Quarterly* 485 at 486. See also Zweigert & Kötz *Comparative Law* at 2 who note that the words ‘comparative law’ “suggest an intellectual activity with law as its object and comparison as its process”. See also Eberle (2009) 8 *Washington University Global Studies L R* 451-485. See also Ch 5; Ch 6; Ch 7; Ch 8; and Ch 9 below generally.

¹⁴⁵ For a discussion of the concept of ‘method’ and ‘methodology’ in legal research, see Simone Glanert ‘Method?’ in: Pier Giuseppe Monateri (ed) *Methods of Comparative Law* (2012) 61 et seq; and Mark van Hoecke ‘Legal Doctrine: Which Method(s) for What Kind of Discipline?’ in: Mark van Hoecke (ed) *Methodologies of Legal Research* (2011) 1 et seq.

¹⁴⁶ See Eberle (2009) 8 *Washington University Global Studies L R* 451 at 453. For this study, the term ‘comparative jurisdictions’ refers to England, the US and Singapore, see Ch 6; Ch 7; and Ch 8 below generally.

¹⁴⁷ Wilhelm Georg Schulze *Legal Aspects of the Insurance Premium* (unpublished LLD Thesis University of South Africa 1996) 6. See also Van Hoecke ‘Methodology of Comparative Legal Research’ 2; and Patrick H Glenn ‘Aims of Comparative Law’ in: Jan M Smits (ed) *Elgar Encyclopaedia of Comparative Law* (2006) (hereinafter Glenn ‘Aims of Comparative Law’) 58.

¹⁴⁸ See Schulze *Legal Premium* at 6; Glenn ‘Aims of Comparative Law’ 61.

Both descriptive and applied comparative law are employed in this study. Descriptive comparative law is different from applied comparative law.¹⁴⁹ It is a form of legal research in which “the legal researcher merely states the position in terms of a foreign legal system, without actually applying it to (or at least comparing it with) their legal system”.¹⁵⁰ Under applied comparative law,¹⁵¹ the role and statuses of legal institutions and laws of various selected jurisdictions will not only be described but will also be analysed with a view to borrowing and applying those principles that may be of use to the South African legal system.

In the last decade, the banking industry has become a globalised one.¹⁵² This globalisation element demands that banking regulators cooperate between and/or among themselves.¹⁵³ For South African banks to meaningfully combat TBML, which is often driven by organised crime, they have to comply with international standards.¹⁵⁴ To ensure that banks participate in the international community of banking, South African banking laws should be adapted and harmonised to be comparable with those of other progressive jurisdictions.¹⁵⁵

1.6.3 Justification of the Selected Comparative Jurisdictions

In this thesis, I compare the South African AML regime with that of England, the US, and Singapore.¹⁵⁶ The primary goal of the comparative approach is to determine if the AML policies from these jurisdictions can provide potential remedies to the deficiencies

¹⁴⁹ See Zweigert & Kötz *Comparative Law* 11.

¹⁵⁰ Schulze *Legal Premium* 6-7. See also Zweigert & Kötz *Comparative Law* at 11 who are of the opinion that ‘[c]omparative law offers the only way by which law can become international and consequently a science’.

¹⁵¹ See Zweigert & Kötz *Comparative Law* 11.

¹⁵² See Schulze ‘The Nature of Banking Law’ 27.

¹⁵³ Schulze ‘The Nature of Banking Law’ 27. The cooperation in the banking sector is increasingly becoming evident in such issues as bank regulation and money-laundering control. For example, to effectively combat TBML in trade finance, organisations such as the FATF, the ICC and the BAFT have come together to issue AML guidelines for financial institutions involved in trade finance. See The Wolfsberg Group, ICC & BAFT (2019 Amendment) *Trade-Finance Principles* passim.

¹⁵⁴ See Hataley (2020) *JMLC* 1 at 1; and Geldenhuys (April 2016) 109 *Servamus* 10-13. In the context of money-laundering control, South Africa is a member of the FATF at the international level and of the EAASMLG at the regional level with obligations to comply with international AML standards to avoid being sanctioned through various measures, including de-risking. See Ch 4 para 4.3.2 for a detailed discussion of both the FATF and the EAASMLG.

¹⁵⁵ Schulze ‘The Nature of Banking Law’ 27.

¹⁵⁶ See Ch 5; Ch 6; Ch 7; and Ch 8 below generally. See also Ch 9 para 9.2 et seq below.

of the South African AML regime against TBML in the selected trade-finance instruments.¹⁵⁷

1.6.3.1 English Law¹⁵⁸

I have chosen the English legal system for this comparative study for the reasons that follow. Throughout history, English law has had a significant impact on the legal systems of its former colonies, including South Africa.¹⁵⁹ The influence of English law on South African banking law has always been there as early as the 18th century and continued to expand over the years.¹⁶⁰ Although English banking law no longer has any binding authority in South Africa, its influence will remain through the doctrine of judicial precedent.¹⁶¹ Through the formal and informal introduction of English banking law to South African banking law, some principles of English banking law have become part of our South African law.¹⁶² Schreiner argues that the principle of binding precedent is the greatest contribution of English law to the South African legal system.¹⁶³ For example, courts of law in South Africa have occasionally cited English cases in lawsuits about banking practices where the law had not yet already been settled by an authoritative decision.¹⁶⁴ It is because of this partly shared legal history

¹⁵⁷ See para 1.5 above and Ch 3 para 3.3.1 et seq below. See also Ch 5 para 5.2 et seq below and Ch 9 para 9.2 et seq below.

¹⁵⁸ For an expansive discussion of the English AML regime in the context of TBML control in trade-finance instruments, see Ch 6 para 6.1 et seq below.

¹⁵⁹ See WG Schulze 'The Sources of South African Banking Law a Twenty-First Century Perspective (Part II)' (2002) 14 *SA Merc L J* 601 at 619. English law was influential in the development of South African law, including our banking law. By way of a general historical account, Roman-Dutch law first became the law of South Africa only to be infiltrated by English law after the first and second British occupation in 1795 and 1806, respectively. See Schulze 'The Nature of Banking Law' 52 et seq; Du Bois 'Introduction: History, System and Sources' in: CG van der Merwe & Jacques E du Plessis (eds) *Introduction to the Law of South Africa* (2004) 1 et seq; and F R Malan & J T Pretorius 'Contemporary Issues in South African Banking Law' (2001) 64 *Journal of Contemporary Roman-Dutch Law* 268-288 at 268.

¹⁶⁰ See Malan & Pretorius (2001) 64 *THRHR* 268 at 268; Schulze (2002) 14 *SA Merc L J* 601 at 619 and François du Bois 'Introduction: History, System and Sources' in: CG van der Merwe & Jacques E du Plessis (eds) *Introduction to the Law of South Africa* (2004) 1 et seq.

¹⁶¹ Schulze (2002) 14 *SA Merc L J* 601 at 619.

¹⁶² For instance, similarities continue to be experienced in areas such as the banker-customer relationship, see the English case of *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461CA and its influence on the South African bank's duty of confidentiality. See also Malan & Pretorius (2001) 64 *THRHR* 268 at 268.

¹⁶³ See The Hon O D Schreiner *The Contribution of English Law to South African Law and the Rule of Law in South Africa* (1967) 11.

¹⁶⁴ For example, in *Standard Bank of SA Ltd v Minister of Bantu Education* 1966(1) SA 229(N) 240-241 the court cited English cases to determine who qualifies as a customer of a bank. Some of

and its subsequent influence, that the English banking law forms an indispensable comparative source for the South African banking law.¹⁶⁵

South Africa has since developed its legal system distinct from the English legal system. However, our courts continue to regard English banking law as persuasive in the development of local banking law.¹⁶⁶ There are also other justifications for the continued reliance on the English-law system as a secondary source of law. Such justification includes the use of English law for persuasive purposes and law reform.¹⁶⁷ English law also continues to play a significant role in the moulding of South African law in areas such as documentary credits and other forms of trade finance.¹⁶⁸

1.6.3.2 American Law¹⁶⁹

The US legal system¹⁷⁰ is the second jurisdiction I have selected for this comparative study. The following reasons justify the choice of the US for comparative purposes. The US AML regime is arguably one of the best in the world.¹⁷¹ It has been involved in the fight against money laundering since the 1970s.¹⁷² For example, the Know Your Customer (KYC) principle that is widely used in the screening of customers for suspicious money-laundering activity originated with the passage of the Bank Secrecy

the cases the court cited include *Importers Company v Westminster Bank Ltd* [1927] 2 KB 297 and *The Great Western Railway Co v London and County Banking Co Ltd* [1901] AC 414.

¹⁶⁵ Schulze 'The Nature of Banking Law' 53.

¹⁶⁶ Schulze (2002) 14 SA Merc L J 601 at 624.

¹⁶⁷ Ibid.

¹⁶⁸ See Schulze (2002) 14 SA Merc L J 601 at 625. See also Charl Hugo 'Payment in and Financing of International Sale Transactions' in: Robert Sharrock (ed) *The Law of Banking and Payment in South Africa* (2016) (hereinafter Hugo 'Financing of International Sale') 415 who notes that 'our courts regard English case law as highly influential (if not authoritative) in the law relating to letters of credit'.

¹⁶⁹ For an expansive discussion of the US AML regime in the context of TBML control in trade-finance instruments, see Ch 7 para 7.1 et seq below.

¹⁷⁰ The use of the phrase 'US legal system' or 'the US' is consistent with the way it is generally referred to in various literature, including those from the US itself, see Federal Judicial Centre, 'The US Legal System: A Short Description' <https://ar.usembassy.gov> [Accessed on 7 May 2021]. See also Van Jaarsveld *Money Laundering* 363 et seq who uses the terms 'the US AML regime' or 'US law' in her discussion of the US jurisdiction's AML regime in comparison to that of South Africa.

¹⁷¹ See Van Jaarsveld *Money Laundering* 28; and John Madinger *Money Laundering: A Guide for Criminal Investigators* 3 ed (2012) (hereinafter 'Madinger *Money Laundering*') 11 et seq. See also Cassara *Next Frontier* at 2 who notes that, the international community gradually adopted the US model for combatting money laundering. As regards the discussion of the US AML regime, see Ch 7 below generally.

¹⁷² See Ch 7 below passim. See also Van Jaarsveld *Money Laundering* 28; Hamman *AML Legislation* 30.

Act (BSA) in 1970 in the US.¹⁷³ The US is also the first country in the world to criminalise money laundering. It enacted a piece of legislation that is still one of the most comprehensive laws in the world, namely, the Money Laundering Control Act of 1986 (MLCA).¹⁷⁴ Certain areas of the AML laws of South Africa are based on the law of the US.¹⁷⁵ For example, civil forfeiture under the South African AML law almost mirrors the statutory provisions in the US.¹⁷⁶ Both the US and South Africa are members of the FATF committed to implementing the same international standards against money laundering.¹⁷⁷ Of the two jurisdictions, the US has a longer history of combatting money laundering than South Africa.¹⁷⁸ Therefore, an examination of the US AML regime would likely provide lessons for possible application to South African problems, particularly, against the threat of TBML in trade-finance transactions.

1.6.3.3 Singapore Law¹⁷⁹

The Singapore legal system is the third comparative jurisdiction for this study. The reasons for selecting this jurisdiction are as follows. First, just like South Africa, the Singapore legal system is a product of the English legal system.¹⁸⁰ The Second Charter of Justice of 1826 provided a legal basis for the general reception of English

¹⁷³ For a brief discussion of the BSA and other US AML laws, see Ch 7 para 7.3.2 below. Under the South Africa the KYC is incorporated under s 21 of the FICA, see Louis de Koker 'Client Identification and Money-Laundering Control: Perspectives on the Financial Intelligence Centre Act 38 of 2001' (2004) 4 *TSAR* 715-746 at 717.

¹⁷⁴ Title 18, US Code Section 1956. See Cassara *Next Frontier* at 202.

¹⁷⁵ See Van Jaarsveld *Money Laundering* 28. See also *National Director of Public Prosecutions v Prophet* 2003(8) BCLR906(C) at para 23 where the court noted that the majority of South Africa's civil forfeiture laws are derived from US statutes and that because the US has had experience with civil forfeiture, its case law would provide great comparative study material.

¹⁷⁶ See *Prosecutions v Prophet* 2003(8) BCLR906(C) at para 23.

¹⁷⁷ See Ch 4 below para 4.3.2 below.

¹⁷⁸ See Ch 7 below *passim*.

¹⁷⁹ For an expansive discussion of Singapore AML regime in the context of TBML control in trade-finance instruments, see Ch 8 para 8.1 et seq below.

¹⁸⁰ See Gary Kok Kew Chan & Eugene K B Tan *Introduction to the Singapore Legal System* (2005) (hereinafter 'Chan & Tan *Singapore Legal System*') 12. See also *R v Willans* (1858) 3 Ky 16; *In the Goods of Abdullah* (1835) 2 Ky 8; and *Ong Cheng Neo v Yeap Cheah Neo* (1872) 1 Ky 326; Andrew Phang 'Reception of English Law in Singapore: Problems and Proposed Solutions' (1990) 2 *SAC L J* 20-40 at 21; Kevin Tan & Li-ann Thio 'Singapore: Inherited Law and Sources of Law' (1993) 191 *Asia-Pacific Constitutional Year Book* 191-242 at 191; Reginald H Hickling 'Language, Law and Singapore' (1975) 17 *Malaya L Rev* 136-148 at 136; Jiang Yu Wang 'Making Singapore Company Law More Singaporean? A Critical Examination of the Recent Revision of the Companies Act in the Light of Comparative Law' (2014) 14 *The Asian Business Lawyer* 1-21 at 3; and Yihan Goh 'Statutory Interpretation in Singapore' (2009) 21 *SAC L J* 97-134 at 100 note 12.

law in Singapore.¹⁸¹ However, with independence, there has been a gradual movement towards developing a Singapore legal system independent of the English legal heritage.¹⁸² Although English law still applies in certain selected areas,¹⁸³ the Singapore legal system now represents a system of law that has detached itself from its historical roots. The courts in Singapore have made significant departures from the decisions of the English courts based on the need to adapt to local circumstances and conditions. As some scholars in Singapore note, there has been an increased acknowledgement of local jurisprudence in the evolution of Singapore's common law.¹⁸⁴

Secondly, Singapore has established itself as a leading global financial centre.¹⁸⁵ In the 2023 ranking of the Global Financial Centres Index,¹⁸⁶ Singapore has been ranked the third most competitive financial centre in the world surpassed only by New York in the US and London in the United Kingdom (UK).¹⁸⁷ The country's origins as a financial centre can be traced back to its colonial origins in 1819 when Sir Stamford Raffles¹⁸⁸

¹⁸¹ See *R v Willans* (1858); Phang (1990) 2 *SAC L J* 20 at 21; Tan & Thio (1993) 191 *Asia-Pac Const Y B* 191 at 191; Hickling (1975) 17 *Malaya L Rev* 136 at 136; and Wang (2014) 14 *The Asian Business Lawyer* 1 at 3. As for the legal history of Singapore in general, see Chan & Tan *Singapore Legal System* 2 et seq.

¹⁸² See Chan & Tan *Singapore Legal System* 1; Goh (2009) 21 *SAC L J* 100 note 12; Wang (2014) 14 *The Asian Business Lawyer* 1 at 2; and Tan & Thio (1993) 191 *Asia-Pac Const Y B* 191 at 193.

¹⁸³ See the Application of the English Law Act (Cap 7A, 1994 Rev Ed). Section 3 of that Act states that the common law of England will continue to be in force in Singapore as long as it suits the circumstances of Singapore and subject to such modifications as these circumstances may require. Section 4 of the Act as read with the First Schedule specifies the English pieces of legislation, with the necessary modifications, that continue to apply in Singapore. See also Goh (2009) 21 *SAC L J* 100 note 12; Tan & Thio (1993) 191 *Asia-Pac Const Y B* 191 at 193.

¹⁸⁴ See Chan & Tan *Singapore Legal System* 7. See also Tan & Thio (1993) 191 *Asia-Pac Const Y B* 191 at 193; Wang (2014) 14 *The Asian Business Lawyer* 1 at 2 et seq.

¹⁸⁵ See Christian Hofmann 'Shadow Banking in Singapore' (2017) *Singapore Journal of Legal Studies* 18-52 at 18.

¹⁸⁶ This is a ranking done by the China Development Institute in collaboration with Z/Yen Partners in England. The Global Financial Centres Index is compiled using 134 quantitative measures provided by third parties that include the World Bank, the United Nations, the Economic Intelligence Unit and the Organisation for Economic Co-operation and Development (OECD). See <https://www.zyen.com> [Accessed on 22 July 2020].

¹⁸⁷ See Long Finance & Financial Centre Futures (March 2023) 'The Global Financial Centres Index-Long Finance' <https://www.longfinance.net> [Accessed on 11 August 2023].

¹⁸⁸ As described by Chan & Tan *Singapore Legal System* at 2 'Raffles presciently determined Singapore's strategic geopolitical location; it gave the British a good measure of control over the entrance to the Straits of Malacca as well as the main shipping route between South Asia and North-East Asia. Singapore rapidly evolved into a key trading port'. As regards the socio-economic development history of Singapore as a nation and its associated politics, see Yew Lee Kuan *From Third World to First-The Singapore Story: 1965-2000* (2012) passim. See also Wang (2014) 14 *The Asian Business Lawyer* 1 at 3.

first established a trading post of the British East India Company.¹⁸⁹ To date, Singapore is a flourishing financial centre of international status serving both the local and Asia-Pacific markets.¹⁹⁰ As a trading and transportation centre, Singapore is also vulnerable to the risks of TBML in trade-finance transactions.¹⁹¹ In light of the magnitude of the money-laundering challenge globally, Singapore recognises the importance of a vibrant and effective AML regime to sustain a competitive financial centre, which it has become in Asia.¹⁹² The Monetary Authority of Singapore (MAS) is one of the leading authorities in the fight against TBML.¹⁹³ The MAS has issued guidance on AML in trade finance and correspondent banking.¹⁹⁴ Therefore, it is significant to examine the guidance to see how it may inform the interpretation of the AML laws in Singapore. Such a process would assist in drawing inferences for extrapolation purposes to the South African context.

Similar to South Africa, Singapore is also a member of the Asia-Pacific Group¹⁹⁵ (APG), a FATF-Style Regional Body.¹⁹⁶ The APG has issued a guidance note against TBML.¹⁹⁷ As FATF members, Singapore and South Africa are committed to implementing and sustaining internationally recognised standards against money laundering, including TBML.¹⁹⁸ The inclusion of Singapore in this study is intended to give an Asian-Pacific perspective on the combatting of TBML in trade finance for which lessons may be drawn for South Africa.

¹⁸⁹ Woo Jun Jie *Singapore's Transformation into a Global Financial Hub* (2017) 1.

¹⁹⁰ See Hofmann (2017) *Sing J Legal Stud* 18 at 18; and SLA www.singaporelaw.org [Accessed on 28 September 2018].

¹⁹¹ See Liao & Acharya (2011) 14 *JMLC* 79 at 80 et seq; and MAS www.mas.gov.sg [Accessed on 25 September 2017].

¹⁹² Pieth & Aiolfi (eds) *A Comparative Guide to Anti-Money Laundering: A Critical Analysis of Systems in Singapore, Switzerland, the UK and the USA* (2004) 64.

¹⁹³ As regards an expansive discussion of the MAS and its role against TBML in trade-finance instruments, see Ch 8 para 8.5.2 below.

¹⁹⁴ See the Guidance at www.mas.gov.sg [Accessed on 07 September 2019].

¹⁹⁵ Founded in 1997 in Bangkok, Thailand, the APG is an autonomous and cooperative global organisation with 41 members, including Singapore, and other international and regional observers, see <https://www.apgml.org> [Accessed on 30 August 2020].

¹⁹⁶ For the contribution of the APG against TBML in trade-finance instruments, see Ch 4 para 4.3.4 below.

¹⁹⁷ See APG (2012) *Trade-Based Money Laundering Report*. Singapore has since made a follow up to this report by producing its own ACIP (2018) *Best Practices for Countering Trade-Based Money Laundering Report*.

¹⁹⁸ See the MAS www.mas.gov.sg [Accessed on 25 September 2017]. See also Ch 4 para 4.2 et seq below.

1.6.4 The Comparative Research Approach Used in the Thesis

In comparative legal research, a study can employ either a micro-comparison or macro-comparison. A micro-comparison limits its scope to examining specific legal institutions or rules that are designed to solve a particular problem.¹⁹⁹ By contrast, macro-comparison, while dealing with two or more legal systems, compares their spirit, style and other general issues. This study employs a macro-legal comparative research in order to capture the international nature of the issues being examined, namely, TBML and trade-financing operations.²⁰⁰

The South African AML regime is explained first and then considered comparatively with those of the selected jurisdictions.²⁰¹ The idea is to compare and contrast, at a macro-level, how the different AML systems in those jurisdictions have responded or are responding to the threat of TBML particularly in so far as it affects trade-finance instruments.²⁰² To meaningfully employ comparative law, the same topics investigated under the South African AML law are replicated in the other selected jurisdictions.²⁰³ This is also done partly to facilitate the way comparative materials are applied to the selected jurisdictions and partly to compare ‘comparable’ issues.²⁰⁴

1.7 SIGNIFICANCE OF THE STUDY

This study attempts to contribute to the existing literature²⁰⁵ on the South African AML measures by adding the trade-finance dimension.²⁰⁶ Studies have been done before about trade-finance instruments such as documentary credits²⁰⁷ and demand

¹⁹⁹ See Fombad (2018) 67 *J Legal Edu* 984 at 994.

²⁰⁰ For a discussion of the comparative jurisdictions, see Ch 6; Ch 7; and Ch 8 below generally. See also Ch 9 para 9.2 et seq below.

²⁰¹ See Ch 5; Ch 6; Ch 7; and Ch 8 below, generally. For an analysis of issues identified in the comparative chapters, see Ch 9 below generally.

²⁰² For an analysis of the possible threat of TBML in selected trade-finance instruments, see Ch 3 para 3.3 et seq below.

²⁰³ See Ch 5; Ch 6; Ch 7; and Ch 8 below generally. See also Ch 9 para 9.2 et seq below.

²⁰⁴ See Zweigert & Kötz *Comparative Law* 34. See also Ch 9 para 9.2 et seq below.

²⁰⁵ See, for example, Van Jaarsveld *Money Laundering*; Burdette *Reporting Obligations*; Hamman *AML Legislation*; Moodley *Extent of Money Laundering*; and De Koker ‘Money Laundering in South Africa’ passim.

²⁰⁶ See Ch 3 para 3.3 et seq below and Ch 5 para 5.2 et seq below.

²⁰⁷ See Hugo *Documentary Credits*; Schulze (2009) 21 *SA Merc L J* 228 at 228-248; and AN Oelofse ‘Developments in the Law of Documentary Letters of Credit’ (1996) 8 *South African Mercantile Law Journal* 56-74.

guarantees.²⁰⁸ However, none of them has been focusing on the potential risks of TBML that are likely to be encountered in these instruments. In the same measure, works have been undertaken about money laundering under the South African law²⁰⁹ with none of them focusing on the potential TBML in trade-finance instruments. This study, therefore, analyses the South African AML regime in order to establish how it could be applied in the context of TBML in trade-finance instruments.²¹⁰ The combination of TBML and trade-finance in the context of South Africa has not been investigated before. The risk-based approach (RBA) and customer due diligence (CDD),²¹¹ for example, are standard techniques in AML programmes for combatting money laundering.²¹² Despite the fact that the FICA has provisions for these, it is not clear how such standard techniques can be used against TBML in trade-finance transactions since they were designed for traditional²¹³ money-laundering methods.

1.8 SCOPE OF THE THESIS

This study is restricted to the trade-finance component of international trade.²¹⁴ This is an activity whereby financial institutions process trade documents representing the transactions. It is in these documents where financial institutions can apply control measures against TBML.²¹⁵ In its broader context, TBML is only discussed to the extent that it assists in the understanding of how it affects the operation of trade-

²⁰⁸ See Kelly-Louw *Demand Guarantees* passim; WG Schulze 'Strict Conformity of Documents under a Performance Guarantee' (2009) *Obiter* 411 at 411; Charl Hugo 'Bank Guarantees' in: Robert Sharrock (ed) *The Law of Banking and Payment in South Africa* (2016) (hereinafter Hugo 'Bank Guarantees') 438; and Tiny Musesengwa *Unconscionability and a Breach of a Negative Stipulation in the Underlying Contract as Exceptions to the Autonomy Principle of Demand Guarantees in South Africa* (unpublished LLD Thesis University of South Africa, 2022).

²⁰⁹ See again, for example, Van Jaarsveld *Money Laundering*; Burdette *Reporting Obligations*; Hamman *AML Legislation*; Moodley *Extent of Money Laundering*; and De Koker 'Money Laundering in South Africa' passim.

²¹⁰ See Ch 5 para 5.2 below and Ch 3 para 3.3 et seq below. See also Ch 9 para 9.2 et seq below.

²¹¹ The Customer Due Diligence requirement was first introduced in South Africa in 2001 by the FICA 38 of 2001. The FICA (Amendment) 1 of 2017 strengthens and modernises this CDD/KYC requirement by introducing a risk-based system of KYC, see National Treasury <https://www.treasury.co.za> [Accessed on 23 September 2017].

²¹² See Ch 5 para 5.3.4 et seq below.

²¹³ The terms 'traditional' or 'traditional money laundering' are used in this thesis to denote and distinguish TBML as a 'new method' of money laundering different from those other methods such as cash smuggling and abuse of the financial system. See also Naheem *Exploring TBML* 128; Chhina (2014) *JIBLR* 665 at 665; and Cassara *Next Frontier* 2.

²¹⁴ See Ch 3 para 3.3.1 below. See also para 1.4.2 above.

²¹⁵ See Ch 3 para 3.2 below.

finance instruments.²¹⁶ The thesis scrutinises the risks of TBML in trade-finance instruments against the current South African AML regime,²¹⁷ international best practice,²¹⁸ and other selected comparative jurisdictions to establish whether financial institutions operating in South Africa are not in danger of non-compliance with the law.²¹⁹

For purposes of this research, an exhaustive discussion of the development and history of the selected trade-finance instruments is not required.²²⁰ However, a general discussion of the nature and operation of these instruments is essential for a proper understanding of how the threat of TBML can affect them.²²¹

1.9 ASSUMPTIONS OF THE STUDY

This thesis is based on the assumption that the primary legislation under the South African AML regime, namely, the POCA and the FICA adequately address money laundering in general.²²² However, the AML regime provided for under these laws and the available institutional capacity are not adequate to address TBML in trade-finance instruments.²²³ The thesis hypothesises that the current state of the South African AML laws have loopholes that make them vulnerable to TBML in trade-finance transactions.²²⁴ Thus, the thesis proceeds on the assumption that a comparative study of the South African AML regime with those of the selected jurisdictions will yield a different perspective on how to combat TBML in the best possible way.²²⁵

²¹⁶ See Ch 2 para 2.3 below. See again para 1.4.2 above.

²¹⁷ See Ch 3 para 3.3 et seq below and Ch 5 para 5.2 et seq below.

²¹⁸ See Ch 4 para 4.2 et seq below.

²¹⁹ See Ch 5; Ch 6; Ch 7; Ch 8; and Ch 9 below generally.

²²⁰ For a detailed discussion of some of these instruments, see Michelle Kelly-Louw *Selective Legal Aspects of Bank Demand Guarantees The Main Exceptions to the Autonomy Principle* (2009); Hugo *The Law Relating to Documentary Credits from a South African Perspective with Special Reference to the Legal Position of the Issuing and Confirming Banks* (published LLD Thesis University of Stellenbosch 1996); and AN Oelofse 'Developments in the Law of Documentary Letters of Credit' (1996) 8 *South African Mercantile Law Journal* 56-74. See also Ch 3 para 3.3 et seq below.

²²¹ See Ch 3 para 3.3 et seq below.

²²² See Ch 5 para 5.3.2 below.

²²³ See Ch 5 para 5.3.4 et seq below. See also Ch 3 para 3.3 et seq below and Ch 9 para 9.2 et seq below.

²²⁴ See Ch 5 para 5.3.4 et seq below. See also Ch 3 para 3.3 et seq below and Ch 9 para 9.2 et seq below.

²²⁵ See Ch 9 para 9.2 et seq below and Ch 10 para 10.2 et seq below.

1.10 LIMITATIONS OF THE STUDY

There is a dearth of literature specific to TBML in trade finance in the context of South Africa.²²⁶ The only available literature in South Africa is largely on money laundering in general and some types of the selected trade-finance instruments such as demand guarantees and documentary credits.²²⁷ Much of the literature on TBML relied upon in the study is from other jurisdictions such as England, the US and international organisations.²²⁸ These literature sources may not directly speak to the context of the South African jurisdiction. However, the aim is that the literature sources may shed more light and provide answers on the problem of TBML for the South African jurisdiction. In addition, the comparative legal-research method this thesis largely relies on, may also constitute a limitation.²²⁹ This is because the method may not accurately reflect the gaps that exist between the law in the books or under legislation, on the one hand, and the law in action, on the other hand, as applied in the selected comparative jurisdictions.

1.11 TERMINOLOGY USED IN THE THESIS

This thesis attempts to consistently refer to terms by a particular name to avoid confusion. For instance, documentary collections are referred to as such. The name 'bills of collection' is avoided.

Documentary credits may be referred to by various terms. They may be called 'letters of credit', 'independent undertakings' 'documentary letters of credit', 'commercial letters of credit', or simply 'trade-finance instruments'.²³⁰ There seems to be no consistency in the way documentary credits have been termed across jurisdictions. Even the ICC does not indicate some form of consistency in this regard. In the introductory part of the UCP rules it uses the term 'letter of credit' while in the first two articles, it uses the term 'documentary credit' and thereafter the abbreviation 'credit' only.²³¹ In this thesis, the instruments are referred to as 'documentary credits'. The

²²⁶ See Ch 5 below generally.

²²⁷ See Ch 2 para 2.2 below; Ch 3 para 3.3 below and Ch 5 para 5.2 et seq below.

²²⁸ See Ch 6; Ch 7; and Ch 4 below generally.

²²⁹ See para 1.6 above.

²³⁰ See Oelofse (1996) 8 *SA Merc L J* 56-74; Schulze (2009) 21 *SA Merc L J* 228-248; Hugo (2017) *TSAR* 1-20; and Kelly-Louw *Demand Guarantees* passim.

²³¹ See Introduction to the UCP 600; Article 1 of UCP 600.

terms 'letters of credit' or commercial letters of credit' are avoided. The choice is in line with the term used by the ICC to describe the instruments under the UCP.

Just like documentary credits, demand guarantees can also be referred to by various names. They can be referred to as 'independent undertakings', 'performance guarantees', 'tender guarantees', 'independent (bank) guarantees', 'demand guarantees', 'first demand guarantees' or 'bank guarantees'.²³² In this study, unless the context indicates otherwise, or the intention is to draw some distinction between the types of guarantees, it is referred to simply as a 'demand guarantee'. The term 'demand guarantee' is also consistent with how the instrument is referred to under the Uniform Rules for Demand Guarantees (URDG).²³³

Standby letters of credit are known by various names such as 'performance standby', 'advance payment standby', 'bid bond/tender bond standby', 'counter standby', 'financial standby', or simply 'standby'.²³⁴ These various ways of referring to the same instrument are usually for classification purposes based on their function in the underlying transaction. This thesis refers to it as a 'standby letter of credit'. The reference is also consistent with how the instruments are called under ISP.

Where the context demands the term 'trade finance', 'trade-finance instruments' or 'trade-finance transactions' are used to refer collectively to the documentary credits, demand guarantees, documentary collections and the standby letter of credit. The choice of the terms 'trade finance' 'trade-finance transactions' or 'trade-finance instruments' is motivated by the current use of the term by internationally significant institutions.²³⁵ These institutions are amongst those involved in the combatting of money laundering and those governing the operation of the instruments.²³⁶

²³² See Kelly-Louw *Demand Guarantees* 1; Roy Goode 'Abstract Payment Undertakings in International Transactions' (1996) 22 *Brooklyn Journal of International Law* 1-20 at 15; and Schulze (2009) 30 *Obiter* 411 at 411.

²³³ See Article 1 of Uniform Rules for Demand Guarantees, ICC Publication No 758, Paris (2010) (URDG758).

²³⁴ See Preface to the International Standby Practices, ICC Publication No 590, Paris (1998) (ISP98) at 5. See also Carter H Klein 'Standby Letter of Credit Rules and Practices Misunderstood or Little Understood by Applicants and Beneficiaries' (2007) 40 *Uniform Com Code Law* 125'-168 at 126; and Jacob E Sifri *Standby Letters of Credit: A Comprehensive Guide* (2008) (hereinafter 'Sifri *Standby Letters*') 3.

²³⁵ See Ch 4 para 4.4 et seq below.

²³⁶ See generally Ch 4 below.

The terms ‘financial institutions’ and ‘banks’ or ‘financial institution’ and ‘bank’ are also used interchangeably in this thesis. Although the term ‘financial institution’ may refer to other entities which are not necessarily banks, such as insurance companies or pension institutions, whenever this term is used in this study, the intention is to refer to banks. Although an attempt is made to distinguish between the terms ‘TBML’ and ‘money laundering’, these are sometimes used interchangeably unless the context demands otherwise.

1.12 REFERENCING STYLE USED IN THE THESIS

In this thesis, a source is cited in full for the first time and a short version of the citation is used throughout thereafter. Authors are referred to in the footnotes by their surnames only in the short format while their first names appear only when the source is cited for the first time in full. At the end of the thesis, a bibliography is provided containing the full references of every source cited next to the short form used in the footnotes. Furthermore, in the footnotes, the abbreviation ‘ch’ is used for chapter while ‘para’ is used for paragraph, ‘s’ for section or ‘ss’ for sections. The Latin phrases ‘*ibid*’ for ‘as above’, ‘*idem*’ for ‘in the same place’, ‘*et seq*’ for ‘and what follows’ are also used in the footnotes. The term ‘*passim*’ is used interchangeably with ‘generally’ to mean the same thing in the footnotes. Additionally, all references to dollars or USD\$, are a reference to United States Dollars.

1.13 THESIS STRUCTURE AND CHAPTER OVERVIEW

This thesis has ten chapters that are structured as follows:

Chapter 1 deals with the general research context. It outlines the problem statement, the theoretical and conceptual frameworks, and the aims and objectives of the study. The chapter introduces the themes of money laundering and TBML in South Africa. Chapter 2 discusses the concept of money laundering and TBML in broader terms to provide the general jurisprudence of the major theme of the thesis. The chapter discusses the nature, magnitude and methods of TBML and its effects on the economy.

Chapter 3 discusses the nature and operation of selected trade-finance instruments and how they may be affected by the risk of TBML.

Chapter 4 gives an international dimension to the control of TBML. The chapter discusses various positions of internationally significant bodies in the fight against money laundering and how they have contributed to the fight against TBML.

Chapter 5 discusses the control of TBML in trade-finance instruments under South African law. Under the chapter, I attempt to establish the presence of weaknesses under the regime against TBML particularly in the context of trade finance. Thus, the chapter examines the South African AML regime to establish if it may adequately be deployed against TBML.

Chapter 6 examines the control of TBML in trade-finance instruments under English law. The chapter follows the structure and style of chapter 5 for ease of comparison under chapter 9.

Chapter 7 discusses the control of TBML in trade-finance instruments under US law. The chapter also follows the structure and style of chapter 5 for ease of comparison under chapter 9.

Chapter 8 provides for the control of TBML in trade-finance instruments under Singapore law. The chapter also follows the structure and style of chapter 5 for ease of comparison under chapter 9.

Chapter 9 is the comparative analysis of the legal systems investigated in relation to the control of TBML in trade-finance instruments. In this regard, it compares the South African AML regime with the AML regimes of the England, the US, and Singapore and how they respond to the risk of TBML in the selected trade-finance instruments.

Chapter 10 provides some guidelines, conclusions and recommendations to improve the South African AML regime against TBML in trade finance.

CHAPTER 2: THE JURISPRUDENCE OF MONEY LAUNDERING AND TBML

2.1 INTRODUCTION

Money laundering has affected every country in the world, including South Africa.¹ The presence of organised crime groups in South Africa has made the country vulnerable to many forms of financial crime, including potential TBML.² The desire to acquire and use illegal money with little to no detection by law enforcement authorities has motivated organised-crime syndicates to devise more and new methods of money laundering that are difficult to detect, including TBML.³ This type of money laundering has the potential to harm both the international trade system and financial institutions.⁴

In the previous chapter, I introduced the general theme of the thesis.⁵ The concepts, scope and methodology to be applied in this study were also introduced.⁶ This chapter gives an overview of the nature of TBML.⁷ The objective is to lay the foundation on how TBML may affect selected trade-finance instruments, a question that is explored in more detail in chapter three below.⁸ To appreciate TBML, the chapter begins by giving an overview of money laundering.⁹ It should be noted that TBML is a slight variation of the money-laundering process in the traditional sense.¹⁰ It comes in various typologies and techniques that exploit the international trade and finance sectors.¹¹ Thus, the focus of this chapter is an exposition of the issue of TBML in a broad sense.¹²

¹ For an examination of the South African AML regime, see Ch 5 below generally.

² See Ch 5 para 5.2 below.

³ See Ch 2 para 2.3 et seq below.

⁴ For a discussion of the effects of TBML, see para 2.5 et seq below.

⁵ See Ch 1 above generally.

⁶ See again Ch 1 above generally.

⁷ See para 2.3 et seq below.

⁸ See Ch 3 para 3.3 et seq below.

⁹ See Ch 2 para 2.2 below.

¹⁰ Whereas money laundering in general may be undertaken through any means suitable to the launderer, TBML relies solely on manipulating the trade system to achieve the same goal under money laundering, see para 2.2 and para 2.3 below for a brief discussion of the two.

¹¹ See Ch 2 para 2.3 et seq and Ch 3 para 3.3 et seq below.

¹² By the phrase 'TBML in the broad sense' I mean TBML in its generic form whereby it is capable of affecting various sectors and environments of a country's economy. This has to be contrasted with 'TBML in the narrow sense', by which, for purposes of this study, I mean TBML in the context of trade finance wherein it affects the financing component of international trade, see Ch 3 para 3.2 et seq below. See also Ch 1 para 1.8 above as regards the scope of this thesis.

2.2 THE NATURE OF MONEY LAUNDERING

2.2.1 General

When money is 'clean', it is worth more than 'dirty money'.¹³ It could be invested profitably or spent with freedom and without the risk of incrimination.¹⁴ 'Dirty money', however, cannot be spent visibly because it attracts punishment from law enforcement authorities.¹⁵ In order to enjoy 'dirty money', criminals must 'clean' or 'wash' it first, to disguise its tainted source or the identity of those who generated it.¹⁶ Money laundering is that process that does the 'magic' for criminals.¹⁷ It facilitates the conversion of illegally obtained funds into some deceptive appearance of legitimately earned funds.¹⁸ Money laundering poses a serious threat to legitimate human enterprising in the business world.¹⁹ Policymakers globally, have devoted much effort to fighting money laundering.²⁰ As a global problem, money laundering became criminalised in the last three decades.²¹ The practice, however, could be traced back to ancient times.²² In those ancient times, false trading was employed to facilitate the

¹³ See Peter Alldridge *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* (2003) (hereinafter 'Alldridge Money Laundering Law') 1; Michael Levi & Peter Reuter 'Money Laundering' (2006) 34 *Crime and Justice* 289-375 at 289. The concept of 'dirty money' denotes money tainted with criminal association or identified as the proceeds of criminal activities, see Baker *Capitalism* 23 et seq who explains that there are three forms of 'dirty money', namely, criminal, corruption and commercial.

¹⁴ See Levi & Reuter (2006) 34 *Crime and Justice* 289 at 289; Alldridge *Money Laundering Law* 1.

¹⁵ See Alldridge *Money Laundering Law* 1; Miriam Wasserman 'Dirty Money' (2002) 1 *Regional Review* 15-21 at 16.

¹⁶ See Levi & Reuter (2006) 34 *Crime and Justice* 289 at 289; Wasserman (2002) *Regional Review* 15 at 16.

¹⁷ See para 2.2.3 below. In the words of John McDowell & Gary Novis 'The Consequences of Money Laundering and Financial Crime' (2001) 6 *Economic Perspectives* 6-10 at 6 'money laundering is the criminal's way of trying to ensure that, in the end, crime pays'.

¹⁸ See Lisa A Barbot 'Money Laundering: An International Challenge' (1995) 3 *Tul J Int'l & Comp L* 161-204 at 164. See also para 2.2.5 below.

¹⁹ See Jan van Koningsveld 'Money Laundering — "You Don't See It, Until you Understand It": Rethinking the Stages of the Money-Laundering Process to Make Enforcement More Effective' in: Brigitte Unger & Daan van der Linde (eds) *Research Handbook on Money Laundering* (2013) (hereinafter Van Koningsveld 'Money Laundering') 435; McDowell & Novis (2001) 6 *Economic Perspectives* 6 at 7. See also para 2.5 et seq below.

²⁰ See John L Evans 'International Money Laundering: Enforcement Challenges and Opportunities' (1996) 3 *Sw J L & Trade Am* 195-221 at 196; Van Koningsveld 'Money Laundering' 435. For a discussion of the various initiatives against money laundering at the international level, see Ch 4 below generally.

²¹ For example, prior to 1986 in the US where money laundering was first criminalised, money laundering was not an offence, see Madinger *Money Laundering* 23.

²² See Brigitte Unger 'Introduction' in: Brigitte Unger & Daan van der Linde (eds) *Research Handbook on Money Laundering* (2013) (hereinafter Unger 'Introduction') 3; Van Jaarsveld (2004) 16 *SA Merc L J* 685 at 686.

movement of illicit goods for sale. It was also used to move the proceeds from such sales to some other hidden places.²³ A brief account of the origins of money laundering is necessary to deepen our understanding of this problem. The next section, therefore, explores narratives about the origins of money laundering.²⁴

2.2.2 The Origins of Money Laundering: A Brief Account

Various historical accounts²⁵ explain the origins of money laundering. Al Capone,²⁶ a gangster from Chicago, is often cited as the godfather of money laundering.²⁷ It is reported that he employed cash-intensive businesses of launderettes to hide his illegal alcohol proceeds in the 1920s.²⁸ However, whether Al Capone was a money launderer or not it is not clear. What is clear is that in 1931 he was convicted for tax evasion²⁹

²³ See John S Zdanowicz 'International Trade Mispricing: Trade-Based Money Laundering and Tax Evasion' in: Brigitte Unger & Daan van der Linde (eds) *Research Handbook on Money Laundering* (2013) 253; Jagdish N Bhagwati 'Fiscal Policies, the Faking of Foreign Trade Declarations, and the Balance of Payments' in: Jagdish N Bhagwati (ed) *Illegal Transactions in International Trade: Theory and Measurement* (1974) 66-83; Andreas Buehn & Stefan Eichler 'Trade Misinvoicing: The Dark Side of World Trade' (2011) *The World Economy* 1263-1287 at 1263 et seq; and De Boyrie, Nelson & Pak 'Capital Movement through Trade Misinvoicing: The Case of Africa' (2007) 14 *Journal of Financial Crime* 474-489 at 474 et seq.

²⁴ See para 2.2.2 below.

²⁵ See Brigitte Unger 'Money Laundering Regulation: from Al Capone to Al Qaeda' in: Brigitte Unger & Daan van der Linde (eds) *Research Handbook on Money Laundering* (2013) (hereinafter Unger 'From Al Capone to Al Qaeda') 19; Madinger *Money Laundering* 11-14; Turner *Money Laundering Prevention* 2-3; Kevin Sullivan *Anti-Money Laundering in a Nutshell: Awareness and Compliance for Financial Personnel and Business Managers* (2015) 1, (hereinafter 'Sullivan AML in Nutshell'); and Peter Lilley *Dirty Dealing: The Untold Truth about Global Money Laundering, International Crime and Terrorism* 3 ed (2006) (hereinafter 'Lilley Dirty Dealing') xii.

²⁶ He was popularly known by this name but his full name was Alphonse Gabriel Capone and was also nicknamed "Scarface".

²⁷ See Unger 'Introduction' 3; Van Jaarsveld (2004) 16 *SA Merc L J* 685 at 686; and Nicholas Ryder 'The Financial Services Authority and Money Laundering a Game of Cat and Mouse' (2008) 67 *The Cambridge Law Journal* 635-653 at 635.

²⁸ See Unger 'From Al Capone to Al Qaeda' 19; Madinger *Money Laundering* 11-14. See also Guy Stessens *Money Laundering: A New International Law Enforcement Model* 2 ed (2003) (hereinafter 'Stessens Money-Laundering Model') at 82 who notes that the term 'money laundering' was 'apparently used by American police officers with reference to the ownership and use of launderettes by mafia groups'.

²⁹ Today the nexus between money laundering and tax evasion is now well established, see Verena Zoppei *Tax Evasion as a Predicate Offence for Money Laundering* (unpublished LLM Dissertation, The University of the Western Cape, 2012) 22 et seq; Aileen Barry 'Examining Tax Evasion and Money Laundering' (1998) 2 *Journal of Money Laundering Control* 326-330 at 326; and Rui Tavares 'Relationship between Money Laundering, Tax Evasion and Tax Havens' (2013) *EU CRIM* 1-8 at 2 et seq.

and not money laundering.³⁰ It should be noted that at that time tax evasion was not regarded as a specified unlawful activity for money laundering in the US.³¹

A further suggestion for the origin of money laundering proposes yet another name, Meyer Lansky.³² The money-laundering approach as it is known today is allegedly attributed to him.³³ By way of a brief historical account, Lansky was a gangster and a leader of the American mafia. He is reputed for creating the process whereby cash from criminal activities in the US was taken to Switzerland and then given back in the US to organisations owned or controlled by criminal gangs.³⁴ Lansky understood the connection between organised crime, business, and politics. He recognised the value of businesses, both as "fronts" for illegal activities, such as bootlegging, and as mechanisms to launder money.³⁵ His goal in conducting shrewd and criminal-business practices was to circumvent potential charges in tax evasion for which Al Capone had been convicted.³⁶ Lansky's activities were, therefore, designed to make it difficult to "trace the connection between wealth and its criminal sources".³⁷ This narrative though, does not squarely put Lansky at the origins of money laundering. The narrative rather credits him for adding dimensions to the evolution of the process.

The 'washing of coins' is cited as another story for the origins of money laundering. In the 1900s coins were washed in casinos to ensure that ladies "wearing white gloves would not get them dirty while playing in the casino".³⁸ However, there has not been much proof as to whether the term 'money laundering' emanates from this kind of 'washing' of money at the casino. A further, yet another narrative, is that while the term

³⁰ See Madinger *Money Laundering* 11-14; Turner *Money Laundering Prevention* 2-3; Sullivan *AML in Nutshell* 1; and Lilley *Dirty Dealing* xii.

³¹ 'Specified unlawful activity' is a term used under the US jurisdiction to refer to the term 'predicate offence' under the South African AML regime, see Ch 5 para 5.3.2.4 below and Ch 7 para 7.3.2.6 below.

³² Meyer Lansky was born in Poland as Maier Suchowljansky and became a genius of organised crime in New York City. He learnt a lot from the mistakes of Al Capone and perfected the art of money laundering, see Madinger *Money Laundering* 11-14; Turner *Money Laundering Prevention* 2-3; Sullivan *AML in Nutshell* 1; and Lilley *Dirty Dealing* xii.

³³ See Van Jaarsveld *Money Laundering* 161. See also Madinger *Money Laundering* 11-14; Turner *Money Laundering Prevention* 2-3; and Sullivan *AML in Nutshell* 1.

³⁴ See Turner *Money Laundering Prevention* 3. See also Madinger *Money Laundering* 11-14.

³⁵ See Madinger *Money Laundering* 11 et seq.

³⁶ See Unger 'Introduction' 3; Madinger *Money Laundering* 11-14; and Levi & Reuter (2006) 34 *Crime and Justice* 289 at 290.

³⁷ See Levi & Reuter (2006) 34 *Crime and Justice* 289 at 290; Unger 'Introduction' 3.

³⁸ See Unger 'Introduction' 3; Madinger *Money Laundering* 11-14.

‘money laundering’ has been around since the early 20th century, the ideas of criminal practice have been around for four thousand years.³⁹ In those ancient times in China and other Asian countries, the ruling elites confiscated funds from common merchants. In response, the merchants adopted ways of moving money around without the risk of it being identified and confiscated.⁴⁰ The practice could perfectly fit into the modern-day form of TBML where value is moved through a sale of or purported sale of goods.⁴¹ This account might be evidence that money laundering could have been around much longer than what is presently known.

However, despite all these narratives, there seems to be consensus regarding the first appearance of the term ‘money laundering’ in mainstream media. The term is said to have first featured in media reportage of the 1973 Watergate scandal in the US.⁴² In the legal and judicial contexts, the phrase ‘money laundering’ was initially used in the 1982 case of *US v USD\$4,255,625.39*.⁴³ This case concerns the issue of forfeiture under civil law. The US government filed it in opposition to the sums of USD\$4,255,625.39 and USD\$3, 668,639 that were being kept in AR Capital Bank under Sonal's name. Molina had deposited this money into Sonal's bank account. The court observed that there was a high probability that the money had been moved through a ‘money-laundering process’ from Molina to Sonal at AR Capital Bank.⁴⁴ The process, therefore, became known by that name until today.⁴⁵

Money laundering became a criminal offence, for the first time, in the US in 1986 by the passage of the MLCA in 1986.⁴⁶ The crime only received global attention in 1989

³⁹ See Sullivan *AML in Nutshell* 1. See also Van Jaarsveld *Money Laundering* at 686 et seq who traces the origins of money laundering to the medieval times during which the Roman Catholic Church prohibited the collection of interests on loan agreements resulting in people devising ways of hiding the practice.

⁴⁰ See Wasserman (2002) 1 *Regional Review* 15 at 16; Sullivan *AML in Nutshell* 1.

⁴¹ See para 2.2.5 below.

⁴² See Stessens *Money-Laundering Model* 82. See also Unger ‘Introduction’ 3; Hamman *AML Legislation* 11.

⁴³ (1982) 551 F Supp 314. See also David Tuba ‘Prosecuting Money Laundering the FATF Way: An Analysis of Gaps and Challenges in South African Legislation from a Comparative Perspective’ (2012) 2 *Acta Criminologica: Southern African Journal of Criminology* 103-122 at 109; Unger ‘Introduction’ 3.

⁴⁴ (1982) 551 F Supp 325 et seq.

⁴⁵ See Tuba (2012) 2 *Acta Criminologica* 103 at 104.

⁴⁶ The Act was enacted as a response to the case of *US v Anzalone* (1985) 766F.2d 6761st Cir, see Madinger *Money Laundering* 23. For a discussion of the US AML regime and its various initiatives against TBML in trade-instruments, see Ch 7 below generally.

after the establishment of the FATF.⁴⁷ The organisation was established as part of the international community's effort to combat drug trafficking whose proceeds were regularly the subject of money laundering.⁴⁸ South Africa first criminalised money laundering under the POCA of 1998.⁴⁹ The POCA covers money laundering in a way that is mainly in line with the 1998 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention).⁵⁰

2.2.3 Defining Money Laundering

2.2.3.1 General

Various scholars have defined money laundering⁵¹ differently.⁵² At one point Unger carried out a literature research of money laundering and found out that there are more than 18 different definitions of the term.⁵³ A few definitions of money laundering can be given.

2.2.3.2 The Definition of Money Laundering

The FATF has defined money laundering as the concealment of the illegal source of criminal proceeds through various processes.⁵⁴ The International Monetary Fund

⁴⁷ See Madinger *Money Laundering* 71; Kern Alexander 'The International Anti-Money-Laundering Regime: The Role of the Financial Action Task Force' (2001) 4 *Journal of Money Laundering Control* 231-248. For a discussion of the role of the FATF in TBML control, see Ch 4 para 4.3.2 below.

⁴⁸ See Ryder (2008) 67 *Cambridge Law Journal* 635 at 636. The initial thrust in combatting money laundering was on drug trafficking, see in general Carl P Florez & Bernadette Boyce 'Laundering Drug Money' (1990) 59 *FBI Law Enforcement Bulletin* 22-26.

⁴⁹ The other piece of legislation is the FICA 38 of 2001. See also De Koker 'Money Laundering in South Africa' 83 et seq; FATF& ESAAMLG (2009) *South Africa Mutual Evaluation Report* 6. For a discussion of the history of the FICA and its amendments, see Hugo & Spruyt (2018) *TSAR* 227 at 227 et seq.

⁵⁰ See Schlenther (2013) 16 *JMLC* 126 at 127; Tuba (2012) 2 *Acta Criminologica* 103 at 109; FATF& ESAAMLG (2009) *South Africa Mutual Evaluation Report* 6. For a general discussion of the South African AML framework, see Ch 5 below generally.

⁵¹ This process does not successfully convert 'black money' into 'white money' or 'dirty money' into 'clean money'. It actually changes the appearance of money from 'dirty' form to a 'clean' one but laundered money is never really 'clean', see Varun Chandna *The Curious Case of Black Money and White Money: Exposing the Dirty Game of Money Laundering* (2017) (hereinafter 'Chandna Black Money') 23; Madinger *Money Laundering* 5.

⁵² See Turner *Money Laundering Prevention* 3; Sullivan *AML in Nutshell* 2. See also Madinger *Money Laundering* at 5 who defines money laundering as the use of funds obtained through illicit activity by hiding the identity of those who received the funds and transforming them into assets that seem to have originated from a legitimate source.

⁵³ See Van Koningsveld 'Money Laundering' 436. See also Tuba (2012) 2 *Acta Criminologica* 103 at 105 who notes that the definition of money laundering is likely to continue to evolve as new money laundering trends continue to develop.

⁵⁴ See FATF <https://www.fatf-gafi.org/www.fatf-gafi.org> [Accessed on 26 September 2017].

(IMF) defines it as a method wherein the illegal source of assets created or acquired through criminal conduct is hidden in order to obfuscate the relationship between the funds and the initial criminal activity.⁵⁵ In South Africa, the FICA⁵⁶ defines money laundering in two parts. First, it defines it as any activity that would be considered an offence under section 64 of this Act or section 4, 5, or 6 of the Prevention Act.⁵⁷ Secondly, it defines it as any activity that has the potential to have the effect of hiding or masking the nature, source, location, disposition, or movement of the proceeds of unlawful activity or any interest that someone may have in such proceeds.⁵⁸

The definition of money laundering under the FICA was adopted in *S v Van der Linde*⁵⁹ where the court defines money laundering as the process whereby the proceeds of crime are transformed into assets that seem to have a lawful source in order to be retained indefinitely or recycled into new criminal ventures.⁶⁰ Various scholars have also defined money laundering but in substantial agreement with the way it is defined under South African legislation and case law.⁶¹ For instance, Hopton considers money laundering to be a method by which criminals attempt to conceal the source and ownership of the money obtained from illegal activities.⁶² To add on to that, but putting it differently, Busuioc defines money laundering as the act of hiding the illegal source of proceeds obtained through criminal activity in order to make them appear legitimate.⁶³ Further slightly varying the definition, Sullivan notes that money

⁵⁵ See IMF 'Fight Against' <https://www.imf.org/> [Accessed on 20 December 2019].

⁵⁶ Act 38 of 2001.

⁵⁷ See s 1 of FICA. For a discussion of the offence of money laundering under the South African AML regime and its scope for addressing TBML in trade-finance instruments, see Ch 5 para 5.3.2.4 below.

⁵⁸ See s1 of FICA. See also Hamman *AML Legislation* 9; Van Jaarsveld *Money Laundering* 29.

⁵⁹ [2016] ZAGPJHC 179.

⁶⁰ *S v Van der Linde* [2016] ZAGPJHC 179 at para 108.

⁶¹ *The Cambridge Advanced Learners' Dictionary* 4 (ed) defines money laundering as "the crime of moving money that has been obtained illegally through banks and other businesses to make it seem as if the money has been obtained legally".

⁶² See Doug Hopton *Money Laundering: A Concise Guide for all Business* (2006) (hereinafter 'Hopton *Money Laundering Guide*') 1. The idea of hiding the proceeds of crime is consistent with the criminal need to enjoy the fruits of crime without detection by law enforcement authorities, see Levi & Reuter (2006) 34 *Crime and Justice* 289 at 289.

⁶³ See Elena Madalina Busuioc 'Defining Money Laundering: Predicate Offences — The Achilles' Heel of Anti-Money Laundering Legislation' in: Brigitte Unger & Elena Madalina Busuioc *The Scale and Impacts of Money Laundering* (2007) (hereinafter Busuioc 'Defining Money Laundering: Predicate Offences') 15. This definition is consistent with most commonly cited definition from *United States v Cuellar* (478 F3d 282 (5th Cir.2007) of "taking steps to make funds appear legitimate".

laundering is an act of disguising the source of criminal proceeds in order to incorporate them into the established financial community.⁶⁴

2.2.3.3 Observations from the Definitions of Money Laundering

From these definitions, certain observations can be made. It appears that the overall goal of any money-laundering activity is threefold. The first goal is to hide the illegal source from which the money-laundering proceeds came.⁶⁵ The second goal is to ensure that the money launderer can spend the 'dirty money'⁶⁶ as 'clean money' without raising suspicion regarding how the money was acquired.⁶⁷ The third goal is the desire by money launderers to retain control over the criminal proceeds as well.⁶⁸ This is usually achieved by obfuscating the process of money laundering itself. It is apparent that deception is at the centre of money laundering-operations. Traditionally, the view has been taken that money launderers engage in the vice to avoid prosecution and forfeiture of their assets.⁶⁹ While this view may be correct, some cases have shown that the main objective is not just to hide property but to break the connection between themselves and any property, including the 'dirty money', which can otherwise link them to the criminal offence.⁷⁰ This perspective is supported by the layering method used in money laundering.⁷¹ This has led to the conclusion that money laundering is much about the disguising of ownership of property as much as

⁶⁴ See Sullivan *AML in Nutshell* 2. This definition emphasises one stage of the money-laundering process, namely, integration. For a review of the three stages of money laundering, see para 2.2.5 below. For a discussion of the concept of money laundering in the broad and narrow sense, see Van Jaarsveld *Money Laundering* 156 et seq.

⁶⁵ See Hopton *Money-Laundering Guide* 1. See also Sullivan *AML in Nutshell* 5.

⁶⁶ In this work and works by others synonyms like 'tainted money', 'black money', 'washed money', 'dirty money' are all used to refer to the proceeds of criminal activity and may be used interchangeably. See also Madinger *Money Laundering* 5; Hamman *AML Legislation* 9; Van Jaarsveld 'Mimicking Sisyphus? An Evaluation of the Know Your Customer Policy' (2006) 27 *Obiter* 228-244 at 231-233; and Chandna *Black Money* 21 et seq.

⁶⁷ See Stessens *Money-Laundering Model* 83; Hamman *AML Legislation* 9. See also Alexander (2001) 4 *JMLC* 231 at 232 who notes that 'laundering renders criminal conduct lucrative, thus, providing the incentive and the means for that conduct to persist'.

⁶⁸ See Hopton *Money-Laundering Guide* 1; Sullivan *AML in Nutshell* 5.

⁶⁹ See Levi & Reuter (2006) 34 *Crime and Justice* 289 at 289 et seq; Sullivan *AML in Nutshell* 5 et seq; and Hopton *Money-Laundering Guide* 1.

⁷⁰ See Tuba (2012) 2 *Acta Criminologica* 103 at 105; Sullivan *AML in Nutshell* 5 et seq; and Hopton *Money-Laundering Guide* 2.

⁷¹ For an explanation of the layering technique in a typical money-laundering activity, see para 2.2.4.3 below.

it is about 'cleaning' the proceeds of crime.⁷² The proceeds of crime do not necessarily have to be in cash form. The proceeds can assume other forms such as diamonds, credit cards, gold, rare coins, stocks, bonds and wire transfers.⁷³

In carrying out the money-laundering activity, criminals do not only desire to evade imprisonment but also to enjoy the fruits of their criminal activity.⁷⁴ Money launderers involve financial institutions in the process in order to gain certain benefits these institutions offer to their legitimate customers. First, by placing the illegal funds in the financial system the money launderers consider it the only safest place to keep the 'dirty money' away from other criminal gangs.⁷⁵ Secondly, the money launderers may need to swiftly transfer funds throughout the world, which service only banks can provide legally or without their knowledge, illegally.⁷⁶ Thirdly and probably most importantly, the money launderer may desire to clothe the ill-gotten funds with an element of legitimacy through the financial system so that no questions can be raised when they spend the illegal funds.⁷⁷ Whatever the reason behind the scheme, the money launderers are prepared to pay the cost of 'cleaning' the money and dissociating it from its illegal origins. As Jojarth puts it, "the demand for money laundering is driven by the need to create a false 'legitimate' appearance for funds that are tainted by their illegal origin".⁷⁸ Thus, the extent to which criminals use complex tactics to hide their ill-gotten wealth 'depends directly on the extent to which they face a real risk of detection'.⁷⁹ AML legislation is designed and directed at ensuring that 'crime does not pay'. The goal is to make money launderers fail to enjoy the fruits of

⁷² See Jojarth 'Money Laundering Methods' 21 et seq; Hopton *Money-Laundering Guide* 2; and Sullivan *AML in Nutshell* 5.

⁷³ See Turner *Money Laundering Prevention* 48; De Koker 'Money Laundering in South Africa' 89 et seq; and Hamman *AML Legislation* 9.

⁷⁴ See Levi & Reuter (2006) 34 *Crime and Justice* 289 at 289 et seq.

⁷⁵ See Sullivan *AML in Nutshell* 2. See also Turner *Money Laundering Prevention* at 5 who cites two primary reasons for hiding money in a money-laundering scheme, namely, safety and secrecy.

⁷⁶ See Sullivan *AML in Nutshell* 2. The idea is to create as much distance as possible between the perpetrator, the criminal activity, and the proceeds of the crime so that eventually crime pays, see Alldridge *Money Laundering Law* 1; Levi & Reuter (2006) 34 *Crime and Justice* 289 at 289 et seq. Cyber-money laundering relies on alternative payment technologies such as smart cards and internet banking to move money across the globe, see Van Jaarsveld (2004) 16 *SA Merc L J* 685 at 685; Alexander (2001) 4 *JMLC* 231 at 232.

⁷⁷ See Jojarth 'Money Laundering Methods' 21; Sullivan *AML in Nutshell* 2; and Alldridge *Money Laundering Law* 1.

⁷⁸ See Jojarth 'Money Laundering Methods' 17; Alldridge *Money Laundering Law* 1.

⁷⁹ See Wasserman (2002) *Regional Review* 15 at 16; Jojarth 'Money Laundering Methods' 18.

their criminal activity by making the cost of laundering 'dirty money' higher than the perceived benefits.⁸⁰

The term 'money laundering' as used in the definitions has been regarded as a 'misnomer'. This is because in the modern world the laundering activity does not always involve money or cash.⁸¹ Any commodity capable of storing value can be employed in the laundering of criminal proceeds.⁸² Examples that would come to mind are motor vehicles,⁸³ art,⁸⁴ gold,⁸⁵ or even underground money-transfer systems such as the Hawala.⁸⁶

2.2.3.4 Conclusion

With new methods of money laundering emerging such as TBML, a broader understanding of money laundering is desirable.⁸⁷ Such an approach would accommodate even complex money-laundering methods such as TBML, which is the primary goal of this research. A wider definition of money laundering that includes the transfer of value without using cash is desirable. Such definition would not only capture digital methods of money laundering through cryptocurrencies but will also address TBML.⁸⁸ Having defined money laundering, it is significant to briefly explain the process of money laundering in order to appreciate how this criminal activity occurs.⁸⁹ The next section attempts to address this aspect.

⁸⁰ See Busuioc 'Defining Money Laundering: Predicate Offences' 15. See also Charles Goredema 'Introduction' in: Charles Goredema (ed) *The Invisible Threat: Money Laundering in Eastern and Southern Africa* (2010) (hereinafter Goredema 'Introduction') at 1.

⁸¹ See Hopton *Money Laundering Guide* 1; Goredema 'Introduction' 2.

⁸² See Goredema 'Introduction' 2; Baker *Capitalism* 23.

⁸³ See Kotie Geldenhuys 'When Vehicles become a Vehicle for Money Laundering' (February 2019) 112 *Servamus* 33-35.

⁸⁴ See Purkey 'The Art of Money Laundering' (2010) 22 *Florida Journal of International Law* 111-143; Saskia Hufnagel & Colin King 'Anti-Money Laundering Regulation and the Art Market' (2019) *Legal Studies* 1-20. See also para 2.4.6 below.

⁸⁵ Gold can be employed as a substitute for transferring illegal funds out of the country because it is easy to convert into other forms of money and can be smuggled with ease among other attractive qualities for criminal enterprising, see Cassara *Next Frontier* 89 et seq; Sullivan *AML in Nutshell* 17. See also para 2.4.4 below.

⁸⁶ See para 2.3.5.3 below. See also Alldridge *Money Laundering Law* 3; De Koker 'Money Laundering in South Africa' 93.

⁸⁷ See para 2.2.2 and para 2.2.3 above.

⁸⁸ See again para 2.2.3 above. See also para 2.3 et seq below.

⁸⁹ See para 2.2.4 below.

2.2.4 The Process of Money Laundering

2.2.4.1 General

Three elements are significant to most money-laundering operations. First, there is the element of transforming illegal money into another form of property.⁹⁰ Secondly, there is the element of hiding of the true source or ownership of the illegally acquired funds.⁹¹ Thirdly, there is the element of creating the perception of legitimacy of the source and ownership of income to be able to spend it without raising suspicion.⁹² These elements have given rise to the three stages or cycle of the money-laundering process. These three stages are placement,⁹³ layering,⁹⁴ and integration.⁹⁵ Before examining these stages in detail, it may be significant to establish how the stage originated. This will aid in understanding the concept of money laundering.

In the 1980s, the US battle against the drug trade gave rise to the three-stage money-laundering process.⁹⁶ The US Drug Enforcement Administration (DEA) is credited for creating the three-stage money-laundering cycle, as it is known today.⁹⁷ It is reported that the agency came up with the model in order to analyse the practice of money laundering in simple terms.⁹⁸ This was pertinent because the problem was not yet well understood. The money-laundering cycle model was designed mainly to combat basic drug-trafficking operations without considerations about complex financial

⁹⁰ See Van Jaarsveld (2004) 16 *SA Merc L J* 685 at 687; De Koker 'Money Laundering in South Africa' 94; and Sullivan *AML in Nutshell* 5. See also s 1 of POCA property is defined broadly as "money or any other movable, immovable, corporeal or incorporeal thing". It also includes "any rights, privileges, claims, securities and any interest in, and all proceeds of, such property".

⁹¹ See Van Jaarsveld (2004) 16 *SA Merc L J* 685 at 687; Jojath 'Money Laundering Methods' 21; and Hamman *AML Legislation* 10 et seq.

⁹² See Van Jaarsveld (2004) 16 *SA Merc L J* 685 at 687; Stessens *Money-Laundering Model* 84. See also Turner *Money Laundering Prevention* 7 who calls this third element 'renting of credibility' through use of legitimate organisations.

⁹³ See para 2.2.4.2 below.

⁹⁴ See para 2.2.4.3 below.

⁹⁵ See para 2.2.4.4 below. See also Dennis Cox *Handbook of Anti Money Laundering* (2014) (hereinafter '*Cox Handbook of AML*') 15; Turner *Money Laundering Prevention* 3; Van Koningsveld 'Money Laundering' 438; Goredema 'Introduction' 2; Paul Allan Schott *Reference Guide to Anti-Money Laundering and Combatting the Financing of Terrorism* 2 ed (2006) (hereinafter '*Schott Reference Guide to Anti-Money Laundering*') 1-7; Sullivan *AML in Nutshell* 7; and Moodley *Extent of Money Laundering* 66.

⁹⁶ See Wasserman (2002) *Regional Review* 15 at 19; Van Koningsveld 'Money Laundering' 437.

⁹⁷ Another narrative gives credit to the Board of Governors of the Federal Reserve System for coining the model, see Levi & Reuter (2006) 34 *Crime and Justice* 289 at 311; Melvin R Soudijn 'Rethinking Money Laundering and Drug Trafficking: Some Implications for Investigators, Policy Makers and Researchers' (2016) 19 *Journal of Money Laundering Control* 298-310 at 299.

⁹⁸ See Soudijn (2016) 19 *JMLC* 298 at 299; Van Koningsveld 'Money Laundering' 437.

investigations.⁹⁹ The model was first introduced into the US AML laws in 1986 through the MLCA.¹⁰⁰ The FATF globalised the model by merely copying and spreading the DEA's version as it was.¹⁰¹ Nonetheless, an examination of the three-stage money-laundering model is significant in understanding money laundering as a concept. As mentioned earlier, the money-laundering process has three basic stages, namely, placement, layering, and integration. I briefly explain each of these stages below.

2.2.4.2 Placement

Placement is the initial step in the money-laundering process.¹⁰² Robinson describes this stage as 'immersion' and interprets this as meaning "consolidation and placement" of the illegal funds.¹⁰³ Though the stage may be known by different names,¹⁰⁴ it refers to one phase. One of the difficulties a money-launderer encounters is dealing with big sums of money, which are typically heavy and hard to conceal.¹⁰⁵ Consequently, the launderer has to come up with a plan to convert the illegal funds into some form, which will not arouse suspicion from law enforcement authorities about the origins of the money.¹⁰⁶ The objective of the money launderer at the placement stage is to hide the proceeds of crime with an intention to layer it at a later stage.¹⁰⁷ Placement of 'dirty

⁹⁹ See Florez & Boyce (1990) *FBI Law Enforcement Bulletin* 22-26; Van Koningsveld 'Money Laundering' 437.

¹⁰⁰ Title 18 USC §1956.

¹⁰¹ See Van Koningsveld 'Money Laundering' 438.

¹⁰² Almost every textbook or piece of literature cites this stage as the first stage in a money-laundering process although what it entails may differ from one writer to another, see Moodley *Extent of Money Laundering* 66-67; Levi & Reuter (2006) 34 *Crime and Justice* 289 at 311; Lacey & George 'Crackdown on Money Laundering: A Comparative Analysis of the Feasibility and Effectiveness of Domestic and Multilateral Policy Reforms' (2003) 23 *Northwestern Journal of International Law & Business* 265-350 at 267 et seq; Deborah Srour Politis 'Money Laundering, Terrorism Financing and Financial Networks' (2003) 1 *IDF Law Review* 211-289 at 218 et seq; Soudijn (2016) 19 *JMLC* 298 at 299 et seq; Goredema 'Introduction' 2 et seq; Cox *Handbook of AML* 15 et seq; Turner *Money Laundering Prevention* 6 et seq; and Sullivan *AML in Nutshell* 6 et seq.

¹⁰³ See Jeffrey Robinson *The Laundrymen: Inside Money Laundering — The World's Third Largest Business* 2 ed (2009) (hereinafter 'Robinson *The Laundrymen*') 12. See also Levi & Reuter (2006) 34 *Crime and Justice* 289 at 311 and Sullivan *AML in Nutshell* at 7 who explains that placement "means the cash is deposited or substituted for another form, such as a money order, bank check, prepaid access card, and so on."

¹⁰⁴ See Turner *Money Laundering Prevention* 6.

¹⁰⁵ It should be noted that placement does not always entail the depositing of cash with a financial institution. Other methods such as the purchasing of shares, the purchase of antiques, the acquisition of new or used vehicles, and the purchasing commodities or precious metals may be used, see Cox *Handbook of AML* 16; Goredema 'Introduction' 4; Hamman *AML Legislation* 11.

¹⁰⁶ See also Madinger *Money Laundering* 243; Van Jaarsveld *Money Laundering* 687.

¹⁰⁷ Van Koningsveld 'Money Laundering' 438. It should be noted that placement does not always involve physical cash although this is the most cited form of money. An appropriate way of

money' into the washing cycle can be done in different ways but usually involves a financial institution at some point.¹⁰⁸ Cox argues that the placement activity is not necessarily the physical conveyancing of 'dirty cash' into some bank account although most criminals frequently opt for this method.¹⁰⁹ The scholar elaborates that; placement is the act of transferring illicitly obtained funds from their original source into a different one, which allows the money launderer to conceal the true source of the funds.¹¹⁰ This view is acceptable and wide enough to encompass almost all techniques of placement where value is involved.¹¹¹

The money launderer has various options available to them at the placement stage.¹¹² In fact, it has been argued that the money launderer's creativity is the only constraint on the placement operation.¹¹³ Besides simply depositing cash into the bank account, which is the most obvious and commonly used technique, there are other options. For instance, the money launderer can buy a valuable piece of art¹¹⁴ for resale in exchange for 'cleaner money' with some appearance of legitimacy. If the money launderer decides to deposit the money into a bank account, extra care must be taken to avoid and evade detection. For this to work, money launderers sometimes use a process called 'smurfing'¹¹⁵ or 'structuring'¹¹⁶ to deposit small amounts of 'dirty money' into a bank account without triggering the currency-reporting levels.¹¹⁷ Most countries,

understanding placement would be to see it as a method of changing the illegal funds from one form to another in a bid to distance the funds from their illicit source, see para 2.2.4.2 below.

¹⁰⁸ See Brigitte Unger & Elena Madalina Busuioc 'How Money is Being Laundered' in: Brigitte Unger & Elena Madalina Busuioc *The Scale and Impacts of Money Laundering* (2007) (hereinafter Unger & Busuioc 'How Money is Being Laundered') 89. Other forms of businesses usually targeted by criminals for placement are insurance companies, trade brokers or investment firms, see Turner *Money Laundering Prevention* 9.

¹⁰⁹ See Cox *Handbook of AML* 15.

¹¹⁰ Ibid. See also Goredema 'Introduction' 3 et seq.

¹¹¹ See Cassara *Next Frontier* 4; Goredema 'Introduction' 2. See also para 2.3 below for TBML where placement can occur outside the bank through the purchase of goods.

¹¹² Placement can be effected via different methods, see Cox *Handbook of AML* 16.

¹¹³ See Cox *Handbook of AML* 16.

¹¹⁴ See also Tom Mashberg 'The Art of Money Laundering' (2019) 56 *Finance & Development* 31-34 at 31 et seq who argues that because the art market is loosely regulated it has fallen prey to money launderers through facilitating the movement of illicit cash.

¹¹⁵ Smurfing is the use of various individuals called 'smurfs' to make deposits of illegal funds into financial institutions at different locations, see Unger & Busuioc 'How Money is Being Laundered' 89.

¹¹⁶ Structuring is the division of huge sums of money into several smaller amounts for depositing into bank accounts without triggering the minimum currency reporting threshold, see Unger & Busuioc 'How Money is Being Laundered' 89; Sullivan *AML in Nutshell* 16. See also Hamman *AML Legislation* 12 for a further discussion regarding the origins and operation of this technique.

¹¹⁷ See Hamman *AML Legislation* 12; Unger & Busuioc 'How Money is Being Laundered' 89.

including South Africa, have reporting requirements for unusual transactions.¹¹⁸ Therefore, money launderers try as much as possible to remain below the reporting threshold.¹¹⁹ Other placement techniques may include buying antiques and art,¹²⁰ or second-hand vehicles.¹²¹ Usually, money launderers easily exploit a less regulated market¹²² for placement purposes. In addition, businesses in desperate need of cash¹²³ have higher chances of attracting money launderers. For example, a newly established bank that is under pressure to increase its deposit base or one that is struggling with liquidity issues may provide a good hunting ground for money launderers.¹²⁴ Usually, the customer due-diligence process of such banks would be relaxed in order to attract liquidity. Consequently, criminals would find it simpler to take advantage of the financial system for money-laundering purposes. As an alternative to cash depositing, criminals can also convert cash into negotiable instruments like certificates of deposit and money orders.¹²⁵ Smuggling is also a good option for the placement technique. It can be employed to transfer large sums of money from jurisdictions with stringent bank-reporting regulations to those with stringent bank secrecy regulations.¹²⁶

The placement stage has been regarded as the most vulnerable one for the money launderer due to its proximity to the source of illegality.¹²⁷ Most AML regimes also

¹¹⁸ The reporting threshold for currency in the US is USD\$10 000 while in South Africa is R50 000 as per s 28 of FICA. See again Ch 9 below.

¹¹⁹ See Hamman *AML Legislation* 12. See also Geldenhuys (February 2019) 112 *Servamus* 33 at 33 et seq for a discussion of laundering through motor vehicles.

¹²⁰ Antiques would be preferred because they difficult to standardize in pricing and their provenance is not easy to trace, see Mashberg (2019) *Finance & Development* 31 at 32; Hamman *AML Legislation* 12. For a detailed discussion of TBML through art trade, see para 2.4.6 below.

¹²¹ See Hamman *AML Legislation* 12. See also Geldenhuys (February 2019) 112 *Servamus* 33 at 33.

¹²² Examples of such markets are free-trade zones and underground alternative remittance systems, see para 2.4.8 and para 2.3.5.3 below for a discussion of these, respectively. See also Alldridge *Money Laundering Law* 3.

¹²³ Cash can be placed with banks or supplied to front companies that are well-known for having a high-cash turnover rate such as cheque-cashing businesses or jewellery stores, see Cox *Handbook of AML* 16; De Koker 'Money Laundering in South Africa' 89 et seq; Sullivan *AML in Nutshell* 8 et seq; and Hamman *AML Legislation* 11.

¹²⁴ See Cox *Handbook of AML* 16.

¹²⁵ See Sullivan *AML in Nutshell* 8; Hamman *AML Legislation* 11-12.

¹²⁶ See Moodley *Extent of Money Laundering* 68; Hamman *AML Legislation* 12.

¹²⁷ See Politis (2003) 1 *IDF L Rev* 211 at 216; Robinson *The Laundrymen* 8. See also Sullivan *AML in Nutshell* at 8 who calls this stage's vulnerability to detection by law enforcement authorities 'choke point'.

target the placement stage in money-laundering control. This would enable them to intercept the problem at its earliest stage through the KYC on boarding requirements.

2.2.4.3 Layering

Layering is the second step in the money-laundering process. Robinson terms this stage 'heavy soaping' in a typical washing gesture.¹²⁸ By moving the 'dirty money' multiple times, the layering stage's primary goal is to further conceal its true origin and ownership.¹²⁹ The illicit proceeds are split up into "layers", or smaller sums, and then transferred to several bank accounts. An international dimension can be added to the process to make it complex and difficult to trace. This can be achieved by creating offshore companies¹³⁰ in tax havens to which funds can be transferred forth and back without any logical economic reasons.¹³¹ In these international schemes, the money launderer relies on bank secrecy laws and lawyer-client privilege to conceal their identity and to create a web of financial transactions that obliterates any audit trail.¹³² Other schemes that can be deployed under the layering phase are the use of bank drafts, collective accounts, payable-through accounts, back-to-back loans or documentary credits.¹³³

Often, money launderers in the layering stage also create the impression that transactions are occurring between independent parties whereas the same individual may be in full control of the entire operation.¹³⁴ Deception is at the centre of a typical money-laundering activity. As such, layering employs purported business transactions to justify the movement of money from one account to the other. In the process, false documents may be generated to create an appearance of legality where there is

¹²⁸ See Robinson *The Laundrymen* 11. See also Turner *Money Laundering Prevention* 9.

¹²⁹ Van Koningsveld 'Money Laundering' 438; Politis (2003) 1 *IDF L Rev* 211 at 218.

¹³⁰ Some of these companies would just be shell companies also known as 'suitcase bank' or 'brass plate' due to their existence only as post office box or nameplate on some building without any actual legitimate business taking place, see Moodley *Extent of Money Laundering* 67.

¹³¹ See Van Koningsveld 'Money Laundering' 438. Sometimes the movement of money makes economic sense to depart from the norm of usually expected red-flags, see Hamman *AML Legislation* 14. For the contributory role of tax havens in money laundering and TBML processes, see para 2.4.9 below.

¹³² See Robinson *The Laundrymen* 12. See also Politis (2003) 1 *IDF L Rev* 211 at 218.

¹³³ See Unger & Busuioc 'How Money is Being Laundered' 94-95. For the potential use of documentary credits in TBML schemes, see Ch 3 para 3.3.2 et seq below.

¹³⁴ See Van Koningsveld 'Money Laundering' 438. See also Ch 3 para 3.3 et seq below.

none.¹³⁵ The use of deceptive documents to facilitate the laundering of illegal funds is central to TBML operations in trade finance.¹³⁶ Documents may be used in the money-laundering process at several points.¹³⁷ For example, the documents may embody the value of the money being laundered, just like with bills of exchange.¹³⁸ Documents may also be used to create an appearance of legality in facilitating money-laundering activity by using either genuine or fraudulent invoices or waybills.¹³⁹

2.2.4.4 Integration

Integration is the third stage in the money-laundering process.¹⁴⁰ Robinson calls this stage ‘spin dry’ or ‘repatriation and integration’.¹⁴¹ The stage entails the reintroduction of the ‘cleaned’ or ‘washed’ money into the economy with a supposed legal origin.¹⁴² At this point, the money launderer desires to get back the illicit funds in a way that conceals raising the suspicion of law enforcement authorities.¹⁴³ Laundered funds can be incorporated into the mainstream economy in many ways. Cleverly-devised techniques similar to those adopted by legitimate businesses are often used at the integration stage.¹⁴⁴ Such techniques may include the money launderer generating invoices for phantom sales of goods or services to support the transfer of funds and serve as evidence of the money’s source.¹⁴⁵ To complicate the scheme and create a waterproof integration process, the money launderer may also create anonymous companies in tax-haven jurisdictions where bank secrecy is guaranteed.¹⁴⁶ It is from these companies where money launderers would then grant themselves huge sums of ‘clean’ money in declared ‘dividends’, loans or tax relief.¹⁴⁷ Integration can also be achieved through the purchase of financial instruments such as documentary

¹³⁵ See Van Koningsveld ‘Money Laundering’ at 439. See also Hamman *AML Legislation* 13.

¹³⁶ See para 2.3.4 below and Ch 3 para 3.3 et seq.

¹³⁷ See again Ch 3 para 3.3 et seq above.

¹³⁸ See para 2.3.4 below.

¹³⁹ See para 2.3.4 et seq below.

¹⁴⁰ See Moodley *Extent of Money Laundering* 67; Levi & Reuter (2006) 34 *Crime and Justice* 289 at 311.

¹⁴¹ See Robinson *The Laundrymen* 12.

¹⁴² See Van Koningsveld ‘Money Laundering’ 439; Soudijn (2016) 19 *JMLC* 298 at 299.

¹⁴³ See Cox *Handbook of AML* 15; Politis (2003) 1 *IDF L Rev* 211 at 219.

¹⁴⁴ See Moodley *Extent of Money Laundering* 67; Turner *Money Laundering Prevention* 8-9.

¹⁴⁵ See Cox *Handbook of AML* 18; Soudijn (2016) 19 *JMLC* 298 at 299. See also para 2.3.4 below.

¹⁴⁶ For a discussion of the general role of tax havens in money-laundering schemes, see para 2.4.9 below.

¹⁴⁷ See Turner *Money Laundering Prevention* 9; Cox *Handbook of AML* 18.

credits,¹⁴⁸ derivatives, bills of lading and bank demand guarantees.¹⁴⁹ Other integration techniques are the purchase of luxury goods or real estate or venture into the gold or diamond markets.¹⁵⁰ The money realised from these ventures can then be spent in perfectly legal ways such as consumption or further investment. This would then complete a typical money-laundering cycle.¹⁵¹

2.2.4.5 Conclusion

The money-laundering stages are significant in understanding the operation of money laundering in general.¹⁵² It is significant to note that in practice money launderers may not always conduct money-laundering activities following the process depicted in the three-stage model.¹⁵³ Some methods of money laundering such as money laundering through cryptocurrencies and TBML may defy the classical money-laundering process.¹⁵⁴ Although TBML may also employ the traditional three-stage process, it is mainly used in the layering and integration stages of money laundering.¹⁵⁵ The placement stage, which largely relies on depositing illegal cash into the financial system, may not ideally be used in TBML.¹⁵⁶ Placement in TBML is likely to take place through the buying of goods or services. This is the ideal stage to introduce illegal funds into the trading system enroute to banks. There is a need to understand how TBML may differ from the traditional money-laundering process to adequately capture it under AML regulations. In addition, an appreciation of the similarities between TBML and money laundering in general would assist in the deployment of current AML strategies against TBML.¹⁵⁷ Since the process of money laundering has been

¹⁴⁸ See Ch 3 para 3.3.2 et seq below.

¹⁴⁹ See Unger & Busuioc 'How Money is Being Laundered' 100; Hamman *AML Legislation* 16. For the potential use of both documentary credits and demand guarantees in TBML schemes, see Ch 3 para 3.3.3 et seq below.

¹⁵⁰ See Unger & Busuioc 'How Money is Being Laundered' 100-101; Cox *Handbook of AML* 18-19.

¹⁵¹ It should be noted that in real life the money-laundering process does not necessarily follow the money-laundering cycle as depicted in literature. For example, there is nothing that prevents a money launderer from beginning by layering or integrating their proceeds of crime before placing them in a bank.

¹⁵² See para 2.2.4 above.

¹⁵³ See para 2.2.4.1 et seq above.

¹⁵⁴ See para 2.3 et seq below and para 2.4.7 below.

¹⁵⁵ See para 2.2.4.3 and para 2.2.4.4 above. See also para 2.3 et seq below.

¹⁵⁶ See para 2.2.4.2 above. See also para 2.3 et seq below.

¹⁵⁷ See para 2.2 et seq above and para 2.3 et seq below.

explained, it is noteworthy to now understand the main methods through which money can be laundered. The next section explores that aspect.¹⁵⁸

2.2.5 Methods of Laundering Money

2.2.5.1 General

There are three¹⁵⁹ main methods to move and clean ‘dirty money’, which stand out when one, gets down to the nuts and bolts of money laundering.¹⁶⁰ The following section presents a brief explanation of these methods.

2.2.5.2 Physical Movement of Illegal Cash

The first method that is usually used to launder money involves the physical movement of cash.¹⁶¹ Through this method, the money launderer may elect to physically move the money from one point to the other. This could be achieved through, for instance, depositing cash into a bank.¹⁶² Strict financial-reporting requirements for banks and other financial institutions have prompted money launderers to devise other ways of moving illegally acquired money in cash form.¹⁶³ In this regard, the money launderers usually use ‘structuring’ as a method of depositing cash to avoid the need for reporting.¹⁶⁴ The idea behind the physical moving of cash is to move it to offshore jurisdictions with favourable bank-secrecy laws where the process of disguising the origins of the money further, such as layering, can start.¹⁶⁵ Moving cash physically involves hiding large sums of cash on a person, in a piece of luggage, as disguised cargo or in the vehicle boot.¹⁶⁶ Through this method, huge amounts of cash have been transferred either in or out of South Africa by means of third-party couriers.¹⁶⁷ Moving cash within South Africa is not illegal per se. However, huge amounts of cash may

¹⁵⁸ See para 2.2.5 below.

¹⁵⁹ See para 2.2.5.2, para 2.2.5.3 and para 2.2.5.4 below.

¹⁶⁰ See Sullivan *AML in Nutshell* 15.

¹⁶¹ See FATF (2006) *TBML Report* 1.

¹⁶² *Ibid.*

¹⁶³ See Turner *Money Laundering Prevention* 48; Sullivan *AML in Nutshell* 17.

¹⁶⁴ See Jojath ‘Money Laundering Methods’ 21; Madinger *Money Laundering* 24.

¹⁶⁵ See Ping He ‘A Typological Study on Money Laundering’ (2010) 13 *Journal of Money Laundering Control* 15-32; De Koker ‘Money Laundering in South Africa’ 91; and Sullivan *AML in Nutshell* 17.

¹⁶⁶ See Sullivan *AML in Nutshell* 17. See also He (2010) 13 *JMLC* 15-16; De Koker ‘Money Laundering in South Africa’ 91.

¹⁶⁷ See De Koker ‘Money Laundering in South Africa’ 91.

only be legally moved across the South African jurisdiction after satisfying the restrictions under the exchange-control regulations.¹⁶⁸

2.2.5.3 Moving Illegal Money through the Financial System

The second method employed in money laundering is moving illegal money through the financial system. Through this method, the money launderer may also opt to move money via the legitimate financial system through such institutions as banks or money-transfer agencies. In one way or another, almost all money-laundering techniques result in the abuse of the financial system.¹⁶⁹ South Africa has a well-developed financial system with readily available banking products and services.¹⁷⁰ The availability of such various banking products and services for the benefit of legitimate customers, has also attracted criminals who intend to launder their illicit money. The layering technique designed to create a maze of confusing networks of wire transfers, shell companies, and offshore correspondent banking relationships, is essentially a key component in the abuse of the financial system.¹⁷¹

2.2.5.4 Misuse of the International Trade System

Misusing the international trade system is the third method employed in money laundering.¹⁷² To avoid highly-regulated areas with a high risk of detection, criminals have always come up with new methods of laundering money. Misuse of the international trade is one such method. The FATF has noted that this strategy involves the movement of value by using fake documents and fraudulently declaring traded goods or services. Abuse of the international-trade system can come through three

¹⁶⁸ See Reg 3(1) (a) (b) of the Exchange Control Regulations GoN R1647 of 1966.

¹⁶⁹ See again para 2.2.5 above.

¹⁷⁰ See De Koker 'Money Laundering in South Africa' 92; FATF & ESAAMLG (2009) *Anti-Money Laundering and Combatting the Financing of Terrorism-South Africa Mutual Evaluation Report* (hereinafter 'FATF & ESAAMLG (2009) *South Africa Mutual Evaluation Report*') 17.

¹⁷¹ Cox *Handbook of AML* 17; He (2010)13 *JMLC* 15 at 16-17. See also para 2.2.4.3 above.

¹⁷² See Sullivan *AML in Nutshell* 15; FATF (2006) *TBML Report* 1.

methods, namely, tax evasion,¹⁷³ abusive-transfer pricing,¹⁷⁴ and TBML.¹⁷⁵ This study focuses on TBML in the context of selected trade-finance instruments.¹⁷⁶ However, it should be noted that these three main methods may be used in combination with other methods, even those yet to be discovered. Similarly, nothing prevents a money launderer to combine the three methods in order to achieve the level of desired complexity necessary in concealing the illegal funds.

2.2.5.5 Conclusion

The grouping of money-laundering methods is done, ideally, to understand them.¹⁷⁷ In practice, these methods may be used separately or together in one operation to conceal the illegal funds. It should be noted that all money-laundering techniques include the misuse of the financial system at some point.¹⁷⁸ Organised crime groups usually involve financial institutions to achieve a 'clean' image of the illegal funds after a money-laundering process.¹⁷⁹ This study preoccupies itself with TBML.¹⁸⁰ However, before dealing with the subject of TBML, it is necessary to try to understand the overall

¹⁷³ See Jean Spreutels & Caty Grijseels 'Interaction between Money Laundering and Tax Evasion: Belgian and International Measures in the Fight against Money Laundering' (2001) 10 *EC Tax Review* 3-18; David J Pyle *Tax Evasion and the Black Economy* (1989) 4; Zoppei *Tax Evasion as a Predicate Offence* 5; Betty Annan, William Bekoe & Edward Nketiah-Amponsah 'Determinants of Tax Evasion in Ghana: 1970-2010' (2013) 6 *International Journal of Economics Sciences & Applied Research* 97-121 at 97 et seq; Brigitte Unger 'Money Laundering and Tax Evasion' (2017) 1 *Coffers EU Horizon 2020 Project* 1-35; Peter Alldridge 'Are Tax Evasion Offences Predicate Offences for Money-Laundering Offences?' (2001) 4 *Journal of Money Laundering Control* 350-359 at 350 et seq; and Ansia Storm 'Establishing the Link Between Money Laundering and Tax Evasion' (2013) 12 *Interl Bus & Econ Research Journal* 1437-1450. South Africa uses an all-crimes approach where almost all forms of crime may be regarded as a predicate offence for money laundering purposes, see FATF & ESAAMLG (2009) *South Africa Mutual Evaluation Report* 6-7; Schlenther (2013) 16 *JMLC* 126 at 126 et seq.

¹⁷⁴ See Baker *Capitalism* 34; Gao Zeng-an & Weng Li-fang 'Transfer Price-Based Money Laundering in International Trade' (2006) *International Conference on Management Science and Engineering* 1128-1132 at 1128 et seq; Annet Wanyana Oguttu 'Transfer Pricing and Tax Avoidance: Is the Arm's-Length Principle Still Relevant in the E-Commerce Era?' (2006) 18 *South African Mercantile Law Journal* 138-158; and Lana Harmse & Pieter van der Zwan 'Alternatives for the Treatment of Transfer Pricing Adjustments in South Africa' (2016) 49 *De Jure* 288-306.

¹⁷⁵ See Sullivan *AML in Nutshell* 15; FATF (2006) *TBML Report* 1. See also para 2.3 below.

¹⁷⁶ See Ch 1 para 1.8 above and Ch 3 para 3.2 et seq above.

¹⁷⁷ See para 2.2.5 et seq above.

¹⁷⁸ See again para 2.2.5 et seq above.

¹⁷⁹ See para 2.2.4 et seq above.

¹⁸⁰ See Ch 1 para 1.5 et seq above. See also Ch 3 para 3.3 et seq below and Ch 5 para 5.2 et seq below.

extent of money laundering in South Africa.¹⁸¹ This would in turn assist in establishing the approximate size of TBML.¹⁸²

2.2.6 The Scale of the Money-Laundering Problem

2.2.6.1 General

Money laundering is generally complicated and “conceptually elusive”.¹⁸³ This has made it difficult to accurately state the amount of money involved in the criminal enterprise.¹⁸⁴ Studying the concept of money laundering is like examining a black box whose contents can only be ascertained through conjecture.¹⁸⁵ This is because money laundering is generally an underground operation and thrives on a lack of transparency.¹⁸⁶ In order to fully appreciate the challenge of money laundering under the South African AML regime, one has to somehow measure it. It is easier to note the effects of money laundering once its magnitude is measured.¹⁸⁷ Before one measures the scale of money laundering for a specific country such as South Africa, one has to first ask the question of whether the phenomenon can be measured on a global scale.¹⁸⁸ This would be pertinent because global money-laundering estimates often determine flows of money-laundering streams into a country. These can, therefore, be used to estimate the country-specific scale of the problem.¹⁸⁹

¹⁸¹ See para 2.2.6 et seq below.

¹⁸² See para 2.3.3 et seq below.

¹⁸³ See Levi & Reuter (2006) 34 *Crime & Justice* 289 at 291.

¹⁸⁴ See Alexander (2001) 4 *JMLC* 231 at 232. See also Wasserman (2002) *Regional Review* 15 at 16 who notes that it is difficult to establish if the figures for money laundering being thrown around are not being counted more than once as money circulates in the system.

¹⁸⁵ See Ryder (2008) 67 *Cambridge Law Journal* 635 at 636.

¹⁸⁶ See Zdanowicz ‘Trade-Based Money Laundering and Terrorist Financing’ (2009) 5 *Review of Law and Economics* 855-878 at 855 who points out that ‘deception is the heart of money laundering’. See also para 2.2.3 above.

¹⁸⁷ See John Walker & Brigitte Unger ‘Measuring Global Money Laundering: The Walker Gravity Model’ (2009) 5 *Review of Law and Economics* 821-853 at 821.

¹⁸⁸ See Brigitte Unger, Melissa Siegel & Joras Ferwerda ‘Measuring Money Laundering for Australia and the Netherlands’ in: Brigitte Unger & Elena Madalina Busuioc *The Scale and Impacts of Money Laundering* (2007) (hereinafter Unger et al ‘Measuring Money Laundering for Australia’) 57. For different ways through which money laundering can be quantified, see Brigitte Unger ‘Money Laundering — A Newly Emerging Topic on the International Agenda’ (2009) 5 *Review of Law & Economics* 807- 818 at 808 et seq.

¹⁸⁹ See Unger et al ‘Measuring Money Laundering for Australia’ 57. For an estimation of the magnitude of money laundering in selected countries across the world in the past, see Lilley *Dirty Dealing* 29 et seq.

2.2.6.2 Measuring Money Laundering in General

Measuring the size of money laundering means “measuring the immeasurable”.¹⁹⁰ The process is usually a secretive and an underground enterprise thus, rendering the exercise of measuring it a difficult one.¹⁹¹ In addition, the fact that money laundering takes place in numerous and various forms within the economic sphere makes it difficult to accurately quantify.¹⁹² Any financial transaction can be manipulated to facilitate money-laundering activities.¹⁹³ This results in an infinite number of ways through which ‘dirty money’ can be ‘cleaned’.¹⁹⁴ Money-laundering figures also originate from different sources that are official and non-official. Official sources include capital transfers in a country’s capital balance and balance of trade information such as over- or under-priced exports and imports.¹⁹⁵ Non-official sources include off-book balance sheet information such as cross-border cash smuggling.¹⁹⁶ This makes the exercise of quantifying the scale of money laundering a challenge. Therefore, there is no consensus about which sources of information to consider as valid for inclusion in assessing the scale of money laundering.

Notwithstanding the difficulties in determining the precise amounts involved in money-laundering operations, an effort has been made to estimate the scope and magnitude of the issue.¹⁹⁷ The United Nations Office on Drugs and Crime (UNODC) carried a study in 2009¹⁹⁸ to determine the amounts of money generated through organised crime and reported that 2.7 per cent of global Gross Domestic Product (GDP) was

¹⁹⁰ See Brigitte Unger ‘Ways of Quantifying Money Laundering’ in: Brigitte Unger & Elena Madalina Busuioc *The Scale and Impacts of Money Laundering* (2007) (hereinafter Unger ‘Ways of Quantifying Money Laundering’) 29. It is still possible, however, to estimate the size of money laundering in terms of the amount of money involved at recovery stage, see Unger (2009) 5 *Review of Law & Economics* 807 at 808 et seq.

¹⁹¹ Unger ‘Ways of Quantifying Money Laundering’ 30.

¹⁹² See Unger ‘Ways of Quantifying Money Laundering’ 29; Alexander (2001) 4 *JMLC* 231 at 232.

¹⁹³ See Alldridge *Money Laundering Law* 2-3; Baker *Capitalism* 25 et seq.

¹⁹⁴ See De Koker ‘Money Laundering in South Africa’ 89 et seq; Lilley *Dirty Dealing* 64 et seq.

¹⁹⁵ See Unger ‘Ways of Quantifying Money Laundering’ 29. On how to use statistical methods to measure the flow illegal funds in and out of a country, see Zdanowicz (2009) 5 *Review of Law & Economics* 855 at 857 et seq.

¹⁹⁶ See Unger ‘Ways of Quantifying Money Laundering’ 29; Alexander (2001) 4 *JMLC* 231 at 232.

¹⁹⁷ See Alexander (2001) 4 *JMLC* 231 at 232; Unger ‘Ways of Quantifying Money Laundering’ 29.

¹⁹⁸ The UNODC has not carried out a similar study after this one and it is being given here as a historical account of past estimates of money laundering.

being laundered yearly.¹⁹⁹ This estimate conforms to the widely cited 1998 figure from the IMF of 2-5 per cent of the world GDP.²⁰⁰ According to other estimations, the third-largest industry in the world is money laundering. It is surpassed only by the foreign exchange and oil industry.²⁰¹

2.2.6.3 Criticism of the Money-Laundering Figures

Critics have expressed reservations about the money-laundering figures being thrown around.²⁰² They argue that estimating the scope of money laundering is similar to estimating the size of the shadow economy, capital flight or the number of illegal weapons involved in the illicit arms trade.²⁰³ Alldridge has warned that attempts to estimate the scale of money laundering “need to be clear as to the method of accounting”.²⁰⁴ For instance, Walker and Unger have criticised the IMF estimate and described it more as “a wet-finger approach than serious measuring”. Their argument is because the IMF estimate only emanated from Michel Camdessus, its managing director then, who threw the figure at the 1998 FATF address without much evidence from research.²⁰⁵ I submit that although these figures are products of less rigorous research, they indicate a problem, which may, possibly, be bigger than what current research suggests. For South Africa, it is therefore prudent to take these estimations from the IMF and FATF with seriousness in order to be ahead in the controlling of money laundering.

It should be noted, however, that methods of measuring money laundering differ and none of them are conclusive.²⁰⁶ The FATF has noted that money-laundering figures

¹⁹⁹ This is an annual estimated figure believed to be the recurrent amounts of money involved in money laundering. It appears no further estimates have been made in later years, see <https://www.unodc.org> [Accessed on 14 June 2021].

²⁰⁰ See Unger ‘Ways of Quantifying Money Laundering’ 30; Wasserman (2002) *Regional Review* 15 at 16.

²⁰¹ See Robinson *The Laundrymen* 14. See also Lilley *Dirty Dealing* 28 et seq.

²⁰² See Alldridge *Money Laundering Law* 4-6; Walker & Unger (2009) 5 *Review of Law & Economics* 821 at 827 et seq.

²⁰³ See Unger ‘Ways of Quantifying Money Laundering’ 29. See also Alexander (2001) 4 *JMLC* 231 at 232.

²⁰⁴ See Alldridge *Money Laundering Law* 5.

²⁰⁵ See Walker & Unger (2009) 5 *Review of Law & Economics* 821 at 823. This figure has been replicated in various other estimations of the size of money laundering, see Wasserman (2002) *Regional Review* 15 at 16; Cassara *Next Frontier* 4.

²⁰⁶ See Walker & Unger (2009) 5 *Review of Law & Economics* 821 at 821 et seq for the critique of methods used in measuring money laundering and the proposal of their ‘Walker Model’. See also Alldridge *Money Laundering Law* 4-6 for similar sentiments.

are only intended to give an estimate of the scale of the problem. Despite the reservations in figures of estimates for global money laundering, the problem cannot be ignored as insignificant. To properly devise methods of combatting money laundering, estimates should not be dismissed as mere guesswork-numbers.²⁰⁷ This is because they can be valuable in identifying areas where money laundering is posing the greatest threats in the economy.²⁰⁸

2.2.6.4 The Scale of Money Laundering in South Africa

South Africa is an ideal location for organised crime.²⁰⁹ Criminal syndicates desirous of laundering 'dirty money' and repatriate it to international tax-haven destinations find the country attractive to them.²¹⁰ Due to low-prosecution rates for money-laundering activities, criminals have been encouraged to find a base in South Africa.²¹¹ This has magnified the problem.²¹² Measuring the scale of money laundering in South Africa has also not been easy. One of the biggest challenges one encounters in trying to measure money laundering in the country is that the exact amounts of funds involved in the domestic money laundering have not been empirically quantified.²¹³ Figures estimating the scale of money laundering in South Africa have been haphazardly thrown from one year to another. As early as 2004, it has been reported that R80 billion could be the amount of money being laundered in South Africa yearly.²¹⁴ This figure has been replicated in various other reportages as the approximate scale of money laundering in the country. The origins or the methods used to arrive at the figure have

²⁰⁷ See Van Jaarsveld *Money Laundering* 166.

²⁰⁸ See Alexander (2001) 4 *JMLC* 231 at 232; Van Jaarsveld *Money Laundering* 166.

²⁰⁹ See Kotie Geldenhuys 'Organised Crime Groups: The "Mafia", their Members and Money (December 2020) 113 *Servamus* 16-20; Geldenhuys (April 2016) 109 *Servamus* 10 at 12; and HF Snyman & BJM Wagener 'The Role of the Chinese Triads in South African Organised Crime' (1997) 10 *Acta Criminologica* 107-115 at 107.

²¹⁰ See Geldenhuys (April 2016) 109 *Servamus* 10 at 12.

²¹¹ See D Aslett *Combatting Organised Crime in South Africa* (Unpublished LLD Thesis, The North-West University, 2018); Fafore Olumide & Adekoye Abimbola 'An Overview of the Effects of Organised Crime on Southern Africa' (2019) 6 *Journal of African Foreign Affairs* 107-118; De Koker 'Money Laundering in South Africa' 94; and Tuba (2012) 2 *Acta Criminologica* 103 at 105 et seq. See also *S v De Vries* (2012 (1) SA 186 (SCA); *S v Dustigar* (Unreported Case No. CC6/2000, D&CLD); and *S v Van Zyl* (Unreported Case No.27/180/98, RCCT).

²¹² See Schlenther (2013)16 *JMLC* 126 at 126.

²¹³ See Goredema 'Confronting Money Laundering in South Africa' 78; Schlenther (2013)16 *JMLC* 126 at 127.

²¹⁴ See Moodley *Extent of Money Laundering* 68; Van Jaarsveld *Money Laundering* 4.

not been verified.²¹⁵ In 2007 an estimate of R150 billion a year was reported in *The Star* as the value of white-collar crime in South Africa.²¹⁶ By extrapolation, Moodley argues that since the proceeds of white-collar crime would require some 'cleaning' then the money-laundering figure should exceed this estimate.²¹⁷ This argument has not been corroborated by either empirical findings or amounts of asset seizures after money-laundering prosecutions.²¹⁸ However, it is difficult to dismiss the argument given the clandestine nature of money-laundering activities.

A different way of estimating the size of money laundering in South Africa is to analyse the amounts of money suspected to be related to the problem. The South African FIC reported in its 2009 *Annual Report* that R66.1 billion in financial transactions were allegedly connected to either crime, money laundering or terrorism financing.²¹⁹ The figure, however, is a blanket cover since it does not show the proportion attributable to money laundering alone. From 2010 to 2011, the Asset Forfeiture Unit placed R6.7 million under freezing orders.²²⁰ Again, the confiscation orders were not specific to money laundering alone to conclusively represent the scale of the problem in the country. In a subsequent report of 2019, the FIC referred 1054 suspected money-laundering matters to the National Prosecuting Authority (NPA) for further investigation.²²¹ In the same report, the South African Reserve Bank (SARB) blocked more than R53.6 million being suspected proceeds of crime.²²² Again, these figures are not indicative of the nature of crime with any particularity to be attributable to money laundering. In the 2020 *Annual Report*, the FIC only gave statistics regarding

²¹⁵ See Van Jaarsveld *Money Laundering* 4; Schlenther (2013)16 *JMLC* 126-127; and Geldenhuys (February 2019) 112 *Servamus* 33 at 33.

²¹⁶ See Moodley *Extent of Money Laundering* 67; Goredema 'Confronting Money Laundering in South Africa' 78.

²¹⁷ See Moodley *Extent of Money Laundering* 68.

²¹⁸ See De Koker 'Money Laundering in South Africa' 94 et seq.

²¹⁹ See Schlenther (2013)16 *JMLC* 126 at 127.

²²⁰ See Goredema 'Confronting Money Laundering in South Africa' 78; Schlenther (2013)16 *JMLC* 126 at 127.

²²¹ See FIC (2018/19) *Annual Report* 11 <https://www.fic.gov.za> [Accessed on 14 June 2021].

²²² Ibid. See also *Singh v South African Reserve Bank* [2023] ZAGPPHC 112 wherein the court noted that where the SARB suspects that the funds involved may be tainted it can issue a blocking order on such funds. As regards recent judicial developments pertaining to the SARB's blocking orders, see WG Schulze 'Blocking and Forfeiture Orders by the South African Reserve Bank: Recent Judicial Developments' (2023) 86 *Journal of Contemporary Roman-Dutch Law* 462-472.

suspicious and unusual transactions which amounted to 299 256.²²³ These did not also disclose whether the transactions were suspicious due to money laundering or not.

2.2.6.5 Conclusion

Money-laundering operations belong to the underworld criminal enterprise.²²⁴ The dark side of the operations make estimating the size of money laundering a huge task.²²⁵ There is no standard way of measuring or estimating money laundering that would give a readily acceptable answer.²²⁶ The opaque nature of money laundering does not allow for correct measurements of the problem.²²⁷ Perhaps the effects of money laundering may indicate the size of this problem although this may not be conclusive as well.²²⁸ The absence of exact figures, however, should not be a deterrence to the fight against money laundering. In any case, it should act as motivation to dig deeper and find more about the challenge. Having dealt with money laundering in general, the following section deals with TBML. It begins by defining TBML, and then proceed to explore the magnitude, and methods of TBML.²²⁹

2.3 THE NATURE AND PROCESS OF TBML

2.3.1 General

TBML has emerged as a new and unique method of money laundering through trade in goods or services.²³⁰ The method seems to defy current AML frameworks across jurisdictions, including South Africa. There is a need, not only to examine the nature of TBML, but also to analyse current AML legislation in order to determine if it is fit for purpose.²³¹ The discussion of TBML in this section serves as an introduction to the

²²³ See FIC (2018/19) *Annual Report* 36. See also <https://www.fic.gov.za> [Accessed on 14 June 2021].

²²⁴ See para 2.2.6 et seq above.

²²⁵ See para 2.2.6.2 above.

²²⁶ See para 2.2.6.2 and para 2.2.6.3 above.

²²⁷ See again para 2.2.6.2 and para 2.2.6.3 above.

²²⁸ See para 2.5 et seq below.

²²⁹ See para 2.3 et seq below.

²³⁰ See para 2.2.2 above.

²³¹ For a discussion of the South African AML framework and its initiatives against TBML in trade-finance instruments, see Ch 5 para 5.2 et seq below.

detailed analysis of the same concept in the context of selected trade-finance instruments and comparative legal systems.²³²

2.3.2 The Definition of TBML

2.3.2.1 General

A detailed analysis of the challenge of TBML is inadequate without first attempting a comprehensive definition of the problem. “A clear definition is crucial for research. For, after all, how can you research something unless you know what you are researching?”²³³ This quote aptly describes the provocative question at hand, namely, the definition of TBML. “Definitions are not merely a matter of academic quibbling”.²³⁴ They are crucial in setting the stage and demarcations for an informed investigation of the matter. It should be noted that TBML has not been defined sufficiently. Where academic literature and official reports have attempted to define TBML, they have done so without much success.²³⁵ The next section, therefore, gives a critique of the definition.

2.3.2.2 The Definition of TBML

There is no standard definition of TBML. However, the most commonly cited definition comes from the FATF report of 2006.²³⁶ In that report, the FATF popularised the term ‘TBML’.²³⁷ The organisation did so by offering some technical and functional definitions of the term in ways never done before by an international organisation. In this regard, the FATF defines TBML as the act of hiding the proceeds of crime and shifting value through trade transactions in an effort to give legitimacy to their illegal sources.²³⁸ The organisation issues a disclaimer that the definition is intended for money laundering

²³² See Ch 3 para 3.3 et seq below. See also Ch 6; Ch 7; Ch 8; and Ch 9 generally below.

²³³ See Soudijn (2014) 17 *JMLC* 230 at 232.

²³⁴ Ibid.

²³⁵ See Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 4.

²³⁶ See FATF (2006) *TBML Report* 3.

²³⁷ Ibid. See also FATF (2008) *Best Practices on TBML* passim.

²³⁸ See FATF (2006) *TBML Report* 3; FATF & Egmont Group (2020) *Trade-Based Money Laundering: Trends and Developments* (hereinafter ‘FATF & Egmont Group (2020) *TBML Trends & Developments Report*’) 11. See also Roy Majed Sinno, Graham Baldock, & Kimberly Gleason ‘The Evolution of Trade-Based Money Laundering Schemes: A Regulatory Dialectic Perspective’ (2023) 30 *Journal of Financial Crime* 1279-1290 at 1280; Milind Tiwari, Jamie Ferrill & Douglas MC Allan ‘Trade-Based Money Laundering: A Systematic Literature Review’ (2023) *Journal of Accounting Literature* 1-26 at 1.

affecting trade in goods as opposed to services. It further states that, as for risks affecting TBML in the trade of services, further study would be necessary.²³⁹ In that definition, the FATF further notes that the act of misrepresenting price, the volume, or the quality of imports or exports, as the case may be, can lead to TBML.²⁴⁰

As a follow up to the 2006 report, the FATF published a best practice paper on TBML control in 2008.²⁴¹ In that paper, the organisation defines TBML as the act of concealing the proceeds of crime and shifting value through trade in an effort to justify the illicit origin of the proceeds or to provide funding for their operations.²⁴² The definition is almost a regurgitation of the one the FATF gave in 2006.²⁴³ However, slight differences can be observed. In the 2008 definition, the phrase “or to finance their activities” is added. Another variation is the addition on the *modus operandi* of TBML. The FATF explains that TBML could be achieved through the same method as in the 2006 report but to amplify the definition, it added the aspects of fictitious trade activities and the possible usage of front companies.²⁴⁴ The intention of such variations from the two reports is not clear. If anything, the FATF by introducing new terms and phrases without explaining the rationale for such an introduction has added confusion to the understanding of the term.²⁴⁵

The diverse nature of TBML techniques and options have aided in the difficulty of arriving at a clear definition of the term.²⁴⁶ In fact, the term ‘TBML’ itself has been regarded as a misnomer.²⁴⁷ It includes the phrase ‘money laundering’, which implies the use of ‘money’ in its various manifestations, including cash.²⁴⁸ Ironically, the

²³⁹ See FATF (2006) *TBML Report 3*; Sinno *et al* (2023) 30 *Journal of Fin Crime* 1279 at 1280.

²⁴⁰ See para 2.3.4 below.

²⁴¹ These two FATF reports are the most ground-breaking works on TBML. A subsequent FATF report of 2020 is now available but simply regurgitates the content of the 2006 and 2008 reports which are generally regarded as central in the field of TBML research.

²⁴² See FATF (2008) *Best Practices on TBML* 1; FATF & Egmont Group (2020) *TBML Trends & Developments Report* 11.

²⁴³ See FATF (2006) *TBML Report 3*. The APG (2012) *Trade-Based Money Laundering Report* 9 views the 2008 definition of TBML as being broader than the 2006 one by including the element of the financing of terrorism.

²⁴⁴ See FATF (2008) *Best Practices on TBML* 1-2.

²⁴⁵ See Soudijn (2014) 17 *JMLC* 230 at 233 *et seq* for a critique of the definition.

²⁴⁶ See Mohammed Ahmad Naheem ‘Trade-Based Money Laundering: Towards a Working Definition for the Banking Sector’ (2015) 18 *Journal of Money Laundering Control* 513-524 at 514.

²⁴⁷ See Naheem (2015) 18 *JMLC* 513 at 514.

²⁴⁸ *Ibid*.

process mainly relies on the use of fraudulent documents and shipping information to transfer goods and services.²⁴⁹ It appears this could be the reason the FATF conveniently avoids the use of the terms ‘money’ or ‘cash’ in its definitions and opts for the term ‘value’.²⁵⁰ Trade goods and their accompanying documentation, whether genuine or fictitious, can also represent value.²⁵¹

The FATF’s definition of TBML has been criticised as being ambiguous due to some inconsistencies.²⁵² Soudijn argues that the definition does not make it clear that the trade envisaged is ‘international’ in nature nor does it explain what ‘trade transactions’ mean.²⁵³ Sullivan and Smith share this view by arguing that the FATF does not sufficiently demarcate the boundaries of what entails a ‘trade transaction’.²⁵⁴ Soudijn further notes that he finds it difficult to understand what the phrase ‘finance activities’ means or even refer to in the context of TBML.²⁵⁵ Sullivan and Smith are of the view that the 2006 definition of TBML is “more limited” than its 2008 counterpart which is wider.²⁵⁶ They argue that it covers only the idea of obscuring the origins of funds whereas the 2008²⁵⁷ definition encompasses the use of the money to finance terrorist activities.²⁵⁸ There is a need for a comprehensive definition of TBML in future to create certainty in understanding the true nature of the problem.²⁵⁹

²⁴⁹ See Naheem (2015) 18 *JMLC* 513 at 514. See also Laura Hoffmann ‘A Critical Look at the Current International Response to Combat Trade-Based Money Laundering: The Risk-Based Customs Audit as a Solution’ (2013) 48 *Tex Int’l L J* 326-347.

²⁵⁰ See Naheem (2015) 18 *JMLC* 513 at 514. See also Cassara *Next Frontier* 4.

²⁵¹ See Cassara *Next Frontier* 4. See para 2.3.4 below.

²⁵² See Soudijn (2014) 17 *JMLC* 230 at 233.

²⁵³ Ibid. See also APG (2012) *Trade-Based Money Laundering Report* at 9 where it is noted that the term ‘trade’ could mean four things, namely, agreements to exchange goods; financial actions taken to support the trade; the transfer of goods; or the settlement of financial debts.

²⁵⁴ See Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 5. The authors give an example regarding the purchase of real estate which can result in the exchange of money. They argue that such acquisition may not usually be considered ‘trade’ in the context contemplated by the FATF and is not even international in nature.

²⁵⁵ See Soudijn (2014) 17 *JMLC* 230 at 234.

²⁵⁶ See Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 5. See also APG (2012) *Trade-Based Money Laundering Report* 9.

²⁵⁷ See FATF & Egmont Group (December 2020) *Trade-Based Money Laundering Trends & Developments Report* at 11 reaffirms the definition of the 2006 and 2008 reports.

²⁵⁸ See Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 5. The purpose of this study is not to investigate terrorism financing, see Ch 1 para 1.8 above. As regards the major differences between money laundering and terrorism financing, see Schott *Reference Guide to Anti-Money Laundering* 1-5; D’Souza *Terrorist Financing, Money Laundering, and Tax Evasion: Examining the Performance of Financial Intelligence Units* (2012) *passim*.

²⁵⁹ See Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 5; Soudijn (2014) 17 *JMLC* 230 at 234.

Beyond the definitional challenges, the FATF's definitions should be viewed and understood as sensitising concepts meant only for guidance. The definitions remain purely open for development by scholars who can choose to elaborate on specific grey areas of choice.²⁶⁰ In any case, TBML is still an emerging-risk area that has had little attention from both scholars and policy authorities.²⁶¹ The latest 2020 definition of TBML from the FATF and the Egmont Group simply reaffirms its previous definition in the 2006 and 2008 reports without any changes.²⁶² Therefore, going forward there is room for improvement for the definition to capture the various concerns raised by some critics.

Alternative definitions of TBML have been offered. The US Immigration and Customs Enforcement (ICE) ²⁶³ offers a definition that also generally agrees with that of the FATF in principle. The customs authority notes that TBML is not a process achieved through a single activity. The authority defines TBML as a variety of schemes used in concert to conceal criminal proceeds. These schemes may include the transportation of illegal goods, the falsification of trade documents, and the misrepresentation of financial transactions related to trade in order to integrate criminal proceeds.²⁶⁴ This definition also finds support in Sullivan and Smith who define TBML in its broad sense as the use of trade to shift value with the purpose of concealing the genuine origins of funds.²⁶⁵ In this sense, trade is described as including both legitimate and illegitimate trade in goods and services. Of significance from the definitions is that, although they try to add new dimensions, they generally agree with that of the FATF. Both definitions still allude to the moving of value through trade. The intention of moving such value through trade is to obscure the illicit origins of the money being represented by the

²⁶⁰ See Soudijn (2014) 17 *JMLC* 230 at 234.

²⁶¹ See Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 2; FATF (2006) *TBML Report* 3.

²⁶² See FATF & Egmont Group (2020) *TBML Trends & Developments Report* 11.

²⁶³ The US ICE was created in 2003 through a merger of the investigative and interior enforcement elements of the former US Customs Service and the Immigration and Naturalization Service. Its goal is to defend American citizens against illegal immigration and cross-border crime, which pose a threat to public safety and national security, see ICE [https:// www.ice.gov](https://www.ice.gov) [Accessed on 25 August 2020].

²⁶⁴ See US ICE <https://www.ice.gov> [Accessed on 25 August 2020].

²⁶⁵ See Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 5.

goods. Thus, the aim of TBML is not necessarily the transfer of goods but that of funds facilitated by the trade-transactions.²⁶⁶

TBML should be distinguished from trade-based tax fraud.²⁶⁷ There is a slight difference between the two. Trade-based tax fraud in the widest sense is “fraud designed to avoid exercise duties and income tax”.²⁶⁸ Although tax evasion is usually a predicate offence for money laundering, the point of departure from tax fraud is the primary objective for undertaking either of the activities.²⁶⁹ It should be noted, however, that some money-laundering schemes could also result in the evading and avoiding of payment of taxes.²⁷⁰ Cases in point are various schemes under TBML such as customs misrepresentation, to mention, just but one. By way of a general and brief historical account, the FATF typology report of 2006, excludes tax evasion, avoidance and capital flight in its coverage of TBML.²⁷¹ The FATF and Egmont Group 2020 report on TBML does not delimit the scope of TBML and its predicate offences.²⁷² The justification offered for the exclusion of tax evasion and other related practices is that these procedures typically entail the cross-border transfer of money obtained lawfully.²⁷³ However, in its best practices paper of 2008, the FATF broadens the definition of TBML to cover tax evasion and other commercial-based forms of laundering money.²⁷⁴

Trade and finance sectors are largely affected by TBML.²⁷⁵ Money launderers capitalize on the vulnerabilities of both sectors to move the value of illegally acquired funds.²⁷⁶ Most of the definitions already given emphasise the trade aspect of TBML.

²⁶⁶ See FATF & Egmont Group (2020) *TBML Trends & Developments Report* 11-12.

²⁶⁷ See also Barry (1998) 2 *JMLC* 326 at 326.

²⁶⁸ See Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 5. See also Schlenker (2013) 16 *JMLC* 126 at 126 et seq.

²⁶⁹ See Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 5.

²⁷⁰ *Ibid.*

²⁷¹ See FATF (2006) *TBML Report* 3.

²⁷² See FATF & Egmont Group (2020) *TBML Trends & Developments Report* 7-11.

²⁷³ See APG (2012) *Trade-Based Money Laundering Report* 9; FATF (2006) *TBML Report* 3.

²⁷⁴ See FATF (2008) *Best Practices on TBML* 1-3. With an all-crimes approach, South Africa regards tax evasion as a predicate offence for money laundering, see FATF & ESAAMLG (2009) *South Africa Mutual Evaluation Report* 6; Schlenker (2013) 16 *JMLC* 126 at 126; and Zoppei *Tax Evasion as a Predicate Offence* passim.

²⁷⁵ See FATF & Egmont Group (2020) *TBML Trends & Developments Report* 12-13.

²⁷⁶ See APG (2012) *Trade-Based Money Laundering Report* 10; Hoffmann (2013) 48 *Tex Int'l L J* 326 at 326 et seq; Liao & Acharya (2011) 14 *JMLC* 79 at 80 et seq; and McSkimming (2010) 15 *Deakin L Rev* 37 at 37 et seq.

The challenge of TBML affects trade in goods or services in the same way it affects the financial sector.²⁷⁷ This is pertinent considering the strategic function financial institutions play in combatting TBML.²⁷⁸ It is from that viewpoint that TBML is much a serious problem to the trade sector as it is to the financial sector.²⁷⁹

An understanding of TBML as demonstrated by the joint Wolfsberg Group, ICC and BAFT 2019 report is pertinent for this study.²⁸⁰ In that report, the joint group acknowledges that 'TBML' is a widely and loosely used term that can mean different things to those in customs, banks, and trade.²⁸¹ The group, therefore, seeks to define TBML in such a way that it addresses both sectors of trade and finance in order to mirror the inter-sectorial nature of the problem.²⁸² They then note that TBML covers a broad aspect of issues collectively understood as 'trade finance'.²⁸³ It also covers other transactional activities that are not under the purview of trade-finance transactions.²⁸⁴ In acknowledging the wide nature of the term 'TBML', Naheem proposes a special definition for the financial sector. The scholar, therefore, defines TBML in that proposed context as the utilisation of financial systems to enable money transfers through dishonesty or fraud.²⁸⁵ The researcher argues that this definition clearly captures the interface between banks and TBML activities. Financial institutions can come to know about TBML at the stage where their systems of risk assessment would have been compromised by the deceptive nature of money laundering.²⁸⁶ The use of the term 'money' is significant for the proposed definition because "that is the part of the TBML transaction that will manifest in the bank's risk assessment".²⁸⁷ In this chapter, a broad definition is adopted, to the extent that it aids in discussing the

²⁷⁷ See Soudijn (2014) 17 *JMLC* 230 at 232; Naheem *Exploring TBML* 129.

²⁷⁸ For a further discussion of the role of financial institutions in international trade and their relevance to TBML control, see Ch 3 para 3.2 et seq below.

²⁷⁹ See FATF & Egmont Group (2020) *TBML Trends & Developments Report* 12-13.

²⁸⁰ See The Wolfsberg Group, ICC & BAFT (2019 Amendment) *Trade-Finance Principles* 8. For the scope of study of this thesis, see para 1.8 above.

²⁸¹ See The Wolfsberg Group, ICC & BAFT (2019 Amendment) *Trade-Finance Principles* 8.

²⁸² Ibid.

²⁸³ This thesis preoccupies itself with TBML in the context of trade finance and how selected comparative AML regimes deal with it, see Ch 3 para 3.3 et seq below. See also Ch 5; Ch 6; Ch 7; Ch 8; and Ch 9 below generally.

²⁸⁴ See The Wolfsberg Group, ICC & BAFT (2019 Amendment) *Trade-Finance Principles* 8

²⁸⁵ See Naheem *Exploring TBML* 129.

²⁸⁶ Ibid. See also Ch 3 para 3.2 et seq below.

²⁸⁷ Ibid. For a discussion of the concept of TBML in the context of trade finance, see Ch 3 para 3.2 et seq below.

concept of TBML in general. Nonetheless, the thesis restricts itself to a narrow understanding of TBML insofar as it affects selected trade-finance instruments.²⁸⁸ The definitional issues aside, an equally pertinent question is that of the magnitude of TBML. The next section, therefore, explores possible answers to that question.

2.3.3 The Magnitude of TBML

2.3.3.1 General

Just like traditional²⁸⁹ money-laundering operations, TBML is clandestine in nature and has not been meaningfully quantified.²⁹⁰ Various estimations have put the magnitude of TBML at different levels.²⁹¹ There is no consensus on the extent of TBML and what should be done to appropriately address it.²⁹² It is estimated that the use of TBML will continue to be attractive to criminals due to heightened law enforcement efforts in other methods of money laundering.²⁹³

2.3.3.2 Considerations in Measuring the Magnitude of TBML

To understand the magnitude of TBML for a particular country there is a need to first establish the size of money laundering in general.²⁹⁴ It has already been observed that precise statistics about money laundering in general are not available.²⁹⁵ Much of what is known about the extent of money laundering is based on estimations. This could be attributed to two reasons. First, the secretive nature of TBML as a criminal activity.²⁹⁶ Secondly, the relative lack of success by law enforcement agencies to detect and curb money laundering and TBML.²⁹⁷ Of the available estimations, there are no known

²⁸⁸ See Ch 1 para 1.4 and para 1.8 above for the conceptual framework and scope of the study respectively. For the justification in selection of the instruments and the general methodology, see again Ch 1 para 1.6.3 above. See also Ch 3 para 3.2 et seq below for an examination of the selected trade-finance instruments and how they may be affected by TBML.

²⁸⁹ The term 'traditional' is used to denote the classical or generic cash-based money-laundering process and does not insinuate the primitiveness of the activities, see para 2.2 above.

²⁹⁰ See para 2.2.4 above.

²⁹¹ See para 2.3.3.3 below.

²⁹² See Cassara *Next Frontier* 3; Hoffmann (2013) 48 *Tex Int'l L J* 326 at 326. See also para 2.3.3.3 below.

²⁹³ See McSkimming (2010)15 *Deakin L Rev* 37 at 38-39; FATF (2006) *TBML Report* 3; and Miller *et al TBML: Overview and Policy Issues* 1 et seq.

²⁹⁴ See Cassara *Next Frontier* 3. For a discussion of estimations regarding the size of money laundering in general, see para 2.3.3 above.

²⁹⁵ See Hoffmann (2013) 48 *Tex Int'l L J* 326 at 326; Unger 'Ways of Quantifying Money Laundering' 29. See again para 2.3.3 above.

²⁹⁶ See Cassara *Next Frontier* 4.

²⁹⁷ See APG (2012) *Trade-Based Money Laundering Report* 22-23.

exact figures relating to TBML.²⁹⁸ Baker declares that there is no place in the international sphere of financial statistics one can find, either by way of estimation or exact figures, 'laundered proceeds', 'flight capital' or 'trade mispricing'.²⁹⁹ This is because all forms of illicit flows, be they tax evasion or TBML, are either hidden or invisible.³⁰⁰

2.3.3.3 Estimations of the Magnitude of TBML in Africa and South Africa

Despite the obvious lack of accurate data about money laundering, estimations have been put forward. In 2013 Zdanowicz, a pioneering TBML scholar, analysed data for overvalued imports and undervalued exports using trade statistics from the US Census Bureau. However, the scholar could not arrive at a figure for the magnitude of TBML based on what he discovered.³⁰¹ Elsewhere, the Global Financial Integrity (GFI) has estimated the size of trade misinvoicing in developing countries.³⁰² Trade misinvoicing is a type of TBML.³⁰³ It entails transferring money across jurisdictions through a deliberate act of misreporting the trade-transactions values on invoices and other documents submitted to customs.³⁰⁴ Kamba argues that TBML contributes to the loss of revenue for the economies of developing countries.³⁰⁵ After analysing data from developing countries, the GFI concluded that USD\$991.2billion was moved from those countries through trade misinvoicing in 2012 alone.³⁰⁶ This figure is just an estimate of one component of TBML, being given here, as a historical account. A High-Level

²⁹⁸ See Hoffmann (2013) 48 *Tex Int'l L J* 326 at 326; APG (2012) *Trade-Based Money Laundering Report* 22.

²⁹⁹ See Baker *Capitalism* 162. See also Walker & Unger (2009) 5 *Review of Law & Economics* 821 at 823 who posit that the economics of money laundering which seeks to measure the scale and impact of illicit funds is still a relatively new field with little success.

³⁰⁰ See Baker *Capitalism* 162. See also Unger 'Ways of Quantifying Money Laundering' 29; and Cassara *Next Frontier* 4.

³⁰¹ See Cassara *Next Frontier* 6. See also Schlenker (2013) 16 *JMLC* 126 at 129-130.

³⁰² See GFI 'Trade Misinvoicing' <https://gfintegrity.org> [Accessed on 20 January 2020].

³⁰³ See para 2.3.4.2 below.

³⁰⁴ See Cassara *Next Frontier* 5. See also Buehn & Eichler (2011) *The World Economy* 1263 at 1263; Tehseen Ahmed Qureshi & Zafar Mahmood 'The Magnitude of Trade Misinvoicing and Resulting Revenue Loss in Pakistan' (2016) 21 *Lahore Journal of Economics* 1–30 at 1 et seq; Maria E de Boyrie, James A Nelson & Simon J Pak 'Capital Movement through Trade Misinvoicing: The Case of Africa' (2007) 14 *Journal of Financial Crime* 474-489.

³⁰⁵ See Charles Kamba 'Cross-Border Trade-Based Money Laundering in Southern Africa' in: Charles Goredema (ed) *The Invisible Threat: Money Laundering in Eastern and Southern Africa* (2010) 154.

³⁰⁶ See GFI 'Trade Misinvoicing' <https://gfintegrity.org> [Accessed on 20 January 2020]. See also Le Blanc 'Trade Misinvoicing, or How to Steal from Africa' <https://gfintegrity.org> [Accessed on 20 January 2020]; and Baker *Capitalism* 24 et seq.

Panel on Illicit Financial Flows (IFFs) established in 2012 by the United Nations Economic Commission for Africa (UNECA) to investigate IFFs across Africa, reviewed the works of the GFI and other relevant research work, and published their findings in 2015.³⁰⁷ In those findings the High-Level Panel estimates that Africa losses at least USD\$50 billion a year through IFFs³⁰⁸ which include TBML.³⁰⁹ A follow-up report on the IFFs by the African Union in 2019 put the figure of losses at USD\$67 billion. In one paper that investigates TBML as a threat to the African Continental Free Trade Area through trade misinvoicing, Iyanda notes that 80 per cent of the IFFs from developing countries, including South Africa, are through TBML.³¹⁰

For South Africa, the only estimates available for TBML emanate from trade misinvoicing. In its 2018 report, the GFI estimates trade misinvoicing for South Africa to be around USD\$7.4 billion per year.³¹¹ In 2020, the GFI updated their research findings on IFFs and estimated that Sub-Saharan Africa loses approximately USD\$22.6 billion. The GFI notes that this figure is conservative in that it does not include all aspects of trade misinvoicing and may suggest that the size of TBML, as a whole, might be bigger.³¹² The organisation has not done any further estimates on the subject since 2020. The other report from Nicolaou-Manias and Wu that estimates trade mispricing and TBML for five countries also includes South Africa in its findings.³¹³ In that report, trade misinvoicing is identified as a major type of TBML

³⁰⁷ See the UNECA 'Report of the High Level Panel on Illicit Financial Flows from Africa' <https://repository.uneca.org> [Accessed on 16 July 2021].

³⁰⁸ The UNECA defines illicit financial flows as 'money illegally earned, transferred or used', see UNECA 'Report of the High Level Panel on Illicit Financial Flows from Africa' <https://repository.uneca.org> [Accessed on 16 July 2021]. This definition is wide enough to include TBML.

³⁰⁹ The UNECA 'Report of the High Level Panel on Illicit Financial Flows from Africa' <https://repository.uneca.org> [Accessed on 16 July 2021]. As regards restrictions on the movement of capital in South Africa, see Hebert Kawadza 'Financial Liberalisation Versus the Regulation of Capital Outflows: Reflections on Capital Movement Restrictions in South Africa on the Backdrop of *South African Reserve Bank and Another v Shuttleworth and Another* 2015 (5) SA 146 (CC)' (2018) 9 *International Journal of Private Law* 95 -106.

³¹⁰ See Adebayo E Iyanda 'The Threat of Trade-Based Money Laundering to the African Continental Free Trade Area' (2018) 2 *Journal of Anti-Corruption Law* 141-162 at 141.

³¹¹ See GFI (2018) *South Africa: Potential Revenue Losses Associated with Trade-Misinvoicing Report* (hereinafter 'GFI (2018) South Africa: Potential Revenue Losses Report') iii. For similar estimates, see Ludvig Wier 'Tax-Motivated Transfer Mispricing in South Africa: Direct Evidence using Transaction Data' (2020) 184 *Journal of Public Economics* 1-16.

³¹² See GFI (2018) *South Africa: Potential Revenue Losses Report* iii.

³¹³ See Nicolaou-Manias Kathy & Wu Yu-Shan 'Illicit Financial Flows: Estimating Trade Mispricing and Trade-Based Money Laundering for Five African Countries' (October 2016) *GEAfrICA* 1-89.

responsible for capital flight from South Africa.³¹⁴ The report argues that trade mispricing occurs in countries where the extractive industries are dominant such as South Africa.³¹⁵ However, it does not cover TBML in the context of trade-finance instruments.³¹⁶ It should be noted that whatever figures of TBML aimed at establishing its magnitude may not be accurate for various reasons. These are briefly discussed below.

2.3.3.4 Factors against Accurate Measurements of TBML

Three factors work against the idea of estimating the magnitude of TBML. First, there is the challenge of factoring ‘acceptable’ predicate offences for TBML.³¹⁷ These are “crimes that underlie money-laundering activity”.³¹⁸ Historically, drug-related offences have been considered as the primary predicate offences of money laundering. Today, the “concept of money laundering has become much more inclusive”.³¹⁹ The international standard is now an ‘all-crimes’ approach for predicate offences. Many jurisdictions, including South Africa, now regard tax evasion as a predicate offence for money laundering.³²⁰ This is also in line with the FATF’s 2012 recommendation that tax crimes and smuggling should be included on the list of predicate offences for money laundering.³²¹ According to reports, TBML and money laundering in general share a wide spectrum of predicate offences.³²² Due to the fluid nature of the concept

³¹⁴ Idem at 23. See also Kotie Geldenhuys ‘Trade-Based Money Laundering’ (June 2019) 112 *Servamus* 16-19 at 16.

³¹⁵ See Olle Östensson ‘Mis invoicing in Mineral Trade: What Do We Really Know?’ (2018) 31 *Mineral Economics* 77-86. See also Goredema ‘Trade-Based Money Laundering: A Shady Side of Globalisation’ <https://www.issa.org> [Accessed on 16 July 2021] wherein trade-based tax evasion costs an estimated USD160 billion in losses annually.

³¹⁶ See Ch 3 para 3.3 et seq for a discussion of the risk of TBML in the selected trade-finance instruments under this thesis.

³¹⁷ See APG (2012) *Trade-Based Money Laundering Report* 23 et seq; Schlenther (2013) 16 *JMLC* 126 at 129-130.

³¹⁸ See Zoppei *Tax Evasion as a Predicate Offence* 23 et seq; Cassara *Next Frontier* 6; and Norman Mugarura ‘The Institutional Framework against Money Laundering and its Underlying Predicate Crimes’ (2011) 19 *Journal of Financial Regulation and Compliance* 174-194.

³¹⁹ See Cassara *Next Frontier* 6.

³²⁰ See Zoppei *Tax Evasion as a Predicate Offence* 23 et seq; FATF& ESAAMLG (2009) *South Africa Mutual Evaluation Report* 6.

³²¹ See Recommendation 2 of the FATF (2012) *International Standards on Combatting Money Laundering and the Financing of Terrorism & Proliferation* (hereinafter ‘FATF (2012) Standards’); Schlenther (2013) 16 *JMLC* 126 at 126; Zoppei *Tax Evasion as a Predicate Offence* 7.

³²² See para 2.2.3 and para 2.3.2 above.

of TBML, it is difficult to have a prescriptive range of what should pass as a predicate offence for this method of money laundering.³²³

After factoring in commercial-related abusive activities in international trade such as trade diversion and abusive-transfer pricing, the magnitude of TBML could be higher than what could be imagined. Cassara argues that it could be “the largest money-laundering method in the world”.³²⁴

Secondly, another difficulty in estimating the size of TBML comes from the failure to comprehend the nature of the problem.³²⁵ There has been little scholarly attention directed to this method of money laundering. Cassara notes that TBML has “never been systematically examined”.³²⁶ The number of documented TBML instances is quite minimal. This has been attributed to a lack of awareness and training about TBML in many jurisdictions.³²⁷

Thirdly, compounding the dearth in research is the challenge of overlap between TBML and general money-laundering techniques.³²⁸ In fact, TBML thrives on combining various techniques of money laundering.³²⁹ The method combines both the financial system and international trade. This complicates efforts to establish stand-alone figures for the size of TBML.³³⁰ The APG notes that getting empirical evidence for the size of TBML is the most daunting task to undertake.³³¹ In many jurisdictions where data about money laundering is recorded, there is no distinction made in the data with respect to cases of TBML.³³² This applies also to South Africa where the South African intelligence unit, the FIC, does not separate data for TBML and general

³²³ See again para 2.2.3 and para 2.3.2 above.

³²⁴ See Cassara *Next Frontier* 8. See also Miller *et al TBML: Overview and Policy Issues* 1.

³²⁵ See Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at iii; Chhina (2014) 29 *JIBLR* 665 at 665.

³²⁶ See Cassara *Next Frontier* 4. See also Chhina (2014) 29 *JIBLR* 665 at 665.

³²⁷ See APG (2012) *Trade-Based Money Laundering Report* 24.

³²⁸ See Joras Ferwerda, Mark Kattenberg, Han-Hsin Chang, Brigitte Unger, Loek Groot and Jacob A Bikker (2013) ‘Gravity Models of Trade-Based Money Laundering’ (2013) 45 *Applied Economics* 3170–3182 at 3170 call TBML a form of trade abuse which is a subset of money laundering.

³²⁹ See para 2.3.4 below.

³³⁰ See Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at iii. See again para 2.3.3 above.

³³¹ See APG (2012) *Trade-Based Money Laundering Report* 22.

³³² *Idem* at 22-23.

money laundering in its annual reports.³³³ Even if the data were maintained, there is no standard way of undertaking the process to ensure uniformity across jurisdictions. Furthermore, the APG notes that in most jurisdictions FIUs do not distinguish whether a report relates to TBML or just money laundering in general.³³⁴ The FIC has not done any quantification of TBML even by way of estimations. What it has only done is to describe TBML as a typology of money laundering also found in South Africa.³³⁵ Although there is a dearth of direct empirical studies for TBML, particularly for South Africa, indications are that trade misinvoicing, a type of TBML, is on the rise.

2.3.3.5 Conclusion

It is difficult to give accurate statistics about TBML in South Africa due to its secretive nature.³³⁶ The absence of a systematic study about TBML in South Africa as a method of money laundering also makes the exercise of estimating TBML difficult.³³⁷ The only reported estimations of TBML in South Africa are those of trade misinvoicing, which is a type of TBML, and these do not cover all methods of TBML.³³⁸ I submit in this study that the absence of accurate figures about TBML should not deter but rather spur investigations of the problem and how it could be solved. Due to the lack of awareness of TBML, current global and national South African estimations of the problem could be higher.³³⁹ This calls for a robust AML regime that captures the nuances of TBML.³⁴⁰ Having attempted to estimate the size of the problem, it is pertinent to appreciate the main methods through which TBML occurs. These methods can be grouped into two, namely, 'basic' and 'complex' for convenience of discussion and in line with how they are described by the FATF.³⁴¹ The next section explores that aspect.

³³³ See, for example, the FIC 2019-2020 *Annual Report* on <https://www.fic.gov.za> [Accessed on 16 July 2021].

³³⁴ See APG (2012) *Trade-Based Money Laundering Report* 22-23. See again para 2.3.3 above.

³³⁵ See FIC 'Trade-Based Money Laundering' <https://www.fic.gov.za> [Accessed on 16 July 2021]. See also Ch 5 para 5.2 below.

³³⁶ See para 2.2.6.4 and para 2.3.3.4 above.

³³⁷ See para 2.3.3.3 above. See also Ch 5 para 5.2 below.

³³⁸ See again para 2.3.3.3 above.

³³⁹ See again para 2.3.3.3 above.

³⁴⁰ See Ch 5 para 5.2 et seq below and Ch 10 para 10.2 et seq below.

³⁴¹ See para 2.3.4 and para 2.3.5 respectively below.

2.3.4 Basic Methods Used in TBML

2.3.4.1 General

Growth in the size of global commerce increases the probability of TBML activities.³⁴² The mere large volume of international-trade transactions provides a cover for the occasional suspect transfer of funds through TBML.³⁴³ There are four basic methods commonly used in the laundering of money through TBML.³⁴⁴ These are over-and-under-invoicing of goods or services,³⁴⁵ multiple invoicing of goods or services,³⁴⁶ falsely described goods or services,³⁴⁷ and over and short shipping of goods or services.³⁴⁸ These methods can be used in combination with other complex TBML methods within different permissive environments.³⁴⁹ A combination of these methods may be used together with additional layers of tricks such as 'phantom' shipping. The methods are termed 'basic' to distinguish them from other methods of TBML such as the Black Market Peso Exchange,³⁵⁰ Hawala,³⁵¹ and acquisition and sale of intangibles³⁵² that are regarded as 'complex'.³⁵³ It should be noted that these methods are not necessarily used in every country. The next section explores these methods.

2.3.4.2 Over- and Under-Invoicing of Goods or Services

The method of over-and-under-invoicing of goods or services is one of the oldest techniques of TBML.³⁵⁴ It remains one of the most common methods of fraudulently

³⁴² See Cassara *Next Frontier* 14; FATF (2006) *TBML Report* 4.

³⁴³ See Cassara *Next Frontier* 14. See also APG (2012) *Trade-Based Money Laundering Report* 10.

³⁴⁴ It should be noted that the analysis of these techniques as standalone schemes is being done to clearly illustrate how they operate. The techniques are often used in combination with other methods of money laundering.

³⁴⁵ See para 2.3.4.2 below.

³⁴⁶ See para 2.3.4.3 below.

³⁴⁷ See para 2.3.4.4 below.

³⁴⁸ See para 2.3.4.5 below. See also Zdanowicz (2009) 5 *Review of Law & Economics* 855 at 858; McSkimming (2010) 15 *Deakin L Rev* 37 at 44; Chhina (2014) 29 *JIBLR* 665 at 666; and FATF (2006) *TBML Report* 4.

³⁴⁹ See para 2.3.5 below.

³⁵⁰ See para 2.3.5.2 below. The distinction is also consistent with how they are described by the FATF and the APG in their reports, see FATF (2006) *TBML Report* 7; and APG (2012) *Trade-Based Money Laundering Report* 4, respectively.

³⁵¹ See para 2.3.5.3 below.

³⁵² See para 2.3.5.4 below.

³⁵³ See FATF (2006) *TBML Report* 7.

³⁵⁴ *Idem* at 4-5. See also McSkimming (2010) 15 *Deakin L Rev* 37 at 43-48; Hataley (2020) *JMLC* 1 at 4; Haemala Thanasegaran & Bala Shanmugam 'International Trade-Based Money Laundering: The Malaysian Perspective' (2007) 10 *Journal of Money Laundering Control* 429-437 at 432; Liao & Acharya (2011) 14 *JMLC* 79 at 81; and Cassara *Next Frontier* 16-17.

transferring value across borders.³⁵⁵ The method relies on the misrepresentation of the price of goods or services “in order to transfer additional value between the importer and exporter”.³⁵⁶ Under the method, the exporter can transfer value to the importer by stating the price of a good or service at a price below the fair-market price.³⁵⁷ Conversely, the exporter can receive value from the importer by invoicing goods or services at a price above the fair-market price.³⁵⁸ In both instances, the manipulated price of goods or services would have been different if the goods were sold in the open market.³⁵⁹ The method allows illegal funds to be moved between two unrelated parties through an actual market transaction.³⁶⁰ Both the exporter and the importer are able to point to an ostensibly legitimate trade to justify the transaction.³⁶¹

Four points are worth noting from the over and under-invoicing method. First, there is need for collusion between the exporter and importer for the fraudulent scheme to operate.³⁶² Secondly, there is a possibility that the exporter and importer could be controlled by the same parent company.³⁶³ To complicate matters the parent company could set up a subsidiary in a foreign jurisdiction with weak money-laundering controls to facilitate the TBML scheme.³⁶⁴ The company could then sell goods to the subsidiary at a fair-market price using legitimate commercial invoices. In turn, the subsidiary could re-invoice and resell the goods at higher or lower prices to the final buyer.³⁶⁵

³⁵⁵ See Hoffmann (2013) 48 *Tex Int'l L J* 326 at 329; Thaendra Frangos *Trade-Based Money Laundering and Terrorist Financing: Methodologies for Combatting the Growing Economic and Cultural Threat* (unpublished MSc Dissertation Utica College 2015) 42-44; Baker *Capitalism* 25; Miller *et al TBML: Overview and Policy Issues* 2; and Soudijn (2014) 17 *JMLC* 230 at 235.

³⁵⁶ See FATF (2006) *TBML Report* 4; Zdanowicz (2009) 5 *Review of Law & Economics* 855 at 857; Thanasegaran & Shanmugam (2007) 10 *JMLC* 429 at 432; and Liao & Acharya (2011) 14 *JMLC* 79 at 81.

³⁵⁷ See FATF (2006) *TBML Report* 4-5; McSkimming (2010) 15 *Deakin L Rev* 37 at 43-48; and Cassara *Next Frontier* 16-17.

³⁵⁸ See Hataley (2020) *JMLC* 1 at 4; Thanasegaran & Shanmugam (2007) 10 *JMLC* 429 at 432; and Liao & Acharya (2011) 14 *JMLC* 79 at 81.

³⁵⁹ See FATF (2006) *TBML Report* 4. See also *R v Miller* [2007] VSCA 249. This is an Australian case where Miller who was a director of Eurovox (Pty) Ltd was charged with money laundering, theft and falsifying documents. He falsely invoiced tolling equipment, DVD players and television set-up boxes and kept part of the funds generated.

³⁶⁰ See Frangos *TBML and Terrorist Financing* 42-44; Baker *Capitalism* 25; and Miller *et al TBML: Overview and Policy Issues* 2.

³⁶¹ See McSkimming (2010) 15 *Deakin L Rev* 37 at 44; Chhina (2014) 29 *JIBLR* 665 at 666.

³⁶² See FATF (2006) *TBML Report* 4-5; Hataley (2020) *JMLC* 1 at 4; and Cassara *Next Frontier* 16-17.

³⁶³ See FATF (2006) *TBML Report* 4-5; Frangos *TBML and Terrorist Financing* 42-44; and Baker *Capitalism* 25.

³⁶⁴ See Cassara *Next Frontier* 16-17; FATF (2006) *TBML Report* 4-5.

³⁶⁵ See Baker *Capitalism* 25 et seq.

Under this scheme, the parent company has just shifted the location for the over-and-under-invoicing operation to a foreign jurisdiction with a low risk of TBML detection.³⁶⁶ Thirdly, the method of over-and-under-invoicing of goods or services has significant tax implications.³⁶⁷ For instance, an exporter who over-invoices the value of his goods will significantly increase the value of the export tax credit or Value Added Tax (VAT) rebate he receives.³⁶⁸ Similarly, when an importer is under-invoiced for the value of goods that he receives, he is able to reduce the value of the import duties he pays to customs authorities.³⁶⁹ These cases show a direct relationship between TBML and the abuse of the tax system.³⁷⁰ It should be noted that cases of over or under-invoicing that are designed to gain a tax advantage are generally considered customs fraud rather than TBML.³⁷¹ This, however, misses the point that there is a link between customs fraud and TBML.³⁷² Sometimes the desire to evade or avoid taxes may result in the commission of TBML.³⁷³ For instance, tax evasion is generally considered a predicate offence for money laundering in many jurisdictions, including South Africa.³⁷⁴

Fourthly, TBML does not only occur when prices of goods or services are manipulated.³⁷⁵ Besides the BMPE or other similar typologies, it is not necessary to even manipulate the prices.³⁷⁶ The FATF seems to suggest that TBML can only occur where there are price anomalies in the goods or services.³⁷⁷ Although this may be true to some extent, it is not always the case. Sometimes the shipment of goods or services occurs at their true value and still be able to move illegal funds from one country to another.³⁷⁸ For instance, the National Crime Squad in the Netherlands, together with

³⁶⁶ See FATF (2006) *TBML Report* 5; Zdanowicz (2009) 5 *Review of Law & Economics* 855 at 857.

³⁶⁷ See McSkimming (2010) 15 *Deakin L Rev* 37 at 44; Zdanowicz (2009) 5 *Review of Law & Economics* 855 at 858.

³⁶⁸ See Cassara *Next Frontier* 16-17; FATF (2006) *TBML Report* 4-5.

³⁶⁹ See Frangos *TBML and Terrorist Financing* 42-44; Cassara *Next Frontier* 16-17; and FATF (2006) *TBML Report* 4-5.

³⁷⁰ See FATF (2006) *TBML Report* 5; Zdanowicz (2009) 5 *Review of Law & Economics* 855 at 858.

³⁷¹ See Cassara *Next Frontier* 16-17; FATF (2006) *TBML Report* 4-5.

³⁷² See FATF (2006) *TBML Report* 4-5.

³⁷³ For a review of possible linkages between commercial abusive transfer systems and money laundering, see para 2.2.5 above.

³⁷⁴ See *The National Director of Public Prosecutions v Abrina 6822 Ltd and Others* 2011(1) SACR 419 (KZP); *The National Director of Public Prosecutions v King* 2010 (2) SACR 146 (SCA).

³⁷⁵ See Soudijn (2014) 17 *JMLC* 230 at 235 et seq. See also para 2.3.5.2 above.

³⁷⁶ See Soudijn (2014) 17 *JMLC* 230 at 235; Thanasegaran & Shanmugam (2007) 10 *JMLC* 429 at 432; Frangos *TBML and Terrorist Financing* 42-44; and Baker *Capitalism* 25.

³⁷⁷ See FATF (2006) *TBML Report* 4-5. See also Soudijn (2014) 17 *JMLC* 230 at 235.

³⁷⁸ See Soudijn (2014) 17 *JMLC* 230 at 236; Frangos *TBML and Terrorist Financing* 42-44.

other regional police forces, discovered cases of TBML where the price, quality or quantity of goods was not misrepresented.³⁷⁹ Instead, goods were traded legitimately and transported at a global scale under normal market prices.³⁸⁰

Without even attempting to hide, criminals in TBML may choose to do things legitimately but still achieving their goals.³⁸¹ For instance, an exporter can state in a payment agreement that the importer will receive a 30 per cent discount if they pay within a stipulated period of say, 30 days. Alternatively, the importer may be penalised through an extra payment of say, 25 per cent, if he fails to settle his import bill within the agreed period.³⁸² A further variation of the scheme would entail one party in the transaction complaining about the unacceptable quality of goods and demand a return of part of the purchase price.³⁸³ These typical issues occur in the world of commerce every day. They are perfectly legitimate ways of dealing with problems in business. However, money launderers have mastered the art of abusing them through TBML operations.³⁸⁴

In addition, over-and under-invoicing may also be used in TBML through services.³⁸⁵ There is a limitation though in using this route. Services by their nature are not easily transferable to a third party.³⁸⁶ This makes them unattractive for a technique that requires re-selling like under-invoicing.³⁸⁷ Services are more suitable when used by the exporter in over-invoicing in order to extract money from a restrictive jurisdiction.³⁸⁸ The scheme may be used in combination with other schemes such as 'phantom' shipping whereby the service is not rendered at all.³⁸⁹ It has been argued that given

³⁷⁹ See Soudijn (2014) 17 *JMLC* 230 at 235 et seq.

³⁸⁰ *Idem* at 236; Zdanowicz (2009) 5 *Review of Law & Economics* 855 at 857.

³⁸¹ See Baker *Capitalism* 25 et seq; Cassara *Next Frontier* 16-17; Soudijn (2014) 17 *JMLC* 230 at 236.

³⁸² See Soudijn (2014) 17 *JMLC* 230 at 236.

³⁸³ See Baker *Capitalism* 25 et seq; Soudijn (2014) 17 *JMLC* 230 at 237.

³⁸⁴ See Soudijn (2014) 17 *JMLC* 230 at 237. See also Frangos *TBML and Terrorist Financing* 42-44.

³⁸⁵ See FATF (2006) *TBML Report* 4-5; McSkimming (2010) 15 *Deakin L Rev* 37 at 43-48. See para 2.3.5.4 below.

³⁸⁶ See Baker *Capitalism* 25 et seq; Cassara *Next Frontier* 16-17.

³⁸⁷ See Cassara *Next Frontier* 16-17.

³⁸⁸ See FATF (2006) *TBML Report* 4-5; McSkimming (2010) 15 *Deakin L Rev* 37 at 43-48.

³⁸⁹ See McSkimming (2010) 15 *Deakin L Rev* 37 at 43-48.

the fraudulent nature of the scheme, no actual valuable and legitimate services are rendered at all.³⁹⁰

2.3.4.3 Multiple-Invoicing of Goods or Services

This is another basic method of TBML.³⁹¹ The technique does not depend on misrepresenting the price of the goods or services on the invoice.³⁹² Instead, the same good or service is invoiced more than once to justify the making of fraudulent payments.³⁹³ Professional money launderers can use numerous financial institutions to make multiple-invoice payments. This additional detail gives them two advantages that are intertwined. First, it increases the level of complexity of the transactions.³⁹⁴ Second, because of the complexity aspect, it decreases the chances of detection by law enforcement authorities.³⁹⁵ Multiple invoicing is a technique money launderers can easily defend. Different plausible excuses and explanations can be given as justification under the technique.³⁹⁶ Such explanations may range from an amendment of payment terms, correction of previous payment instructions to the payment of late fees.³⁹⁷ The technique appears to be a ready-made avenue for TBML through services and other tangibles such as works of art.³⁹⁸ These are difficult to apportion a fair-market value and estimate the number of times billing can reasonably take place.

2.3.4.4 Falsely or Inaccurately Described Goods or Services

TBML can also be committed through falsely describing the goods or services being traded.³⁹⁹ This is a volume-based method that relies on misrepresenting the quality or quantity of the goods or services.⁴⁰⁰ For the method to work, an exporter may ship

³⁹⁰ Idem at 47. Zdanowicz (2009) 5 *Review of Law & Economics* 855 at 858.

³⁹¹ See FATF (2006) *TBML Report* 5.

³⁹² See Hoffmann (2013) 48 *Tex Int'l L J* 326 at 329; Thanasegaran & Shanmugam (2007) 10 *JMLC* 429 at 433.

³⁹³ See Miller *et al* *TBML: Overview and Policy Issues* 2.

³⁹⁴ See FATF (2006) *TBML Report* 5; Cassara *Next Frontier* 20; and Hataley (2020) *JMLC* 1 at 5.

³⁹⁵ See Cassara *Next Frontier* 20; Hataley (2020) *JMLC* 1 at 5; Frangos *TBML and Terrorist Financing* 45; and Soudijn (2014) 17 *JMLC* 230 at 235.

³⁹⁶ See Miller *et al* *TBML: Overview and Policy Issues* 2; FATF (2006) *TBML Report* 5.

³⁹⁷ See Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 6; Chhina (2014) 29 *JIBLR* 665 at 666.

³⁹⁸ See Chhina (2014) 29 *JIBLR* 665 at 666. See also para 2.3.5.4 and para 2.4.6 below.

³⁹⁹ See FATF (2006) *TBML Report* 6-7; Miller *et al* *TBML: Overview and Policy Issues* 2 and Thanasegaran & Shanmugam (2007) 10 *JMLC* 429 at 433.

⁴⁰⁰ See Frangos *TBML and Terrorist Financing* 47; McSkimming (2010) 15 *Deakin L Rev* 37 at 48-49; and Soudijn (2014) 17 *JMLC* 230 at 235.

inexpensive goods and invoice them falsely as expensive.⁴⁰¹ The exporter may also choose to invoice the goods as entirely different items.⁴⁰² The false description of goods being exported creates a discrepancy between what reflects on customs documents and what is actually shipped.⁴⁰³ The effect of falsely describing goods or services is that of over and under-invoicing.⁴⁰⁴ While the method relies on falsifying declarations of the goods, a more sophisticated money launderer may choose to simply give a general or imprecise declaration.⁴⁰⁵ This would assist when the offence is red-flagged. The money launderer would simply explain it away as a description of goods that was rather careless and not necessarily criminal.⁴⁰⁶ To succeed in prosecuting a money-laundering offence the prosecution would need to prove that the accused knows or ought to reasonably know that they were dealing with the proceeds of unlawful activities.⁴⁰⁷ In other words, there is a need for the prosecution to establish clear intention on the part of the accused that they deliberately wanted to disguise and conceal the source, nature and ownership of the criminal proceeds.⁴⁰⁸

The false-description technique is also commonly used in the trade of services such as market research, consulting services or financial advice.⁴⁰⁹ Money launderers prefer these services because their fair-market price is not easy to determine.⁴¹⁰ A service can be worth anything the parties have agreed it to be. Alternatively, it is less onerous to justify payment for 'consulting services' due to their non-standard nature and worth.⁴¹¹ The biggest challenge with combatting the technique of falsely

⁴⁰¹ See FATF (2006) *TBML Report* 6-7; Soudijn (2014) 17 *JMLC* 230 at 235.

⁴⁰² See Frangos *TBML and Terrorist Financing* 47; McSkimming (2010) 15 *Deakin L Rev* 37 at 48-49.

⁴⁰³ See Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 6; McSkimming (2010) 15 *Deakin L Rev* 37 at 48; and Zdanowicz (2009) 5 *Review of Law & Economics* 855 at 858.

⁴⁰⁴ See again para 2.3.4.2 above.

⁴⁰⁵ See McSkimming (2010) 15 *Deakin L Rev* 37 at 48-49.

⁴⁰⁶ *Idem* at 48; Zdanowicz (2009) 5 *Review of Law & Economics* 855 at 858.

⁴⁰⁷ See s 4, 5 and 6 of POCA. See also De Koker 'Money Laundering in South Africa' 85-86; *S v Van der Linde* 2016 (2) SACR 377 GJ paras [111]-[125].

⁴⁰⁸ See Tuba (2012) 2 *Acta Criminologica* 103 at 103; *S v De Vries and Others* 2012 (1) SA 186 (SCA); and *S v Prinsloo* 2016(2) SA 25 (SCA).

⁴⁰⁹ See Cassara *Next Frontier* 127-128; Baker *Capitalism* 25 et seq. See also para 2.3.5.4 below.

⁴¹⁰ See APG (2012) *Trade-Based Money Laundering Report* 9; McSkimming (2010) 15 *Deakin L Rev* 37 at 48-49.

⁴¹¹ See Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 6; Cassara *Next Frontier* 127-128.

describing goods is that a physical inspection is necessary to verify the fraud.⁴¹² Where services or other forms of intangibles are involved, the inspection process may not yield positive results because these kind of services are not physically observable.⁴¹³

2.3.4.5 Over-and Short-Shipping of Goods or Services

Besides price manipulation in exports and imports, a potential launderer in TBML may also overstate or understate the quantity or quality of the goods or services being supplied.⁴¹⁴ This method also requires collusion between the parties involved to sail through.⁴¹⁵ Sometimes no actual goods or services are supplied at all.⁴¹⁶ The colluding parties can simply exchange legitimate documents for purported goods or services supplied. This is called 'phantom' shipping or 'counterfeit trade'.⁴¹⁷ The phantom shipping-scheme relies on the success of fraudulent documents being accepted as genuine.⁴¹⁸ The criminal activity also depends on the manipulation of legitimate trade-finance options commonly used by genuine traders.⁴¹⁹ Financial institutions with weak AML programmes may become part of a counterfeit trade unawares by providing the necessary financing options.⁴²⁰

In a 2006 case study provided by the FATF, the technique of over-and-under-shipment of goods or services operates as follows.⁴²¹ Company E a local exporter, sells 1 million widgets to company F a colluding foreign importer at a price of USD\$2 each. On shipping the cargo, company E supplies 1.5 million widgets. This is half a million more

⁴¹² See Sullivan & Smith (2012) *Australian Institute of Criminology* 7. Inspecting falsely described goods to verify the true value of the goods or services is costly, and in terms of logistics it may not always be feasible. The lack of TBML expertise is also the biggest impediment to authorities who may wish to undertake the investigative exercise, see McSkimming (2010) 15 *Deakin L Rev* 37 at 48-49; APG (2012) *Trade-Based Money Laundering Report* 7.

⁴¹³ See Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 6; McSkimming (2010) 15 *Deakin L Rev* 37 at 48-49.

⁴¹⁴ See FATF (2006) *TBML Report* 6; Zdanowicz (2009) 5 *Review of Law & Economics* 855 at 857.

⁴¹⁵ See Frangos *TBML and Terrorist Financing* 45; Soudijn (2014) 17 *JMLC* 230 at 235; and Hoffmann (2013) 48 *Tex Int'l L J* 326 at 329.

⁴¹⁶ See FATF (2006) *TBML Report* 6; Miller *et al* *TBML: Overview and Policy Issues* 2; Thanasegaran & Shanmugam (2007) 10 *JMLC* 429 at 433; and Frangos *TBML and Terrorist Financing* 45.

⁴¹⁷ See Frangos *TBML and Terrorist Financing* 45.

⁴¹⁸ See Miller *et al* *TBML: Overview and Policy Issues* 2.

⁴¹⁹ See Ch 3 para 3.3 et seq below for a discussion of how trade-finance instruments may be abused for TBML purposes.

⁴²⁰ See Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 6; Zdanowicz (2009) 5 *Review of Law & Economics* 855 at 858.

⁴²¹ See FATF (2006) *TBML Report* 6.

widgets than the agreed number. Company F pays company E, through a bank transfer, a sum of USD\$ 2million. In turn, company F proceeds to sell the widgets on the open market for USD\$3million. The company deposits the extra USD\$1million into a specified bank account from which the money is disbursed according to company E's instructions. It should be noted that the deposit of USD\$ 1million is the difference between the invoiced quantity and the actual quantity that was delivered.⁴²² This is the value being laundered and gained in the process. Secrecy jurisdictions play a role in the scheme by hosting the specified offshore account.⁴²³ Secrecy fuels criminality and money laundering.⁴²⁴ They sell 'secrecy' as a product to be exploited by criminals.⁴²⁵ Within secrecy jurisdictions, there are strong bank secrecy laws, lack of transparency in financial transactions and less or no co-operation in the exchange of information about ultimate beneficial owners of bank accounts.⁴²⁶ These characteristics are ideal for potential money laundering due to the ready-made conditions suitable for criminality.⁴²⁷

2.3.4.6 Conclusion

At the centre of most TBML operations is the basic technique of over or under valuation of goods or services.⁴²⁸ This is done in order to launder proceeds of crime and to move value across jurisdictions. The falsification of documents is also a key component in

⁴²² See Zdanowicz (2009) 5 *Review of Law & Economics* 855 at 857; Chhina (2014) 29 *JIBLR* 665 at 666.

⁴²³ See John Christensen & Verena Zoppei 'What Do a Tax Evader and a Money Launderer have in Common?': The Role of Secrecy in the Financial Sector' in: Heinrich-Böll-Stiftung & Regine Schönenberg (eds) *Transnational Organised Crime: Analyses of a Global Challenge to Democracy* (2014) (hereinafter Christensen & Zoppei 'What Do a Tax Evader and a Money Launderer have in Common?') 35; Gerald Hilsher 'Banking Secrecy: Coping with Money Laundering in the International Arena' in: Robert C Effros (ed) *Current Affairs Affecting Central Bank Volume I* (1992) (hereinafter Hilsher 'Banking Secrecy') 239.

⁴²⁴ See Christensen & Zoppei 'What Do a Tax Evader and a Money Launderer have in Common?' 35; Hilsher 'Banking Secrecy' 239.

⁴²⁵ See Christensen & Zoppei 'What Do a Tax Evader and a Money Launderer have in Common?' 35. Examples of secrecy jurisdictions are Hong Kong, Macau, Singapore, Bahrain, Dubai, Lebanon, Mauritius, Seychelles, South Africa, Liberia, Sao Tome and Principe, see Baker *Capitalism* 36. See also Hoyt Barber *Tax Havens Today: The Benefits and Pitfalls of Banking and Investing Offshore* (2007) (hereinafter 'Barber *Tax Havens Today*') 131 et seq.

⁴²⁶ See Baker *Capitalism* 96; OECD (1998) *Harmful Tax Competition: An Emerging Global Issue* (hereinafter 'OECD (1998) *Harmful Tax Competition*') 21. See also para 2.4.9 below.

⁴²⁷ See Christensen & Zoppei 'What Do a Tax Evader and a Money Launderer have in Common?' 35; Hilsher 'Banking Secrecy' 239.

⁴²⁸ See para 2.3.4.2 above.

the operations of TBML.⁴²⁹ This is meant to create an appearance of legitimacy of purely illegal activities. Additionally, TBML can also take place through phantom or short shipping of goods or services.⁴³⁰ Nothing is supplied at all under these contrived transactions. Just like money laundering in general, TBML thrives on deception in any form.⁴³¹ The discussion of these methods as stand-alone processes is meant only to bring clarity to each method. However, there is a possibility that these methods may be used in combination with others to further strengthen the money-laundering process. When that happens, a complex form of TBML is created which may not even rely on over or under-valuation of the goods being traded. The following section is a discussion of such complex methods of TBML.⁴³²

2.3.5 Complex Methods of TBML

2.3.5.1 General

The FATF recognises three ‘complex’ methods of TBML.⁴³³ These methods are termed ‘complex’ because they combine different aspects of basic methods of TBML with more schemes that are still developing.⁴³⁴ An example of complex methods of TBML are the Black Market Peso Exchange (BMPE),⁴³⁵ the Hawala system⁴³⁶ and the acquisition and sale of intangibles.⁴³⁷ It should be noted that this classification is not exhaustive but is convenient for the FATF in sensitising its members about TBML.

⁴²⁹ See para 2.3.4.4 above.

⁴³⁰ See para 2.3.4.5 above.

⁴³¹ See para 2.2 et seq and para 2.3 et seq above.

⁴³² See para 2.3.5 et seq below.

⁴³³ See para 2.3.4.1 above for a distinction between what are termed ‘basic’ methods by the FATF. The classification of the methods of TBML as ‘basic’ and ‘complex’ is done in this thesis in line with the FATF’s classification in its ground-breaking 2006 report on TBML, see FATF (2006) *TBML Report* 3-7.

⁴³⁴ See Chhina (2014) 29 *JIBLR* 665 at 665. See again para 2.3.4 above.

⁴³⁵ See para 2.3.5.2 below.

⁴³⁶ See para 2.3.5.3 below.

⁴³⁷ See para 2.3.5.4 below. See also Chhina (2014) 29 *JIBLR* 665 at 665; McSkimming (2010) 15 *Deakin L Rev* 37 at 43; and Hoffmann (2013) 48 *Tex Int’l L J* 326 at 328.

2.3.5.2 Black Market Peso Exchange (BMPE) as a Method of TBML

2.3.5.2.1 General

The BMPE is a black-market system that relies on the misuse of international trade for its operations.⁴³⁸ It is an example of how money launderers have mastered the ability to exploit legitimate trade-transactions to their advantage.⁴³⁹ The system is called BMPE because originally its purpose was to facilitate ‘swaps’ of dollars owned by drug cartels in the US for Pesos in Colombia.⁴⁴⁰ In its basic nature, the BMPE is just an alternative remittance system whose name resembles its *modus operandi*.⁴⁴¹ It moves value through goods while the money remains in one place.⁴⁴² BMPE combines legal and illegal activities and several actors across jurisdictions to facilitate TBML either knowingly or unknowingly.⁴⁴³

2.3.5.2.2 A Brief Account of The Origins of BMPE

The origins of BMPE⁴⁴⁴ can be traced back to Colombia. It is a value-transfer system that originated many years ago before drug cartels monopolised it for criminal purposes.⁴⁴⁵ Its origin was motivated by the desire to avoid tax and restrictive exchange rates.⁴⁴⁶ As early as 1967, the government of Colombia passed restrictive exchange-rate regulations prohibiting citizens from accessing foreign currency, especially the US dollar.⁴⁴⁷ Traders who wanted to purchase goods in the US through

⁴³⁸ See Chandna *Black Money* 23; FATF (2006) *TBML Report* 7; Weitz & Porter ‘Understanding and Detecting the Black Market Peso Exchange’ (2013) 61 *United States Attorneys’ Bulletin* 29-35 at 29.

⁴³⁹ FATF (2006) *TBML Report* 7; FinCEN [https:// www.fincen.gov](https://www.fincen.gov) [Accesses on 21 January 2020].

⁴⁴⁰ See Madinger *Money Laundering* 246; Cassara *Next Frontier* 33 et seq; FATF (2006) *TBML Report* 7 et seq; Sullivan *AML in Nutshell* 25; and FinCEN [https:// www.fincen.gov](https://www.fincen.gov) [Accesses on 21 January 2020].

⁴⁴¹ See Frangos *TBML and Terrorist Financing* 50; Sharolyn G Delver *Trade-Based Money Laundering and Terrorist Financing: Combatting TBML/FT in the Financial Institution* (unpublished Mini-Dissertation Utica College 2018) 15.

⁴⁴² See Madinger *Money Laundering* 246; FATF (2006) *TBML Report* 7 et seq; and Cassara *Next Frontier* 33 et seq.

⁴⁴³ See Miller et al *TBML: Overview and Policy Issues* 2; Cassara *Next Frontier* 34; and Madinger *Money Laundering* 246.

⁴⁴⁴ Almost every source attributes its origins to Columbia, see FATF (2006) *TBML Report* 7 et seq Miller et al *TBML: Overview and Policy Issues* 8; Madinger *Money Laundering* 246; Cassara *Next Frontier* 33 et seq; and Sullivan *AML in Nutshell* 25; Weitz & Porter (2013) 61 *US Att’y’s Bull* 29 at 29.

⁴⁴⁵ See Frangos *TBML and Terrorist Financing* 50; Delver *Combatting TBML/FT in the Financial Institution* 15; and Cassara *Next Frontier* 33 et seq.

⁴⁴⁶ See Cassara *Next Frontier* 33 et seq; Delver *Combatting TBML/FT in the Financial Institution* 15.

⁴⁴⁷ See Cassara *Next Frontier* 36.

the formal banking system had to pay high charges to access foreign currency. Consequently, they were forced to use government-licensed institutions to access financing based on the Colombian peso.⁴⁴⁸ These institutions had strict currency-reporting requirements to the Colombian Ministry of Finance. Besides the currency reporting, they also charged exorbitant premiums for their services.⁴⁴⁹ To avoid this onerous process, traders resorted to underground or black market peso dealers. The peso brokers sold the US dollars on the black market for less than the official exchange rates obtaining in the formal banking sector.⁴⁵⁰ The BMPE is responsible for facilitating about 45 per cent of Colombia's imported consumer goods.⁴⁵¹ The DEA reported that the BMPE was responsible for laundering roughly USD\$5billion worth of drug money annually by 2004.⁴⁵²

2.3.5.2.3 The Operation of BMPE

The nature and operation of the BMPE provide a ripe environment for TBML.⁴⁵³ Generally, a BMPE scheme consists of two separate parts. First, a Colombian peso exchange in Colombia and second, a US dollar transaction in the US.⁴⁵⁴ The BMPE process usually starts with drug sales in the US, for instance, worth USD\$4million of cash.⁴⁵⁵ The cartel drug dealer sells the USD\$4million to a Colombian-peso broker at a large discount.⁴⁵⁶ The discount is meant to quicken the sales process and is considered an acceptable cost of 'doing business'.⁴⁵⁷ The peso brokers operate at the intersection of the US financial system and the trading system both in Colombia and the US.⁴⁵⁸ It should be noted that the sale of the US dollars to the Colombian-peso broker does not result in the movement of any cash across the border. The actual

⁴⁴⁸ Ibid.

⁴⁴⁹ See Frangos *TBML and Terrorist Financing* 50; FATF (2006) *TBML Report* 8 note 10; Weitz & Porter (2013) 61 *US Att'ys Bull* 29 at 29.

⁴⁵⁰ See FATF (2006) *TBML Report* 8 note 10; Weitz & Porter (2013) 61 *US Att'ys Bull* 29 at 31-32.

⁴⁵¹ See Sullivan *AML in Nutshell* 25; Cassara *Next Frontier* 36.

⁴⁵² Cassara *Next Frontier* 36. See also FATF (2006) *TBML Report* 7.

⁴⁵³ See FATF (2006) *TBML Report* 7; Weitz & Porter (2013) 61 *US Att'ys Bull* 29 at 31.

⁴⁵⁴ See Sullivan *AML in Nutshell* 25; Weitz & Porter (2013) 61 *US Att'ys Bull* 29 at 31.

⁴⁵⁵ See Madinger *Money Laundering* 246; Thanasegaran & Shanmugam (2007) 10 *JMLC* 429 at 434.

⁴⁵⁶ See Sullivan *AML in Nutshell* 25; Madinger *Money Laundering* 246; and Thanasegaran & Shanmugam (2007) 10 *JMLC* 429 at 434.

⁴⁵⁷ See Sullivan *AML in Nutshell* 25; Cassara *Next Frontier* 36-37; Madinger *Money Laundering* 246; and Frangos *TBML and Terrorist Financing* 50.

⁴⁵⁸ See Madinger *Money Laundering* 246; FinCEN <https://www.fincen.gov> [Accessed on 21 January 2020].

dollars remain in the US while the broker pays the drug cartel an equivalent of USD\$4million in 'clean' Colombian pesos.⁴⁵⁹ The drug cartels get out of the equation as soon as they receive their pesos' payment.⁴⁶⁰

Two further steps are required from the Colombian-peso broker in order to conclude the BMPE cycle. First, the broker instructs his contacts in the US to deposit the drug dollars into the US financial institutions.⁴⁶¹ The depositing of 'dirty' dollars is done using various techniques designed not to raise any law enforcement suspicion.⁴⁶² It is also done in such a way that it does not trigger financial-reporting thresholds.⁴⁶³ The success of the BMPE depends on the ability of the 'smurfs'⁴⁶⁴ used by the cartels to place drug funds in the US banking system.⁴⁶⁵

Secondly, the broker collects orders from the Colombian business owners wishing to import goods from the US.⁴⁶⁶ The broker then purchases the goods using his funds already deposited in the US banks. Manufacturers and distributors in the US are paid in the 'clean' drug dollars from banks and then export the goods to Colombia.⁴⁶⁷ The payments to US businesses are usually made from third-party accounts to complicate and further distance the funds from their illegal source.⁴⁶⁸ A classic case is that of the Woody Toys Company which received drug money from Colombian and Mexican cartels.⁴⁶⁹ The money was deposited directly into Woody's bank account from multiple locations.⁴⁷⁰ The 'structuring' technique was used to place the money into the company's bank account where amounts deposited ranged from USD\$10000 and

⁴⁵⁹ See Cassara *Next Frontier* 37; Thanasegaran & Shanmugam (2007) 10 *JMLC* 429 at 434.

⁴⁶⁰ See Madinger *Money Laundering* 246; and Cassara *Next Frontier* 37.

⁴⁶¹ See Cassara *Next Frontier* 38; FATF (2006) *TBML Report* 8; and Madinger *Money Laundering* 246.

⁴⁶² Such techniques include structuring and use of smurfs, see Madinger *Money Laundering* 246; Frangos *TBML and Terrorist Financing* 50.

⁴⁶³ See Cassara *Next Frontier* 37. See also para 2.2.4.2 above.

⁴⁶⁴ See para 2.2.4.2 above.

⁴⁶⁵ Sullivan *AML in Nutshell* 25; FinCEN <https://www.fincen.gov> [Accessed on 21 January 2020].

⁴⁶⁶ See Cassara *Next Frontier* 38; Miller *et al TBML: Overview and Policy Issues* 3; and FATF (2006) *Trade-Based Money Laundering TBML Report* 7.

⁴⁶⁷ See Sullivan *AML in Nutshell* 25; FATF (2006) *TBML Report* 8; and Delver *Combatting TBML/FT in the Financial Institution* 16.

⁴⁶⁸ See Madinger *Money Laundering* 246; Cassara *Next Frontier* 35.

⁴⁶⁹ See Miller *et al TBML: Overview and Policy Issues* 8. See also Cassara *Next Frontier* 35.

⁴⁷⁰ See Miller *et al TBML: Overview and Policy Issues* 8.

below. The company then used the money to import toys from China and export them to Mexico and Colombia.⁴⁷¹

The BMPE's complexity makes it challenging for law enforcement authorities to track the movement of narcotics funds.⁴⁷² Each step in the cycle moves the money further away from its narcotics origins. Unlike other methods of TBML, the BMPE does not rely on collusion between the importer and exporter.⁴⁷³ Instead, the prices and quantities are reported correctly to customs authorities while value representing illegal funds is transferred across national borders.⁴⁷⁴ Although BMPE refers to a method originally associated with Colombian drug dealers, the scheme is not limited to them anymore.⁴⁷⁵ It is widely used in numerous countries to hide and repatriate the money earned through several illicit endeavours.⁴⁷⁶ Its complexity gives the money launderers the desired protection from law enforcement authorities.⁴⁷⁷

2.3.5.3 *The Hawala System as a Method of TBML*

2.3.5.3.1 General

Remittances are an economic lifeline for many countries around the world.⁴⁷⁸ They come in the form of money or goods sent back to countries of origin by migrant workers. Remittances are the most direct link between migration and development. The World Bank has estimated that remittances to low and middle-income countries were on course to reach USD\$551billion in 2019 and up to USD\$ 597billion by the year 2021.⁴⁷⁹ Global estimates of money transfers by migrant workers usually do not cover informal transfers. Financial flows through unofficial routes are thought to be at least 50 per cent larger than fund transfers that are documented.⁴⁸⁰ This implies that

⁴⁷¹ Ibid. See also Cassara *Next Frontier* 37.

⁴⁷² See Cassara *Next Frontier* 38; Madinger *Money Laundering* 247.

⁴⁷³ See Thanasegaran & Shanmugam (2007) 10 *JMLC* 429 at 434; FATF (2006) *TBML Report* 8; and Soudijn (2014) 17 *JMLC* 230 at 232. See also para 2.3.4 above.

⁴⁷⁴ See FATF (2006) *TBML Report* 8; Cassara *Next Frontier* 38.

⁴⁷⁵ See FATF (2006) *TBML Report* 8-9; Sullivan *AML in Nutshell* 25.

⁴⁷⁶ See FATF (2006) *TBML Report* 8-9.

⁴⁷⁷ Ibid.

⁴⁷⁸ See Cassara *Next Frontier* 50. See also Goredema 'Confronting Money Laundering in South Africa' 84.

⁴⁷⁹ See 'Remittances' <https://www.migrationdataportal.org> [Accessed on 22 January 2020].

⁴⁸⁰ See Cassara *Next Frontier* 50.

the informal value-transfer systems account for larger flows of value than reported estimates. The Hawala is one such informal system.

2.3.5.3.2 The Hawala System Explained

The Hawala system is an alternative remittance method that relies on the informal channels of the financial system to transfer funds.⁴⁸¹ It is a 'parallel banking system' that is sometimes described as 'underground banking.' It is incorrect, however, to describe the Hawala system as 'underground' since the system usually operates in the open legitimately.⁴⁸² Just like the BMPE, the system has been targeted for abuse by money launderers. The Hawala system is known by various names depending on the geographic location in which it is operating. In the Middle East, North Africa, and South Asia, it is simply referred to as 'Hawala', while in Pakistan and Bangladesh, it is known as 'Hundi'.⁴⁸³ It is also known as 'Fei-Chien' or 'Chinese Flying Money' in China.⁴⁸⁴ Although the term 'Hawala' is not universal, it has come to be associated with all systems of informal value transfer despite location in the world. In the 1988 US prosecution of Iranian money launderer Rayhani, the Hawala method was referred to as a "money transfer without money movement".⁴⁸⁵ This aptly describes the core aspect of how the system operates.

2.3.5.3.3 The Origin of the Hawala System

The origin of the Hawala system is subject to different accounts.⁴⁸⁶ The system is believed to have developed in South Asia centuries ago.⁴⁸⁷ This was pure traditional

⁴⁸¹ See Patrick M Jost & Harjit Singh Sandhu *The Hawala Alternative Remittance System and its Role in Money Laundering* (2000) (hereinafter 'Jost & Sandhu *Hawala in Money Laundering*') 5; APG (2012) *Trade-Based Money Laundering Report* 69.

⁴⁸² See Jost & Sandhu *Hawala in Money Laundering* 5.

⁴⁸³ See Cassara *Next Frontier* 51. Hundi means 'trust' while Hawala means 'transfer related to money', see APG (2012) *Trade-Based Money Laundering Report* 69.

⁴⁸⁴ Other general references to the system classify it as 'underground banking system' or 'parallel banking system' or 'informal money transfer system', see APG (2012) *Trade-Based Money Laundering Report* 69; Cassara *Next Frontier* 51.

⁴⁸⁵ See Cassara *Next Frontier* 51.

⁴⁸⁶ See Nikos Passas 'Demystifying Hawala: A Look into its Social Organisation and Mechanics' (2006) 7 *Journal of Scandinavian Studies in Criminology and Crime Prevention* 46-62 at 48.

⁴⁸⁷ See Jost & Sandhu *Hawala in Money Laundering* 11-16; APG (2012) *Trade-Based Money Laundering Report* 69; Cassara *Next Frontier* 51; FATF (2013) *Report on the Role of Hawala and other Similar Service Providers in Money Laundering and Terrorist Financing* (hereinafter 'FATF (2013) *Report on Hawala in Money Laundering*') 9; and Passas (2006) 7 *Journal of Criminology and Crime Prevention* 46 at 49.

Hawala often used for trade finance. The system has operated for ages in an unregulated environment and is currently present in some countries for similar purposes.⁴⁸⁸ Some claim that Hawala originated in classical Islamic law, citing references to it in Islamic jurisprudence dating back to the eighth century.⁴⁸⁹ The concept, however, continued to develop up to the modern-day as an unofficial value-transfer mechanism.⁴⁹⁰

2.3.5.3.4 Characteristics of the Hawala System

Around the world, there are many different kinds of alternative-remittance systems.⁴⁹¹ However, there are a few traits that these have in common and four of them are worth mentioning. First, all of them move money without actually moving it in the physical sense.⁴⁹² Secondly, they are believed to be certain, convenient and cheap.⁴⁹³ The FATF however, has disputed the fact that Hawalas are cheap and, therefore, in demand. Instead, it argues that the Hawala system is popular because of competitive performance. The international organisation submits that the Hawala system offers advantages such as accessibility to remote areas that formal banks do not have.⁴⁹⁴ Thirdly, most Hawalas, use trade as the principal means of settling accounts between participating brokers.⁴⁹⁵ Fourthly, and most importantly the Hawala system depends on trust.⁴⁹⁶ The system is centred on using regional or familial links, as well as tribal affiliations.⁴⁹⁷ Although it is accepted that trust is a major aspect of the Hawala system, the reputation of the Hawala broker in business is also significant. The system functions well based on the reputation of past performance.⁴⁹⁸ However, the lack of transparency in the manner in which the system operates has made it attractive to money launderers for TBML.⁴⁹⁹ The Hawala system has the twin of facilitating tax

⁴⁸⁸ See FATF (2013) *Report on Hawala in Money Laundering* 14. See also Jost & Sandhu *Hawala in Money Laundering* 11.

⁴⁸⁹ See Jost & Sandhu *Hawala in Money Laundering* 16.

⁴⁹⁰ See Cassara *Next Frontier* 52.

⁴⁹¹ See Passas (2006) 7 *Journal of Criminology and Crime Prevention* 46 at 48.

⁴⁹² See Cassara *Next Frontier* 54; Jost & Sandhu *Hawala in Money Laundering* 9; and FATF (2013) *Report on Hawala in Money Laundering* 16.

⁴⁹³ See Jost & Sandhu *Hawala in Money Laundering* 9.

⁴⁹⁴ See FATF (2013) *Report on Hawala in Money Laundering* 20.

⁴⁹⁵ *Idem* at 16. See also para 2.3.5.3.5 below.

⁴⁹⁶ See Jost & Sandhu *Hawala in Money Laundering* 10-11; Cassara *Next Frontier* 57.

⁴⁹⁷ See Passas (2006) 7 *Journal of Criminology and Crime Prevention* 46 at 48.

⁴⁹⁸ See FATF (2013) *Report on Hawala in Money Laundering* 20.

⁴⁹⁹ See Jost & Sandhu *Hawala in Money Laundering* 9.

evasion and leaving no paper trail, both of which are useful in money-laundering schemes.⁵⁰⁰

2.3.5.3.5 The Operation of the Hawala System

The Hawala system operators known as Hawaladars facilitate the movement of money across national borders.⁵⁰¹ In a typical Hawala operation, a Hawaladar based in the remitting country accepts funds from a client wishing to send money to the receiving country.⁵⁰² The first Hawaladar will communicate with the second Hawaladar, who will then transfer the funds to the designated recipient less his (the second Hawaladar's) commission. To close the transaction Hawaladars eventually would settle their accounts with each other.⁵⁰³ Historically, trade has been used to settle accounts.⁵⁰⁴ A Hawaladar in the remitting country would simply purchase goods such as electronics and send them to the Hawaladar in the receiving country. The clearing process can adopt any method of settlement convenient to the participating brokers.⁵⁰⁵ The settlement of accounts between Hawaladars via trade, provides a convenient opportunity to transfer value thereby facilitating TBML.⁵⁰⁶ Goods can be bought using licit and illicit money commingled together with the sole intent of transferring illegal funds. Hawaladars are also a ready market for the placement of illegal money in TBML since they are already in the business of money transmission.⁵⁰⁷ Due to the opaqueness of the operations involving family and tribal ties, the Hawala system can offer the secrecy desired by criminals when laundering 'dirty' funds through TBML.⁵⁰⁸

The use of technology and emerging cyber currencies such as bitcoin have also modified the way Hawaladars operate. The technological development can help ensure a fast-settlement process. However, it can also heighten the obfuscation of the TBML trail. Similarly, the use of mobile payments to remit funds has also placed the

⁵⁰⁰ Ibid.

⁵⁰¹ See Cassara *Next Frontier* 56.

⁵⁰² See Jost & Sandhu *Hawala in Money Laundering* 5; Passas (2006) 7 *Journal of Criminology and Crime Prevention* 46 at 49; and Cassara *Next Frontier* 56.

⁵⁰³ See APG (2012) *Trade-Based Money Laundering Report* 69; Cassara *Next Frontier* 59.

⁵⁰⁴ See Cassara *Next Frontier* 56.

⁵⁰⁵ Idem at 59.

⁵⁰⁶ Idem at 60; Jost & Sandhu *Hawala in Money Laundering* 12.

⁵⁰⁷ See Jost & Sandhu *Hawala in Money Laundering* 12.

⁵⁰⁸ Idem at 9.

role of money transfer within individuals' control and further opening the room for TBML.⁵⁰⁹

2.3.5.4 Acquisition and Sale of Intangibles as a Method of TBML

2.3.5.4.1 General

TBML through services or intangibles is a method that transfers value through a trade of services rather than goods.⁵¹⁰ Cassara calls this method “service-based money laundering” to clearly distinguish it from trade in commodities.⁵¹¹ TBML through services revolves around fraudulently manipulating invoices just like in the trade of goods. The invoices used for money-laundering manipulation could either be real or fictitious. Additionally, it is possible to produce, inflate, or deflate several invoices for the same service.⁵¹² The most commonly manipulated services are for accounting, leasing, market research, consulting, legal, and natural resource exploration fees.⁵¹³ These services are generally not standardised and are difficult to challenge based on validity.

2.3.5.4.2 Why TBML through Services Also Matter

The focus on TBML in various FATF reports has been on the use of goods.⁵¹⁴ However, it should be noted that trading in services or intangibles can also provide greater opportunities for TBML than the trade in goods.⁵¹⁵ TBML through services presents a much more significant challenge than the trade in goods because of many reasons, including the following four.⁵¹⁶ First, TBML through services or intangibles is not a well-understood process. The FATF notes that there is a need to further examine risks associated with TBML in the trade of services.⁵¹⁷

Secondly, compared to the trade of goods, it is more difficult to identify fraudulent activity in the trade of services.⁵¹⁸ A transaction itself can in part or completely be

⁵⁰⁹ See Cassara *Next Frontier* 59.

⁵¹⁰ See Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 8; Cassara *Next Frontier* 127.

⁵¹¹ See Cassara *Next Frontier* 127.

⁵¹² See again para 2.3.4.2 and para 2.3.4.3 above.

⁵¹³ See Baker *Capitalism* 38-41; Cassara *Next Frontier* 128.

⁵¹⁴ Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 8.

⁵¹⁵ Ibid.

⁵¹⁶ See Baker *Capitalism* 26.

⁵¹⁷ See FATF (2006) *TBML Report* 1; APG (2012) *Trade-Based Money Laundering Report* 9.

⁵¹⁸ See Baker *Capitalism* 26; Cassara *Next Frontier* 128.

faked. In other words, the reality of the transaction is manipulated rather than the price and still be able to generate illegal funds to move across borders without detection.⁵¹⁹

Thirdly, the fact that services are intangible makes the determination of trade in services difficult.⁵²⁰ Sometimes a fictitious billing can take place for services that are imaginary. A variation to the scheme could just be an addition of a fake or disguised buyer or seller thereby making the entire process complex.⁵²¹

Fourthly, unlike goods, services are difficult to standardize.⁵²² Therefore, “anomalies in value and price are less apparent and more difficult to substantiate”.⁵²³ Services can also result in a payment being made even if they were never supplied.⁵²⁴ It is common practice in most jurisdictions to stipulate a clause for a retainer or penalty in a contract that could result in a payment being made.⁵²⁵

2.3.5.5 Conclusion

The FATF has classified the use of BMPE, sale of intangibles and Hawala as some of the complex methods through which TBML may be committed.⁵²⁶ These methods have been termed ‘complex’ because they are difficult to detect and usually cover more than two jurisdictions when operating.⁵²⁷ Although these methods are not necessarily illegal, organised crime groups have hijacked them for their criminal ends. The addition of complex methods of TBML to a money-laundering process makes detection even more difficult. Complex methods of TBML do not necessarily rely on the increasing or decreasing of value in traded goods or services.⁵²⁸ Organised crime groups simply hijack a legitimate value-transfer system that is already in place and use it for their illegal purposes. It should be noted that certain environments that present vulnerabilities for money laundering heighten the commission of TBML

⁵¹⁹ See Baker *Capitalism* 38.

⁵²⁰ See Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 8. See also Baker *Capitalism* 26.

⁵²¹ See Baker *Capitalism* 40-41.

⁵²² See APG (2012) *Trade-Based Money Laundering Report* 9.

⁵²³ See Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 8.

⁵²⁴ See Cassara *Next Frontier* 128.

⁵²⁵ See Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 8.

⁵²⁶ See para 2.3.5 et seq above.

⁵²⁷ See again para 2.3.5 et seq above.

⁵²⁸ See again para 2.3.5 et seq above.

through either basic or complex methods.⁵²⁹ The following section is a discussion of such environments and their vulnerabilities for TBML.

2.4 ENVIRONMENTS AND VULNERABILITIES POSING THE RISK OF TBML

2.4.1 General

The concept of vulnerabilities in the context of TBML comprises of those aspects that can be exploited by threats or that may support the activities of money laundering.⁵³⁰ From a risk assessment perspective, vulnerabilities may represent weaknesses in the AML system or controls of a country.⁵³¹ These weaknesses may also include certain features of a particular sector, a financial product or type of service or good that may make them attractive for TBML purposes.⁵³² In the following paragraphs, I explore some environments susceptible to the threat of TBML. It is the contention in the following analysis that such environments heighten the operation of TBML. To the extent that such vulnerabilities exist in South Africa, they present a huge weak point for the possible occurrence of TBML in the country.

2.4.2 Barter and Countertrade Transactions

2.4.2.1 General

The system of barter is the most basic form of trade, which operates as per the needs of the parties without using 'money' as a payment method.⁵³³ Both the buyer and the seller simultaneously present goods of perceived equal value for exchange.⁵³⁴ Since there is no currency used in the settlement process, one contract is used to formalise the agreement between the parties. It should be noted that in more complex-barter transactions, three or more parties could be involved. The exchange process can also

⁵²⁹ See para 2.4 et seq below.

⁵³⁰ See Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 8; FATF (2013) *National Money Laundering and Terrorist Financing Risk Assessment Guidance* (hereinafter 'FATF (2013) National Money Laundering Risk Assessment Guidance') 7.

⁵³¹ See FATF (2013) *National Money Laundering Risk Assessment Guidance* 7; Joras Ferwerda & Peter Reuter 'Learning from Money Laundering National Risk Assessments: The Case of Italy and Switzerland' (2019) 25 *European Journal on Criminal Policy and Research* 5–20 at 8.

⁵³² See FATF & Egmont (2013) *Money Laundering and Terrorist through Trade in Diamonds Report* 48 (hereafter 'FATF & Egmont (2013) *Money Laundering through Diamonds Report*'); Ferwerda & Reuter (2019) 25 *European Journal on Criminal Policy and Research* 5 at 8.

⁵³³ See Portia Oliver & Mercy Mpinganjira 'Use of Barter Trade in the South African Media Industry' (2010) 7 *Journal of Contemporary Management* 22 – 33 at 22.

⁵³⁴ See Oliver & Mpinganjira (2010) 7 *Journal of Contemp Manage* 22 at 22.

take place over an extended period. In such complex forms of barter, currency may be used “to offset variations in the values of the bartered goods”.⁵³⁵

Barter trade in its basic form is now relatively rare and has challenges.⁵³⁶ For example, the parties to the transaction may choose not to accept the goods each has to offer. Sometimes the quantities involved cannot be absorbed in the intended domestic market or their quality may be perceived not to be acceptable.⁵³⁷

2.4.2.2 Countertrade

To date, barter is still being practised in its varied forms due to the advantages it offers in certain circumstances.⁵³⁸ Such circumstances may include a lack of money, depreciated currency, a high-tax rate, or other types of political or economic unrest.⁵³⁹ The most common variation of classical barter trade in the modern day is countertrade. It has been defined as an arrangement between an importing nation and a foreign seller requiring that, as a condition for the completion of the import transaction, the seller separately purchase certain goods from the importing nation.⁵⁴⁰ Thus, a countertrade transaction is a parallel set of obligations under which parties undertake to sell goods to each other in separate but related transactions.⁵⁴¹ Sometimes a third party is introduced to the equation to acquire the goods purchased from the second party by the first party thereby making such transactions complex in structure.⁵⁴²

⁵³⁵ See Thomas B McVey ‘Countertrade and Barter: Alternative Trade Financing by Third World Nations’ (1981) 6 *Maryland Journal of International Law* 197-220 at 200-201.

⁵³⁶ See Bishop *Finance* 159.

⁵³⁷ Ibid.

⁵³⁸ See Glyn Davies *A History of Money: From Ancient Times to the Present Day* (2002) (hereinafter ‘Davies *History of Money*’) at 9-18 where he distinguishes between early barter and modern barter. See also Oliver & Mpinganjira ‘Use of Barter Trade in the South African Media Industry’ (2010) 7 *Journal of Contemporary Management* 22-33.

⁵³⁹ See Cassara *Next Frontier* 126; Davies *History of Money* 19.

⁵⁴⁰ See McVey (1981) 6 *Maryland Journal of Interl Law* 197 at 197. For a discussion of the various types of countertrade, see Anders Grath *The Handbook of International Trade and Finance: The Complete Guide to Risk Management, International Payments and Currency Management, Bonds and Guarantees, Credit Insurance and Trade Finance* 4 ed (2016) (hereinafter ‘Grath *Handbook of International Trade*’) 65; Bishop *Finance* 149 et seq; Gloria Esteban de la Rosa ‘International Countertrade-Rules and Practices’ (2011) 2 *International Journal of Business and Social Science* 273-283 at 274 et seq.

⁵⁴¹ See Bishop *Finance* 149 et seq. See also Johannes Jacobus van Dyk *Countertrade as a Development Tool: a Comparative Analytical Approach* (Unpublished DPhil Thesis Nelson Mandela metropolitan University, 2015) passim.

⁵⁴² See Bishop *Finance* 149 et seq.

Countertrade is not a completely 'new' method of trade since it borrows largely from barter trade.⁵⁴³ In South Africa, countertrade has been used mainly in the defence industry and in countering economic sanctions during the apartheid era.⁵⁴⁴ A number of reasons necessitates the method. It is often undertaken to facilitate trade in markets with difficulties in paying for imports. Such difficulties can be a consequence of having a non-convertible currency, failure to secure commercial credit or outright shortage of foreign exchange.⁵⁴⁵ Countertrade transactions are common in the areas of defence, nuclear installations and production plants. The transactions are often very secretive in nature and may involve countries with high-risk profiles.⁵⁴⁶ Countertrade is also more prone to the risk of bribery or facilitation payments compared to standard trade transactions.⁵⁴⁷ For most countries under sanctions, countertrade is the only way to access foreign markets, earn foreign exchange, purchase equipment and improve economies.⁵⁴⁸

2.4.2.3 The Vulnerability of Barter and Countertrade to TBML

Barter and countertrade transactions are ideal for TBML due to a number of factors, four of which are worth mentioning.⁵⁴⁹ First, barter and countertrade systems do not have a unified trading platform, governing rules, settlement methods, and standardised regulation.⁵⁵⁰ These make them ideal for criminal activities such as TBML, which thrives in poorly regulated markets. Secondly, barter trade blurs the source of illegal goods more than other forms of trade due to the absence of a financial paper trail and comprehensive monetary-value records.⁵⁵¹ Thirdly, the flexibility of a barter and countertrade contract also makes it vulnerable to TBML. The contract has flexible closing time, transaction amount and payment method. There is also no clear

⁵⁴³ See De la Rosa (2011) 2 *Interl Journal of Bus and Social Scie* 273 at 274; Davies *History of Money* 18 et seq.

⁵⁴⁴ See Van Dyk *Countertrade as a Development Tool* passim; Eisenberg 'South Africa, Countertrade and the General Agreement on Tariffs and Trade' (1993) 4 *Stellenbosch L Rev* 143-175 at 147.

⁵⁴⁵ See Grath *Handbook of International Trade* 65.

⁵⁴⁶ See Baker *Capitalism* 32; Grath *Handbook of International Trade* 66.

⁵⁴⁷ See Grath *Handbook of International Trade* 67.

⁵⁴⁸ See Bishop *Finance* 148.

⁵⁴⁹ See Cassara *Next Frontier* 127 et seq; Baker *Capitalism* 32.

⁵⁵⁰ See Dexiang Mei & Xiaojun Li 'Transfer Pricing-Based Money Laundering in Barter Trade' (2015) 6 *Modern Economy* 747-754 at 748.

⁵⁵¹ Ibid. See also Cassara *Next Frontier* 127 et seq.

limitation regarding the type of goods that can be exchanged. These features make barter and countertrade contracts attractive to TBML. Fourthly, complex payment arrangements such as reciprocal documentary credits can also be added to barter and countertrade to cater for shortfalls.⁵⁵² These can operate over extended periods and allow parties to trade successively thereby justifying the repeated transfer of illegal funds.⁵⁵³

The risk of TBML in barter and countertrade transactions is that organised crime groups can infiltrate purely legitimate trade arrangements in order to exchange illegally acquired goods. The transactions are a ready-made process to make ostensibly legitimate payments to unrelated third parties in TBML schemes.⁵⁵⁴ Plausible reasons can be given to justify payment against goods supplied using countertrade arrangements. Criminals prefer these methods due to the added secrecy it offers in concealing value and other advantages. For instance, barter and countertrade trade-transactions are not screened for money laundering in the same way financial transactions are scrutinised in a bank. There is also no paper trail or a requirement to file suspicious-transactions reports in barter trade. In any case, it is difficult to identify what would constitute a suspicious transaction in barter trade.⁵⁵⁵ Following the money in money-laundering investigations, require some residual evidence in the form of paper trail or some filed reports. The absence of these in barter trade-transactions heighten the incidence of TBML.⁵⁵⁶

2.4.2.4 Conclusion

The use of barter and countertrade transactions is still a common way of conducting business in the modern world.⁵⁵⁷ Certain conditions such as volatile exchange rates, lack of foreign currency and inflation may lead to an increase in barter or countertrade transactions.⁵⁵⁸ However, the commission of TBML is likely to be higher in an

⁵⁵² Regarding the abuse of documentary credits for TBML purposes, see Ch 3 para 3.3.1 et seq below.

⁵⁵³ See Mei & Li (2015) 6 *Modern Economy* 747 at 748. See also APG (2012) *Trade-Based Money Laundering Report* 68.

⁵⁵⁴ See Cassara *Next Frontier* 127 et seq; Baker *Capitalism* 32.

⁵⁵⁵ See Mei & Li (2015) 6 *Modern Economy* 747 at 753.

⁵⁵⁶ See Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 9.

⁵⁵⁷ See para 2.4.2 et seq above.

⁵⁵⁸ See again para 2.4.2 et seq above.

environment where barter or countertrade transactions are still prevalent. Barter and countertrade transactions, are prone to the risk of TBML due to the absence of a comprehensive paper trail, the subjectivity of value in traded goods and the absence of AML requirements to report any suspicious transactions.⁵⁵⁹ Thus, barter and countertrade transactions provide a ready-made vehicle through which TBML may be committed.⁵⁶⁰ There is, therefore, a need to increase monitoring by law enforcement agencies of barter and countertrade transactions for possible abuse through TBML.

2.4.3 High-Risk Jurisdictions and the Risk of TBML

2.4.3.1 General

Some countries have more TBML vulnerabilities than others do. These are what are termed ‘high-risk jurisdictions’ by the FATF in terms of money-laundering control.⁵⁶¹ In its 2007 *Examination Manual*, the Federal Financial Institution Examination Council (FFIEC) notes that financial institutions engaged in trade-financing activities should consider high-risk jurisdictions in their operations. The FFIEC in particular advises that greater scrutiny should be paid to “customers conducting business in high-risk jurisdictions” and “customers shipping items through high-risk jurisdictions, including transit through non-cooperative countries”.⁵⁶² This aligns with the FATF proposal that financial institutions implement heightened due-diligence protocols for commercial dealings with individuals or entities originating from nations categorised as higher-risk jurisdictions.⁵⁶³ A country’s major trading partners can present a high risk of TBML to it.⁵⁶⁴ For instance, due to the value and volume of trade that passes through its borders, South Africa is at high risk of TBML. Many landlocked countries in the Southern African Development Community (SADC) region depend on South Africa’s ports for trade with the outside world.⁵⁶⁵ Three factors, among others, can make a jurisdiction more vulnerable to the risk of TBML than others and thereby be regarded by the FATF as a

⁵⁵⁹ See para 2.4.2.3 above.

⁵⁶⁰ See again para 2.4.2.3 above.

⁵⁶¹ See Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 10.

⁵⁶² See FFIEC (2007) *BSA/AML Manual* 244. As regards the FFIEC’s contribution against TBML control in trade-finance instruments under the US AML regime, see Ch 7 para 7.5.4 below.

⁵⁶³ See Recommendation 19 of the FATF (2012) *Standards*.

⁵⁶⁴ See Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 10.

⁵⁶⁵ See Peter Draper & Nkululeko Khumalo ‘Friend or Foe? South Africa and Sub-Saharan Africa in the Global Trading System’ in: Peter Draper (ed) *Re-Orientating the Compass: South Africa’s Africa Trade Diplomacy* (2005) 40 et seq.

high-risk jurisdiction for money laundering. These are the use of transshipment centres,⁵⁶⁶ the presence of a weak AML framework⁵⁶⁷ and the prevalence of organised crime and high crime rate.⁵⁶⁸ I briefly explain them below.

2.4.3.2 The Use of Transshipment Centres

Transshipment centres “are cargo-sorting and redistribution destinations through which much international trade is routed”.⁵⁶⁹ Their use has improved international trade through efficiency in trans-ocean shipping. The practice is common in Asia with some of its transshipment centres such as Singapore handling approximately 50 per cent of the world’s transshipment-container movement.⁵⁷⁰ Transshipment jurisdictions, however, present a high risk of TBML. Countries with huge transshipment centres such as China, Mexico, Panama and Singapore, have been reported to be hotspots for TBML.⁵⁷¹ Jurisdictions with transshipment zones have multiple possible entry points into the country for handling volumes of cargo in international trade. However, these points can be exploited for TBML. There is also a lack of transparency inherent in the origins of shipments in transshipment centres. This makes the monitoring of TBML activities a challenge in such areas.

Identifying TBML in transshipment jurisdictions is a big challenge.⁵⁷² The risk profile of TBML in such areas is substantially different from the traditional money-laundering red flags.⁵⁷³ Law enforcement personnel usually screen for weapons of mass destruction or other forms of contraband without necessarily focusing on TBML.⁵⁷⁴ Even in cases where shipments are screened for contraband, it is not easy to identify what could pass as evidence for TBML occurrence.⁵⁷⁵ The presence of free trade zones in transshipment hubs also pose huge risks of TBML for a given country.⁵⁷⁶ In addition,

⁵⁶⁶ See para 2.4.3.2 below.

⁵⁶⁷ See para 2.4.3.3 below.

⁵⁶⁸ See para 2.4.3.4 below.

⁵⁶⁹ See FATF (2008) *Proliferation Financing Report* 7. Examples of international transshipment hubs include Rotterdam in the Netherlands, Felixstowe in the UK, Hong Kong, Singapore, and Port Klang in Malaysia.

⁵⁷⁰ See Liao & Acharya (2011)14 *JMLC* 79 at 80.

⁵⁷¹ See Miller *et al* *TBML: Overview and Policy Issues* 12.

⁵⁷² See Liao & Acharya (2011)14 *JMLC* 79 at 80.

⁵⁷³ See para 2.4.8 below.

⁵⁷⁴ See FATF (2006) *TBML Report* 21-22.

⁵⁷⁵ See Liao & Acharya (2011)14 *JMLC* 79 at 80.

⁵⁷⁶ For a detailed discussion of the FTZs vulnerabilities to the risk of TBML, see para 2.4.8 below.

just like other types of money laundering, TBML cuts across multiple jurisdictions. The phenomenon is made worse by the fact that one country's law enforcement is confined to a specific domestic jurisdiction. In the absence of close cooperation between authorities, this regulatory arbitrage promotes TBML across multiple jurisdictions.⁵⁷⁷

A big concern, particularly for South Africa, is that it easily passes as a transshipment jurisdiction.⁵⁷⁸ This makes it vulnerable to the threat of TBML.⁵⁷⁹ The country is host to some of the busiest ports on the African continent with transshipment activities handling huge volumes of trade.⁵⁸⁰ A good example is the Dube Trade Port, which is "a catalyst for global trade and a portal between KwaZulu-Natal and the world".⁵⁸¹ The Dube Trade Port, in Durban, is further described by the South African Department of Trade and Industry (SADTI) as the only facility in Africa that brings together an international airport, a cargo terminal, warehousing, offices, a retail sector, hotels and an agricultural area.⁵⁸² Of significance to the concept of transshipment is that the port is located between the biggest seaports in Southern Africa and linked to the rest of Africa by road and rail. However, the presence of such a free port within South Africa may expose the country to the risk of TBML due to the flexible nature of AML monitoring in typical transshipment hubs. The Dube Trade Port is located within a Special Economic Zone which area is known for weak money-laundering controls.⁵⁸³

2.4.3.3 Presence of A Weak AML Framework

Jurisdictions with questionable and weak AML frameworks have a higher exposure to the risk of TBML than those with robust AML regimes. In February 2023, South Africa was placed on a grey list by the FATF due to deficiencies in its national AML framework. As of 27 October 2023, South Africa is amongst high-risk jurisdictions,

⁵⁷⁷ See Liao & Acharya (2011)14 *JMLC* 79 at 82-83. See also Ch 4 below where the issue of international cooperation in the fight against TBML is discussed.

⁵⁷⁸ See Draper & Khumalo 'Friend or Foe?' 40 et seq. For characteristics of transshipment centres that make them vulnerable to TBML, see Liao & Acharya (2011)14 *JMLC* 79 at 82-83.

⁵⁷⁹ See Ch 5 para 5.2 below.

⁵⁸⁰ See PricewaterhouseCoopers (2013) *Africa Gearing Up: Transportation and Logistics Across Africa Report* 67-71.

⁵⁸¹ The South African Department of Trade and Industry 'Special Economic Zones' <https://www.thedti.gov.za> [Accessed on 6 February 2020].

⁵⁸² Ibid.

⁵⁸³ For a review of the risks of TBML in Special Economic Zones, see para 2.4.8 below.

which are under increased monitoring by the FATF.⁵⁸⁴ This rating by the FATF implies that South Africa may be faring poorly against the risk of TBML even though the rating is about money laundering in general.⁵⁸⁵

In a different rating system by the Basel Institute on Governance⁵⁸⁶, South Africa and its neighbour Mozambique were also given a poor rating in the Basel AML Index of 2023.⁵⁸⁷ The Basel AML Index provides risk scores based on the quality of a country's AML framework and related factors such as perceived levels of corruption and public transparency.⁵⁸⁸ It measures the risk of money laundering using data from publicly available sources such as the FATF, the World Bank, Transparency International, and the World Economic Forum.⁵⁸⁹ In the 2023 measurement, South Africa ranks poorly in the world, at number 44 out of 152 countries, and is classified under high-risk countries due to its AML deficiencies.⁵⁹⁰ The Basel AML Index, however, did not include TBML as a factor in its rankings. This implies that South Africa's exposure to the risk of TBML was not investigated and rated by the Basel Institute on Governance and might be higher.

2.4.3.4 High-Crime Rate and Organised-Crime Prevalence

The prevalence of crime in general and organised crime in particular could also be indicative of a high-risk jurisdiction for TBML.⁵⁹¹ South Africa rates poorly in terms of crime prevalence.⁵⁹² The country is an "ideal location for dozens of international

⁵⁸⁴ These countries are Albania, Barbados, Bulgaria, Burkina Faso, Cameroon, Cayman Islands, Democratic Republic of Congo, Croatia, Gibraltar, Haiti, Jamaica, Jordan, Mali, Mozambique, Nigeria, Panama, Philippines, Senegal, South Africa, South Sudan, Syria, Tanzania, Türkiye, Uganda, United Arab Emirates, Vietnam, Yemen, see FATF Gafi (2024) 'Jurisdictions under Increased Monitoring - 27 October 2023' <https://www.fatf-gafi.org> [Accessed on 30 January 2024].

⁵⁸⁵ See Ch 5 para 5.2 below and Ch 9 para 9.2 et seq below.

⁵⁸⁶ The Basel Institute of Governance is 'an independent not-for-profit competence centre working around the world to strengthen governance and counter corruption and other financial crimes', see <https://baselgovernance.org> [Accessed on 19 February 2021].

⁵⁸⁷ The rating is due to a number of factors such as a poor AML framework, high levels of bribery and corruption, lack of financial transparency, poor public accountability and presence of high legal and political risks, see Basel Institute on Governance (2023) *Basel AML Index 12th Edition: Ranking Money Laundering and Terrorist Financing Risks Around the World* 29.

⁵⁸⁸ See Basel Institute on Governance (2023) *Basel AML Index 12th Edition* 5.

⁵⁸⁹ Idem at 10.

⁵⁹⁰ See Basel Institute on Governance (2023) *Basel AML Index 12th Edition* 29.

⁵⁹¹ See Hataley (2020) *JMLC* 1 at 6.

⁵⁹² See Van der Linde 'The Overlap between the Common Law and Chapter 4 of the Prevention of Organised Crime Act: is South Africa's Anti-Gang Legislation Enough? (2020) 33 *SAC L J* 273-

criminal syndicates”.⁵⁹³ It operates as a source of illicit goods, a destination point and a transit route for criminal syndicates.⁵⁹⁴ Anything that can be turned into money by the criminals is targeted. They deal in commodities such as drugs, vehicles, abalone, cigarettes and stolen credit cards.⁵⁹⁵ Just like legitimate business people, organised crime groups also prefer jurisdictions with huge opportunities to make money.⁵⁹⁶ However, additional considerations appeal to criminal groups as well. They also look at the strength of law enforcement, the presence or absence of established criminal networks and whether there are extradition treaties with their home countries.⁵⁹⁷ For instance, in 2010 the High Court of South Africa in *Palazzolo v The Minister of Justice and Others*⁵⁹⁸ blocked the extradition of Palazzolo to Italy due to a lack of the double criminality requirement. Palazzolo’s request for extradition followed his conviction in absentia by the Criminal Court of Palermo for the offence of complicity with aggravated “Mafia-type association”. For extradition to be effected an offence must be punishable in both the requesting and requested country under public international law. South Africa does not recognise the crime of “Mafia-type association” as conceived under the Italian law.⁵⁹⁹ I submit that this kind of court outcome may encourage criminals to find refuge in South Africa due to the perceived reluctance of government to extradite them.

Besides the extradition loopholes, South Africa also operate as a gateway for illegal wildlife trade to the rest of the world and Africa.⁶⁰⁰ A case in point is that of illegal trade of abalone. In *S v Miller and Others*,⁶⁰¹ a syndicate of nine criminals was charged for the illegal trade in abalone in the Western Cape. In that case, it was noted that,

301 at 276-277; Michael Cowling ‘Fighting Organised Crime: Comment on the Prevention of Organised Crime Bill (1998) 11 *South African Journal of Criminal Justice* 350- at 352.

⁵⁹³ See Geldenhuys (April 2016) 109 *Servamus* 10 at 12. See also Aslett *Combating Organised Crime* passim.

⁵⁹⁴ See Geldenhuys (December 2020) 113 *Servamus* 16-20; Van As ‘The Link Between Marine Living Resources and Organised Crime’ (June 2019) 112 *Servamus* 25-27.

⁵⁹⁵ See Geldenhuys (April 2016) 109 *Servamus* 10 at 12. See also Geldenhuys (February 2019) 112 *Servamus* 33-35.

⁵⁹⁶ See Geldenhuys (December 2020) 113 *Servamus* 16-20 at 18.

⁵⁹⁷ See Cowling (1998) 11 *S Afr J Crim Just* 350 at 352; Geldenhuys (December 2020) 113 *Servamus* 16-20 at 16.

⁵⁹⁸ (7431/2010) [2011] ZAWCHC 89.

⁵⁹⁹ See *Palazzolo v The Minister of Justice and Others* [2011] ZAWCHC 89.

⁶⁰⁰ See Cowling (1998) 11 *S Afr J Crim Just* 350 at 352.

⁶⁰¹ [2017] ZAWCHC124. See this case for a detailed discussion of the illegal abalone trade by criminal groups in South Africa and its *modus operandi*. See also *S v Blignault and Others* [2017] ZAECPHC 55.

abalone, which is also known in South Africa as *perlemoen* or *perlie*, is unique to the shores of South Africa, scarce and of high-market value. Criminals harvest and trade it illegally.⁶⁰² Traffic, a non-profit group that monitors illegal wildlife trading, estimates that two thirds of dried abalone that enters Hong Kong markets originate from South Africa.⁶⁰³ Demand for abalone in Asia is constantly met by organised crime groups in South Africa, which operate in cahoots with Chinese criminal syndicates.⁶⁰⁴ The connection between illegal wildlife trade and money laundering has been established by the FATF.⁶⁰⁵ I submit that due to the level of criminality in the country, South Africa could also qualify as a high-risk jurisdiction and should be on the lookout for potential TBML in this regard.

2.4.3.5 Conclusion

Jurisdictions with a high risk of money laundering are prone to TBML due to their lax AML regimes.⁶⁰⁶ For South Africa, which is rated by the FATF as having a relatively adequate AML regime, its AML deficiencies in some areas and the presence of neighbours with a high risk of money laundering make it vulnerable to the risk of TBML.⁶⁰⁷ Deficiencies in a country's AML framework provide a weak point through which TBML may thrive.⁶⁰⁸ Trading partners in a country classified as a high-risk jurisdiction for money laundering may also lead to a higher risk of TBML. The possibility of being affected by TBML through association to high-risk jurisdictions call for co-operation and information sharing in the combatting of this method of money laundering.

⁶⁰² See Jonny Steinberg 'The Illicit Abalone Trade in South Africa' (2005) 105 *Institute for Security Studies Papers* 1-13; Khalil Goga 'The Illegal Abalone Trade in the Western Cape' (2014) 261 *Institute for Security Studies Papers* 1-10.

⁶⁰³ See Lau & Traffic (2018) *An Assessment of South African Dried Abalone Consumption and Trade in Hong Kong Report* on <https://www.traffic.org/publications> [Accessed on 19 February 2021].

⁶⁰⁴ See Steinberg (2005) 105 *Institute for Security Studies Papers* 1-13; Goga (2014) 261 *Institute for Security Studies Papers* 1-10. See also 'Chinese Gangs Fuel Illegal South Africa Abalone Trade: Report' <https://www.dw.com> [Accessed on 18 February 2021].

⁶⁰⁵ See, in general, FATF (2020) *Money Laundering and the Illegal Wildlife Trade Report* on www.fatf-gafi.org [Accessed on 18 February 2021].

⁶⁰⁶ See para 2.4.3 et seq above.

⁶⁰⁷ See para 2.4.3.3 above. See also Ch 5 para 5.2 below.

⁶⁰⁸ See again para 2.4.3.3 above.

2.4.4 The International Gold Trade and the Risk of TBML

2.4.4.1 General

According to the 2020 World Gold Council⁶⁰⁹ report, South Africa is the 11th largest gold producer in the world and second in Africa.⁶¹⁰ The gold sector represents about 2 per cent of the South African GDP.⁶¹¹ Other notable gold producers in the world are Russia, the US, Canada, Australia and Peru.⁶¹² The international gold trade presents a huge TBML vulnerability that can easily be manipulated by criminals.⁶¹³ The misuse of the international gold trade is one of the oldest TBML techniques. Historically, some of the biggest money-laundering schemes have involved gold.⁶¹⁴ Depending on the circumstances, gold can be used either as a commodity or as a bearer instrument to store and transfer value.⁶¹⁵ Gold can be used in all the three stages of money laundering of placement, layering and integration.⁶¹⁶ In alternative remittance transactions and other underground financial systems such as the BMPE and Hawala, gold also play a significant role in the settlement process.⁶¹⁷ Any commodity can be manipulated for TBML purposes if it enables value to be transferred.⁶¹⁸ However,

⁶⁰⁹ The World Gold Council is the global authority on the gold market and the market development organisation for the gold industry. The Council is headquartered in London in the United Kingdom, see <https://gold.org/who-we-are> [Accessed on 19 July 2021].

⁶¹⁰ See the World Gold Council 'Gold Mine Production' <https://gold.org/goldhub/data> [Accessed on 19 July 2021].

⁶¹¹ See Cassara *Next Frontier* 103. See also The Minerals Council 'Gold' <https://www.mineralscouncil.org.za> which notes that South Africa's gold accounts for 4.2 per cent of the global production with the Witwatersrand Basin remaining one of the world's largest gold resource.

⁶¹² See Cassara *Next Frontier* 92. For similar estimates see also Garside 'World Mine Reserves of Gold by Country 2020' <https://www.statista.com> [Accessed on 21 February 2021].

⁶¹³ See FATF (2006) *TBML Report* 13-14; FATF & APG (July 2015) *Money Laundering/ Terrorist Financing Risks and Vulnerabilities Associated with Gold Report* 4 et seq; and Cassara *Next Frontier* 98.

⁶¹⁴ See Kaplan 'The Golden Age of Crime: Why International Drug Traffickers Are Invading the Global Gold Trade' (1999) 29 *US News and World Report* 42-44; Baker *Capitalism* 39-40.

⁶¹⁵ By way of generalisation, a bearer negotiable instrument is a non-cash form of money or a security that does not include the name of the owner or payee and any person who is in possession of the instrument may present it and receive payment, see CJ Nagel & JT Pretorius 'Bearer, Order, Negotiation, Crossings and Holdership in Due Course: Back to Basics' (2013) 76 *Journal of Contemporary Roman-Dutch Law* 197-205 at 204; s 1(iv) and s29(2) of the Bills of Exchange Act 34 of 1964.

⁶¹⁶ See Yuliya Zabyelina & Lilla Heins 'All that Glitters: Money Laundering through Precious Metals and Minerals' in Yuliya Zabyelina & Daan van Uhm (eds) *Illegal Mining: Organised Crime, Corruption and Ecocide in a Resource-Scarce World* (2020) (hereinafter Zabyelina & Heins 'All that Glitters') 442-443. See also Roman Grynberg & Fwasa Singogo 'Dubai: Conflict Gold, Money Laundering and Illicit Global Trade' (2019) 3 *Journal of Anti-Corruption Law* 117-143 at 124.

⁶¹⁷ See Cassara *Next Frontier* 101. See also para 2.3.5.2 and para 2.3.5.3 above.

⁶¹⁸ See Baker *Capitalism* 25; Cassara *Next Frontier* 90.

where there is need to transfer significant value through trade, gold is the most preferred commodity. It is a ready-made vehicle for money laundering.⁶¹⁹ The popularity of gold with money launderers is due to a number of reasons, some of which I briefly explain below.

2.4.4.2 Gold as a Medium of Exchange in Criminal Transactions

Besides being a haven of wealth since history, gold is also a readily acceptable medium of exchange the world over.⁶²⁰ Even in isolated lands and in economies where the convertibility of the local currency is a challenge, gold is recognised as an international form of currency used as an alternative to cash in the payment of debts and distribution of criminal profits.⁶²¹ The inherent value of gold and its worldwide exchangeability makes it a viable alternative to cash in the settlement of debts and distribution of profit from TBML activities.⁶²² These qualities make gold attractive to criminals particularly as a medium of value exchange in TBML transactions.

2.4.4.3 Gold Offers Anonymity

There is a tradition of secrecy in the precious metals and stones trade that makes it difficult for law enforcement authorities to comprehensively control money laundering in the gold sector.⁶²³ From a criminal-enterprise perspective, gold offers the much-desired anonymity for TBML.⁶²⁴ Usually, transactions involving gold are done anonymously with little or no record keeping identifying the seller or the buyer. This kind of cover is ideal for the money launderers' desire for secrecy.⁶²⁵ It also means that law enforcement agencies have difficulties in identifying not only the source of the

⁶¹⁹ See Grynberg & Singogo (2019) 3 JACL 117 at 124; Zabyelina & Heins 'All that Glitters' 443-445; and Cassara *Next Frontier* 90.

⁶²⁰ See FATF & APG (2015) *Money Laundering/ Terrorist Financing Risks and Vulnerabilities Associated with Gold Report* (hereinafter 'FATF & APG (2015) *Money Laundering Vulnerabilities Associated with Gold Report*') 9; Zabyelina & Heins 'All that Glitters' 443; and Cassara *Next Frontier* 91.

⁶²¹ See Cassara *Next Frontier* 91. See also FATF & APG (2015) *Money Laundering Vulnerabilities Associated with Gold Report* 9.

⁶²² See FATF & APG (2015) *Money Laundering Vulnerabilities Associated with Gold Report* 9. See also Zabyelina & Heins 'All that Glitters' 443-444.

⁶²³ See Cassara *Next Frontier* 101.

⁶²⁴ See FATF & APG (2015) *Money Laundering Vulnerabilities Associated with Gold Report* 8. See also Cassara *Next Frontier* 101.

⁶²⁵ See Cassara *Next Frontier* 93; Zabyelina & Heins 'All that Glitters' 445.

gold but also the identity of the buyer.⁶²⁶ In typical money-laundering investigations the norm has been to ‘follow the money’ through tracing the residual paper trail left by the illicit money in the laundering process. In such circumstances, authorities rely on financial intelligence gathered from such sources as “bank records, identifiers found on currency and electronic codes associated with wire transfers”.⁶²⁷ With gold, it is a challenge to follow a disguised ‘gold trail’ because of the general anonymity in gold trade.⁶²⁸ Gold coins or bars may have serial numbers but even these can easily be erased.⁶²⁹

2.4.4.4 Gold May Be Immune to Asset Freezes

Money launderers also find gold attractive because it is generally immune to asset freezes.⁶³⁰ Due to the proliferation of asset seizures, money launderers are reluctant to integrate their criminal proceeds through the depositing of liquid assets in banks.⁶³¹ Consequently, it is much preferred to hoard gold, in any form, and keep it outside the formal financial system. For instance, when the European Union (EU) threatened to pass new sanctions against Iran in 2008, “USD\$75billion worth of Iranian assets were moved from European banks” and were partly converted to gold beyond the reach of the threatened sanctions.⁶³²

2.4.4.5 Gold Can Be Altered in Form

The characteristics of gold make it an easy target for manipulation by money launderers around the world.⁶³³ It can be altered in form as per the possessor’s needs thereby making it difficult to trace its origins.⁶³⁴ Bullion gold can be melted and converted into various forms to disguise its identity.⁶³⁵ For example, it has been

⁶²⁶ FATF & APG (2015) *Money Laundering Vulnerabilities Associated with Gold Report* 8. See also Grynberg & Singogo (2019) 3 JACL 117at 124.

⁶²⁷ See Cassara *Next Frontier* 93.

⁶²⁸ See Zabyelina & Heins ‘All that Glitters’ 445.

⁶²⁹ See Cassara *Next Frontier* 93.

⁶³⁰ Idem at 94. See also FATF & APG (2015) *Money Laundering Vulnerabilities Associated with Gold Report* 10-11.

⁶³¹ Cassara *Next Frontier* 94.

⁶³² Ibid.

⁶³³ See Zabyelina & Heins ‘All that Glitters’ 444.

⁶³⁴ See Cassara *Next Frontier* 95.

⁶³⁵ See Sullivan *AML in Nutshell* 17-18; FATF & APG (2015) *Money Laundering Vulnerabilities Associated with Gold Report* 8.

disguised as American souvenirs in South America, as machine parts under Operation Meltdown in the US, and as vehicle number plates in Jordan.⁶³⁶ Such alteration may enable gold to be exported in any form under TBML.⁶³⁷

2.4.4.6 Porosity in the Gold Market

Since TBML relies on the movement of value, the gold market offers great opportunities for this method of money laundering.⁶³⁸ In this regard, gold can be described and classified in a false manner as an excuse to move value.⁶³⁹ Sometimes there is not even a need to falsely describe it in trade transactions. Instead, fake documents can be used to accompany real gold trade for the sole reason of justifying movement of illegally obtained funds. In countries with strict gold-export controls, TBML schemers may describe their illegal gold as 'scrap' to bypass controls.⁶⁴⁰ The value of scrap-gold shipment is low but the classification is suitable for disguising illegally mined artisan gold and even the quality of gold in general.⁶⁴¹ The technique can be used to give the flow of illegal funds an appearance of legality. In schemes that are more complex, the gold need not exist at all to be 'traded'.⁶⁴² Instead, a citation of 'gold' as the commodity being traded on the invoice is sufficient to justify the movement of illicit funds across jurisdictions.⁶⁴³

In South Africa, the 'scrap gold' technique has been employed before.⁶⁴⁴ The government of South Africa does not charge VAT on mined gold. However, where there is value addition the VAT is charged on the 'worked' or processed gold.⁶⁴⁵

⁶³⁶ See Cassara *Next Frontier* 95. See also Baker *Capitalism* 39-40 for similar faking schemes in gold-related money laundering.

⁶³⁷ See FATF (2006) *TBML Report* 13.

⁶³⁸ See FATF & APG (2015) *Money Laundering Vulnerabilities Associated with Gold Report* 6; Cassara *Next Frontier* 97-98.

⁶³⁹ See Baker *Capitalism* 39-40; FATF (2006) *TBML Report* 13.

⁶⁴⁰ See Cassara *Next Frontier* 97.

⁶⁴¹ *Idem* at 95. See also Zabyelina & Heins 'All that Glitters' 447.

⁶⁴² See Baker *Capitalism* 39-40.

⁶⁴³ See Cassara *Next Frontier* 95. See also Zabyelina & Heins 'All that Glitters' 447.

⁶⁴⁴ See Fowler 'Exposed: Illegal Gold, Trade Mis-invoicing and Tax Fraud in South Africa' Financial Transparency Coalition (September 26, 2014) <https://www.financialtransparency.org> [Accessed on 03 July 2020].

⁶⁴⁵ See Fowler 'Exposed: Illegal Gold, Trade Mis-invoicing and Tax Fraud in South Africa' Financial Transparency Coalition (September 26, 2014) <http://www.financialtransparency.org> [Accessed on 03 July 2020]. See also Mavrellis 'Good as Gold? South Africa's Problem with Illegal Gold Mining is Severe and Growing' <https://www.gfintegrity.org> [Accessed on 21 February 2021].

Schemers in TBML operations recognised a loophole and disguised the 'worked' gold as 'scrap gold'. They then claim VAT, which they never paid.⁶⁴⁶ Besides losing value in terms of the false 'scrap gold', the government of South Africa is also being defrauded through VAT-refund criminal operations.⁶⁴⁷

In addition to the foregoing, the gold market is also vulnerable to TBML due to its heavy reliance on cash transactions.⁶⁴⁸ The market has the potential of promoting criminal groups to run cash-for-gold businesses. These types of businesses are ideal for placement and integration of illicit proceeds.⁶⁴⁹ There is no international and comprehensive response specifically addressing the issue of TBML in the gold sector. The FATF *Standards*, however, address the potential abuse of gold for money-laundering purposes in general.⁶⁵⁰ In terms of the FATF *Standards*, dealers in precious metals and stones should report suspicious transactions when they engage in any cash transaction with a customer above the applicable designated threshold.⁶⁵¹

The FATF *Standards*, however, do not address the misuse of gold as a commodity for TBML purposes. They address the cash aspect of transactions involving gold. This seems to ignore the fact that, the use of cash in transactions, particularly those of illegal nature, seem to be diminishing.⁶⁵² Strict AML cash-reporting requirements partly contribute to this decline.⁶⁵³ Most transactions, therefore, are no longer conducted in cash. The FATF *Standards* do not stipulate any obligation for CDD or record keeping

⁶⁴⁶ See FATF (February 2007) *Laundering the Proceeds of VAT Carousel Fraud Report* 4; FATF (2010) *Global Money Laundering and Terrorist Financing Threat Assessment Report* (hereinafter 'FATF (2010) *Global Money Laundering Threat Report*') 29; Chhina (2014) 29 *JIBLR* 665 at 666; and Cassara *Next Frontier* 137.

⁶⁴⁷ See Cassara *Next Frontier* 103-104. See also *S v Meyer and Others* [2017] ZAGPJHC 286; *S v Van der Linde* [2016] ZAGPJHC 179; *S v Van Staden and Others* [2016] ZAWCHC 88. It should be noted that as of 1 Aug 2022, the South African government has passed the Domestic Reverse Charge Regulations (published in Government Gazette No. 46512 of 8 June 2022), which are aimed at curbing VAT-refund fraud in the second-hand gold industry.

⁶⁴⁸ See Zabyelina & Heins 'All that Glitters' 443; FATF & APG (2015) *Money Laundering Vulnerabilities Associated with Gold Report* 6.

⁶⁴⁹ See FATF & APG (2015) *Money Laundering Vulnerabilities Associated with Gold Report* 5. See also para 2.2.4 et seq above.

⁶⁵⁰ The FATF has issued report sensitising its members about money laundering risks in gold trade, see FATF & APG (2015) *Money Laundering Vulnerabilities Associated with Gold Report* passim. See also the FATF (2012) *Standards* which cover the gold sector under Recommendations 22 (c) and 23(b) whose scope include Designated Non-Financial Businesses and Professions (DNFBPs).

⁶⁵¹ See Recommendations 22 (c) and 23(b) of the FATF (2012) *Standards*.

⁶⁵² See Sullivan *AML in Nutshell* 15 et seq; Jojarth 'Money Laundering Methods' 20-21.

⁶⁵³ See FATF & Egmont (2013) *Money Laundering through Diamonds Report* 54.

where dealers in gold use other means of payment such as wire transfers. This leaves the gold sector vulnerable to TBML especially where precious metals are used as a form of currency.⁶⁵⁴

2.4.4.7 Conclusion

Historically, organised crime groups have abused the international gold trade through money laundering.⁶⁵⁵ The international gold trade appears to be a ready-made vehicle through which TBML may thrive. Gold is a commodity of choice in TBML operations due to a number of advantages it offers.⁶⁵⁶ Gold can be used as a readily acceptable medium of exchange throughout the world. Thus, organised crime groups may use gold as a cash-out tool in TBML operations.⁶⁵⁷ In addition, the use of cash when making payments in gold transactions and the anonymity involved in some gold trade-transactions, make gold a target for TBML.⁶⁵⁸ There is no specific regulation from the FATF that deals with the abuse of gold for TBML purposes.⁶⁵⁹ This calls for much vigilance and monitoring of international gold trading to filter suspicious TBML transactions.

2.4.5 The International Diamond Trade and the Risk of TBML

2.4.5.1 General

The diamond sector also presents a vulnerable environment for TBML operations.⁶⁶⁰ Just like the gold sector, it is a DNFBP under the FATF's *Standards*.⁶⁶¹ The diamond trade is global in nature.⁶⁶² A significant amount of this trade is transacted through financial institutions.⁶⁶³ The diamond trade has an international connectivity of what is commonly referred to as a 'diamond pipeline'.⁶⁶⁴ This is a diamond value chain from

⁶⁵⁴ Ibid.

⁶⁵⁵ See para 2.4.4 et seq above.

⁶⁵⁶ See again para 2.4.4 et seq above.

⁶⁵⁷ See para 2.4.4.2 above.

⁶⁵⁸ See para 2.4.4.3 above.

⁶⁵⁹ See para 2.4.4.6 above.

⁶⁶⁰ See Jeffrey Simser 'Money Laundering: Emerging Threats and Trends' (2012) 16 *Journal of Money Laundering Control* 41-54 at 50; APG (2012) *Trade-Based Money Laundering Report* 59. See Recommendations 22 and 23 of the FATF (2012) *Standards*.

⁶⁶² See Geldenhuys 'Diamonds-Tools to Launder Money and Fund Terrorism' (June 2019) 112 *Servamus* 20-24; FATF (2013) *Money Laundering Diamonds Report* 6.

⁶⁶³ See FATF (2013) *Money Laundering Diamonds Report* 16.

⁶⁶⁴ See Rebecca Tailby 'The Illicit Market in Diamonds' (2002) 218 *Trends & Issues in Crime and Criminal Justice* 1-6 at 2; Geldenhuys (June 2019) 112 *Servamus* 20-24 at 24.

mining and production, trade and manufacturing centres, distribution and jewellers.⁶⁶⁵ In Southern Africa, the major diamond producers are South Africa and Botswana.⁶⁶⁶ The bulk of cutting and polishing of rough diamonds take place in such places as India, Israel, Belgium and China.⁶⁶⁷ The major trading centres for diamonds are Belgium, the US, the UK and the United Arab Emirates.

2.4.5.2 The Kimberley Process Certification Scheme

The Kimberley Process Certification Scheme (KPCS) regulates the diamond trade industry.⁶⁶⁸ The scheme was launched to specifically combat the trade of conflict diamonds. The implementation of the KPCS is a voluntary export/import exercise adhered to by willing participating countries.⁶⁶⁹ Currently the KPCS has 59 participants which represents 85 countries accounting for approximately 99.8 per cent of the global production of rough diamonds.⁶⁷⁰ Of these participants, the EU and its 27 Member States counting as a single participant and are represented by the European Commission.⁶⁷¹ South Africa is the first country to chair the Scheme at its inception in 2003.⁶⁷² The Kimberley Process regulates rough diamonds and does not cover polished diamonds, which are assumed to come from the KPCS.

⁶⁶⁵ FATF & Egmont (2013) *Money Laundering through Diamonds Report* 13.

⁶⁶⁶ See Statista 'Diamond Production in Africa 2022, by Country' <https://www.statista.com> [Accessed on 23 April 2024].

⁶⁶⁷ See Chandna *Black Money* 136; FATF & Egmont (2013) *Money Laundering through Diamonds Report* 18-19.

⁶⁶⁸ See Elizabeth JA Rodgers 'Conflict Diamonds: Certification and Corruption: a Case Study of Sierra Leone' (2006) 13 *Journal of Financial Crime* 267-276 at 270-271; Fabian MJ Teichmann & Marie-Christin Falker 'Money Laundering through Raw Diamonds' (2020) *Journal of Money Laundering Control* 1-13 at 6. As regards the origins of the Kimberley Certification Process, see generally, Andrew Bone 'The Kimberley Process Certification Scheme: The Primary Safeguard for the Diamond Industry' in: Päivi Lujala & Siri Aas Rustad (eds) *High-Value Natural Resources and Post-Conflict Peacebuilding* (2011); Clive Wright 'The Kimberley Process Certification Scheme: A Model Negotiation' in: Päivi Lujala & Siri Aas Rustad (eds) *High-Value Natural Resources and Post-Conflict Peacebuilding* (2011).

⁶⁶⁹ See Rodgers (2006) 13 *Journal of Fin Crime* 267-276 at 270; Teichmann & Falker (2020) *JM LC* 1 at 6.

⁶⁷⁰ See Kimberley Process <https://www.kimberleyprocess.com> [Accessed on 21 April 2024].

⁶⁷¹ Ibid.

⁶⁷² See SADPMR 'Kimberley Process Certification Scheme' <https://www.sadpmr.co.za> [Accessed on 29 February 2020].

2.4.5.3 The Appeal of Diamonds to TBML

Three broad factors make diamonds and the diamond trade attractive to TBML.⁶⁷³ These factors are the physical features of diamonds,⁶⁷⁴ the diamond industry as a vulnerability,⁶⁷⁵ and the KPCS governance system of the diamond trade.⁶⁷⁶ I briefly explain them below.

2.4.5.4 The Physical Features of Diamonds

Diamonds possess physical features that make them appealing to money launderers who desire to move, conceal, and store the proceeds of crime.⁶⁷⁷ They are a liquid and transferable asset. The durability and stability of diamonds in pricing terms means they can be used to retain value over a long period.⁶⁷⁸ Diamonds can also carry value in small but easily transportable quantities suitable for smuggling.⁶⁷⁹ Therefore, they can be used to transfer value and ownership with little or no audit trail.⁶⁸⁰ Diamonds store very high value in a relatively sized piece and the higher the value the more vulnerable a commodity is to TBML.⁶⁸¹ Due to the high-value storage quality, diamonds could allow the transfer of large amounts of money across borders by a single act of transaction.⁶⁸² Thus, under the physical features of diamonds, three characteristics are worth discussing. These are diamonds as a currency,⁶⁸³ the unmarked and untraceability nature of diamonds,⁶⁸⁴ and the subjectivity of valuation in diamonds.⁶⁸⁵

⁶⁷³ See FATF & Egmont (2013) *Money Laundering through Diamonds Report* 48.

⁶⁷⁴ See para 2.4.5.4 below.

⁶⁷⁵ See para 2.4.5.5 below.

⁶⁷⁶ See para 2.4.5.6 below.

⁶⁷⁷ See Nicholas Gilmour 'Money Laundering through the Purchasing of High-Value Portable Commodities' (2017) 20 *Journal of Money Laundering Control* 105-115 at 110.

⁶⁷⁸ See Zabyelina & Heins 'All that Glitters' 443-444; Gilmour (2017) 20 *JMLC* 105 AT 110.

⁶⁷⁹ See FATF & Egmont (2013) *Money Laundering through Diamonds Report* 48.

⁶⁸⁰ See Tailby (2002) 218 *Trends & Issues in Crime and Criminal Justice* 1 at 3.

⁶⁸¹ See FATF & Egmont (2013) *Money Laundering through Diamonds Report* 51.

⁶⁸² *Idem* at 49.

⁶⁸³ See para 2.4.5.4.1 below.

⁶⁸⁴ See para 2.4.5.4.2 below.

⁶⁸⁵ See para 2.4.5.4.3 below.

2.4.5.4.1 Diamonds as a Parallel Currency

Of significance to TBML operations is that, diamonds can also be used as a form of parallel currency.⁶⁸⁶ They function well as an alternative currency due to their similar characteristics to cash.⁶⁸⁷ Diamonds have a high value-to-weight ratio, can retain their value and are not easily affected by inflation or exchange rates. Due to easy of portability and their small size, diamonds can be exchanged for other commodities or other forms of currency with less chances of detection where criminality is involved.⁶⁸⁸ Of concern, however, is that the AML rules and procedures applicable to cash are not strictly applied to diamonds.⁶⁸⁹ Diamonds are not included in the concept of cash or bearer negotiable instrument under the FATF's *Standards*.⁶⁹⁰ It is possible, however, either to launder money through the diamond trade or to use diamonds as a means of payment to finance criminal activities.

One has to draw a difference between money laundering through the diamond trade, on one hand, and laundering diamond proceeds of crime, on the other hand.⁶⁹¹ Money laundering through the diamond trade is whereby criminals launder illegally obtained money through either placement or layering in the diamond-trading chain.⁶⁹² In this case, the proceeds of crime are used to transact in the trading of diamonds only as a cover to justify the transfer of funds from one location to another.⁶⁹³ Laundering diamond proceeds of crime, on the other hand, entails selling or trading illicit diamonds.⁶⁹⁴ They are illicit in the sense that they may have been obtained through some criminal activity such as theft, robbery or as payment for drugs.⁶⁹⁵ When laundering the profits of crime involving diamonds, the money launderers either cut, recut, or polish the illicit diamonds in an effort to conceal their criminal provenance.

⁶⁸⁶ See Zabyelina & Heins 'All that Glitters' 444.

⁶⁸⁷ See Chandna *Black Money* 133; FATF (2013) *Money Laundering Through Trade in Diamonds Report* 51. See also Tailby (2002) 218 *Trends & Issues in Crime and Criminal Justice* 1 at 3 who describe diamonds as some form of 'compressed cash'.

⁶⁸⁸ See Cassara *Next Frontier* 93; Geldenhuys (June 2019) 112 *Servamus* 20 at 21.

⁶⁸⁹ Chandna *Black Money* 133.

⁶⁹⁰ See Recommendation 32 of the FATF (2012) *Standards*.

⁶⁹¹ See Geldenhuys (June 2019) 112 *Servamus* 20 at 22.

⁶⁹² *Ibid.*

⁶⁹³ See Gilmour (2017) 20 *JMLC* 105 at 110.

⁶⁹⁴ See Zabyelina & Heins 'All that Glitters' 444.

⁶⁹⁵ See Tailby (2002) 218 *Trends & Issues in Crime and Criminal Justice* 1 at 3.

The diamond industry presents a good opportunity for both forms of money laundering either through the diamond trade or through the illicit diamonds themselves.⁶⁹⁶

2.4.5.4.2 Diamonds are Unmarked and Untraceable

In addition to the use of diamonds as a parallel currency, diamonds also possess other characteristics that make them vulnerable to TBML schemes.⁶⁹⁷ Of particular significance to money launderers is that diamonds are generally unmarked and difficult to trace.⁶⁹⁸ Once they enter the illicit market, it is difficult to trace illegal diamonds to their original source.⁶⁹⁹ In addition, diamonds can also be disguised as other stones of less value such as diamond simulants and synthetics. This plays perfectly well into the hands of money launderers who thrive on deception.⁷⁰⁰

2.4.5.4.3 The Subjectivity of Valuation in Diamonds

The subjectivity of valuation of diamonds is also a major vulnerability for TBML.⁷⁰¹ One of the techniques in TBML schemes is the over or under valuation of a commodity.⁷⁰² Therefore, the technique has much leeway for application in the diamond trade. There are no global standardised, official or agreed prices for either rough or polished diamonds.⁷⁰³ Generally, the per-carat price of a diamond depends on four factors, namely, the crystalline shape, the carat weight, the colour and the clarity.⁷⁰⁴ There is no standard weighting or worth to apportion to each quality. Each measure is subjective and cannot be stated with precision except carat weight.⁷⁰⁵ Diamonds are not a single product. For instance, rough diamonds may be subject to thousands of

⁶⁹⁶ See Geldenhuys (June 2019) 112 *Servamus* 20 at 22.

⁶⁹⁷ See Tailby (2002) 218 *Trends & Issues in Crime and Criminal Justice* 1 at 1 et seq; Gilmour (2017) 20 *JMLC* 105 at 110.

⁶⁹⁸ See FATF & Egmont (2013) *Money Laundering through Diamonds Report* 48-52.

⁶⁹⁹ See Tailby (2002) 218 *Trends & Issues in Crime and Criminal Justice* 1 at 3.

⁷⁰⁰ See Geldenhuys (June 2019) 112 *Servamus* 20 at 22-23; FATF & Egmont (2013) *Money Laundering through Diamonds Report* 49-50.

⁷⁰¹ See Geldenhuys (June 2019) 112 *Servamus* 20 at 22-23; Tailby (2002) 218 *Trends & Issues in Crime and Criminal Justice* 1 at 2-3; and FATF & Egmont (2013) *Money Laundering through Diamonds Report* 50. For a discussion of the over and under valuation of a commodity for TBML purposes, see para 2.3.4.2 above.

⁷⁰² See again para 2.3.4.2 above.

⁷⁰³ See Zabyelina & Heins 'All that Glitters' 444-445; Tailby (2002) 218 *Trends & Issues in Crime and Criminal Justice* 1 at 1.

⁷⁰⁴ See FATF & Egmont (2013) *Money Laundering through Diamonds Report* 48.

⁷⁰⁵ See Tailby (2002) 218 *Trends & Issues in Crime and Criminal Justice* 1 at 1.

prices published by companies such as De Beers and Rio Tinto.⁷⁰⁶ The absence of a standard price for diamonds and the presence of subjectivity in the valuation exercise give room for price manipulation for TBML purposes.

2.4.5.5 *The Diamond Industry as a Vulnerability*

The second factor that make diamonds vulnerable to TBML, besides the physical features of diamonds⁷⁰⁷ and the KPCS governance system,⁷⁰⁸ relates to the diamond industry. The trade-based and global nature of the diamond market as well as the long production chain involving many role-players, make the diamond industry ideal for TBML.⁷⁰⁹ Diamond dealers can transact in millions of dollars in the industry due to the high-dollar value of the commodity involved.⁷¹⁰ This gives room for the laundering of large sums of money through over- or under valuation of shipments. In the ordinary course of doing business, such TBML transactions may not be flagged as unusual due to the high-value element of diamonds in general.⁷¹¹ Thus, both customs officials and banks involved in the financing of the trade may not raise any red flags about possible TBML activity.⁷¹² Under the diamond industry as a vulnerability, three points are worth discussing, namely, trading of diamonds outside the formal system,⁷¹³ limited AML record keeping,⁷¹⁴ and the absence of guidelines to monitor diamond exports/imports.⁷¹⁵

⁷⁰⁶ See FATF & Egmont (2013) *Money Laundering through Diamonds Report* 50.

⁷⁰⁷ See para 2.4.5.4 above.

⁷⁰⁸ See para 2.4.5.6 below.

⁷⁰⁹ See Zabyelina & Heins 'All that Glitters' 444-445; FATF & Egmont (2013) *Money Laundering through Diamonds Report* 52-53; and Tailby (2002) 218 *Trends & Issues in Crime and Criminal Justice* 1 at 3.

⁷¹⁰ See FATF & Egmont (2013) *Money Laundering through Diamonds Report* 52-53; Geldenhuys (June 2019) 112 *Servamus* 20 at 22-23.

⁷¹¹ See FATF & Egmont (2013) *Money Laundering through Diamonds Report* 52-53; Tailby (2002) 218 *Trends & Issues in Crime and Criminal Justice* 1 at 3.

⁷¹² See FATF & Egmont (2013) *Money Laundering through Diamonds Report* 52-53.

⁷¹³ See para 2.4.5.5.1 below.

⁷¹⁴ See para 2.4.5.5.2 below.

⁷¹⁵ See para 2.4.5.5.3 below.

2.4.5.5.1 Diamonds Can Be Traded Outside the Formal Financial System

Diamonds can also be bought and sold easily outside the formal financial system.⁷¹⁶ This aspect has far-reaching AML implications because generally AML measures are enforced strictly within the formal banking system. Transactions of diamonds outside the formal banking system are not subject to KYC procedures.⁷¹⁷ The sale of diamonds can also occur at various levels in the chain of production from the local informal markets, individual dealers in remote parts of the world, high-net-worth individuals to large multinational corporations.⁷¹⁸ This complicates AML efforts against TBML where diamonds are involved.

2.4.5.5.2 Limited AML Record Keeping in the Diamond Industry

The AML record-keeping obligations for dealers in the diamond industry are also limited.⁷¹⁹ Sometimes the diamond-trade deals are based on trust and verbal agreements such that dealers may not fully record the transactions.⁷²⁰ Vague and inconsistent records may also be kept as a mere compliance formality. Worse still, false records and invoices can be generated.⁷²¹ To complicate the record-keeping exercise, records, which lack detail as opposed to being false or fraudulent, are kept.⁷²² While false invoices amount to criminality, those that lack detail are not. Plausible and innocent reasons may be given to explain the lack of detail on the invoice.⁷²³ The lack of detail on the invoice may also complicate law enforcement efforts at establishing the criminality, if any, of the transaction involved.⁷²⁴ More importantly, lack of detail on invoices or records may prevent financial institutions from

⁷¹⁶ See Geldenhuys (June 2019) 112 *Servamus* 20 at 22-23; Zabyelina & Heins 'All that Glitters' 444; FATF & Egmont (2013) *Money Laundering through Diamonds Report* 59-63; and Tailby (2002) 218 *Trends & Issues in Crime and Criminal Justice* 1 at 2-3.

⁷¹⁷ See Zabyelina & Heins 'All that Glitters' 444; FATF & Egmont (2013) *Money Laundering through Diamonds Report* 59-63; and Tailby (2002) 218 *Trends & Issues in Crime and Criminal Justice* 1 at 2-3.

⁷¹⁸ See FATF & Egmont (2013) *Money Laundering through Diamonds Report* 50.

⁷¹⁹ *Idem* at 55.

⁷²⁰ See Geldenhuys (June 2019) 112 *Servamus* 20 at 22-23; FATF & Egmont (2013) *Money Laundering through Diamonds Report* 55.

⁷²¹ See Baker *Capitalism* 39-40; FATF & Egmont (2013) *Money Laundering through Diamonds Report* 55.

⁷²² See FATF & Egmont (2013) *Money Laundering through Diamonds Report* 55.

⁷²³ *Ibid.*

⁷²⁴ *Ibid.*

reporting transactions to the financial intelligence unit due to lack of sufficient details.⁷²⁵ However, under the South African AML regime, for example, the FICA mandates financial institutions to keep a record of every transaction conducted through them, including details of the amount, currency parties, date and nature of the transaction.⁷²⁶

2.4.5.5.3 Absence of Guidelines to Monitor the Import/Export of Diamonds

In addition, most countries do not have a separate set of guidelines or procedures to monitor the import/export trade of diamonds by customs authorities.⁷²⁷ Where diamonds are imported or exported, they are dealt with in the same way as any other commodity. The size of the diamond industry also makes it difficult to verify every diamond consignment set for export or import. In South Africa, the South African Diamond and Precious Metals Regulator (SADPMR) regulates the diamond trade.⁷²⁸ The SADPMR administers the Diamonds Act⁷²⁹ (as amended) and the Precious Metals Act.⁷³⁰ Among other things, the SADPMR is responsible for ensuring compliance with the KPCS. It is also its responsibility to implement, administer and control all matters relating to the purchase, sale, beneficiation, import and export of diamonds.⁷³¹ It can be argued that given the unique features of diamonds and their susceptibility to manipulation for TBML, effective and specialised control by customs authorities is necessary.⁷³²

2.4.5.6 The KPCS Governance as a Vulnerability

The third factor⁷³³ that makes diamonds vulnerable to TBML relates to the KPCS governance of the diamond trade.⁷³⁴ The process is obsessed with preventing conflict

⁷²⁵ Ibid.

⁷²⁶ See S 12 (1) and S 12 (2) of the FICA (Amendment) Act 1 of 2017. For a discussion of the South African AML regime and its various responses to TBML in trade-finance instruments, see Ch 5 para 5.2 et seq below.

⁷²⁷ See FATF & Egmont (2013) *Money Laundering through Diamonds Report* 55.

⁷²⁸ See s 3 of the Diamonds (Amendment) Act No.29 of 2005.

⁷²⁹ Act 56 of 1986.

⁷³⁰ Act 37 of 2005.

⁷³¹ See s 2 of the Precious Metals Act 37 of 2005. See also Geldenhuys (June 2019) 112 *Servamus* 20 at 24.

⁷³² As regards the role of the SARS in combatting TBML in the context of trade finance, see Ch 5 para 5.4.10 below.

⁷³³ See also para 2.4.5.4 above and para 2.4.5.5 above.

⁷³⁴ See FATF & Egmont (2013) *Money Laundering through Diamonds Report* 57; Geldenhuys (June 2019) 112 *Servamus* 20 at 21.

diamonds from entering member countries.⁷³⁵ Under the KPCS, all rough diamonds require a certificate that specifies their mining origin, volume and value.⁷³⁶ Where there is no such certificate, the diamonds are confiscated under the suspicion that they are conflict diamonds.⁷³⁷ The KPCS also require that all trading countries submit data on production, import and export of rough diamonds. The biggest risk of TBML in the process is that enforcement efforts in the diamond industry are focused at ensuring compliance with the KPCS rather than the combatting of money laundering.⁷³⁸ The KPCS also deals with rough diamonds only. Thus, the cut and polished diamonds that are not part of the KPCS can still be used in TBML schemes. While dealing with rough diamonds is a significant step in the fight against conflict diamonds, the process does little to prevent the use of finished diamonds in TBML schemes.⁷³⁹

2.4.5.7 Conclusion

Diamonds and the diamond industry provide an environment vulnerable for TBML.⁷⁴⁰ As one of the countries that depend on diamonds on the economic front, South Africa is in danger of TBML through the diamond industry.⁷⁴¹ The presence of uncut diamonds that are not part of the KPCS governance system still pose a high risk of TBML to South Africa.⁷⁴² The subjectivity of valuation of diamonds endear them to possible TBML, which relies on the techniques of over or under valuation.⁷⁴³ The FATF AML regulations in the diamond industry do not focus on the issue of TBML.⁷⁴⁴ This calls for strategies on how the international diamond trade can be monitored for TBML.

⁷³⁵ See Tailby (2002) 218 *Trends & Issues in Crime and Criminal Justice* 1 at 6; FATF & Egmont (2013) *Money Laundering through Diamonds Report* 57 and Geldenhuys (June 2019) 112 *Servamus* 20 at 21.

⁷³⁶ See SADPMR 'Kimberley Process Certification Scheme' <https://www.sadpmr.co.za> [Accessed on 29 February 2020].

⁷³⁷ See FATF & Egmont (2013) *Money Laundering through Diamonds Report* 57.

⁷³⁸ See Geldenhuys (June 2019) 112 *Servamus* 20 at 21.

⁷³⁹ See Chandna *Black Money* 136; Geldenhuys (June 2019) 112 *Servamus* 20 at 21; and FATF & Egmont (2013) *Money Laundering through Diamonds Report* 57.

⁷⁴⁰ See para 2.4.5 et seq above.

⁷⁴¹ See again para 2.4.5 et seq above.

⁷⁴² See para 2.4.5.6 above.

⁷⁴³ See para 2.4.5.4.3 above.

⁷⁴⁴ See para 2.4.5.5.2 above.

2.4.6 The Art Trade and the Risk of TBML

2.4.6.1 General

Art is heritage that shapes and defines human beings.⁷⁴⁵ The South African Heritage Resources Agency⁷⁴⁶ governs the art industry in South Africa. The agency does so as part of its general functions in the maintenance of national heritage for future generations under the National Heritage Act.⁷⁴⁷ The art market is a growing multi-million dollar industry.⁷⁴⁸ The growth of the market is fuelled by the demand of artworks as wealth storage objects by high-net worth individuals. Deloitte predicts that works of art and collectibles held by ultra-high net worth individuals is estimated to follow an upward growth to USD\$2.7million by 2026.⁷⁴⁹ By way of a historical account, the legitimate art market itself is huge and was estimated at USD\$67.4billion worldwide by the end of 2018.⁷⁵⁰ The Art Basel⁷⁵¹ report of 2023 estimates global art and antiques sales to be USD\$67.8billion in 2023 showing an increase of 3 per cent from the pre-Covid-19 era.⁷⁵²

2.4.6.2 Art Theft and Its Vulnerability to Money Laundering

With the booming art market, also comes the problem of art theft and increased attractiveness of the sector to money launderers.⁷⁵³ The theft of art is particularly desirable to organised crime groups because art is easily accessible even in the

⁷⁴⁵ See Hannah Purkey 'The Art of Money Laundering' (2010) 22 *Fla J Int'l L* 111 at 120. See also Fausto Martin de Sanctis *Money Laundering Through Art: A Criminal Justice Perspective* (2013) (hereinafter '*De Sanctis Money Laundering Through Art*') at 49 who notes that 'art shapes society and gives it its character. Art defines humans. Art is both heritage and history'.

⁷⁴⁶ The Agency is established by s11 of the National Heritage Act 25 of 1999.

⁷⁴⁷ Act 25 of 1999. See also s 3 of the same Act for a description of the national estate which includes objects of fine art.

⁷⁴⁸ See Purkey (2010) 22 *Fla J Int'l L* 111 at 118.

⁷⁴⁹ See Deloitte (2016) 'The Art and Finance Report' <https://www2.deloitte.com/lu/en/pages/art-finance/articles/art-financereport.html>. [Accessed on 24 February 2021].

⁷⁵⁰ See Mashberg (2019) *Finance & Development* 31 at 32.

⁷⁵¹ The Art Basel is a non-profitable international art fair held annually in Basel, Switzerland, Miami Beach, Florida and Hong Kong. The organisation connects leading art patrons and galleries across the globe. Its publications *The Art Market* and the *Art Market Principles and Best Practices* are meant to increase transparency and accountability of the art market, see Art Basel 'Overview' <https://www.artbasel.com/about> [Accessed on 7 August 2021].

⁷⁵² See *The Art Market 2021 Report* <https://www.artbasel.com> [Accessed on 25 February 2024].

⁷⁵³ See J Sultan 'Combatting the Illicit Art Trade in the European Union: Europol's Role in Recovering Stolen Artwork' (1998) 18 *Nw J Int'l L & Bus* 759-810. See also Geldenhuys 'When Organised Crime Groups enter the "Art Scene"' (December, 2020) 113 *Servamus* 39-43 at 39.

remotest parts of the world, it is mobile and can be stored with easy.⁷⁵⁴ It is estimated that the theft of art is the second most profitable trade in the world rivalled only by narcotics trafficking.⁷⁵⁵ The art market is a ready vehicle to launder money.⁷⁵⁶ Money laundering through this sector can be done through TBML schemes.⁷⁵⁷ As the prices of art increase in general, so has become its attractiveness to money launderers.⁷⁵⁸ In *Rachmaninoff v Sotheby's and Teranyi*,⁷⁵⁹ judicial notice of the abuse of art for criminal purposes was observed. In that case, it was noted that:

“The public and the law have increasingly come to recognise the potential for abuse by criminals of works of art and of those who deal in them for money laundering ...”⁷⁶⁰

The theft of works of art and their illicit trade seem not to be a priority for law enforcement authorities in South Africa.⁷⁶¹ This is worrying considering that there has been media reportage of gold artefacts being stolen from the Stevenson Hamilton Knowledge Centre at Skukuza.⁷⁶² The centre is a museum under the governance of the South African National Parks. The stolen gold artefacts included a golden necklace, bracelet and beads estimated to be from the 13th and 17th centuries.⁷⁶³ The relaxed approach to the issue of art theft in South Africa has been attributed to the low statistical reports about the problem. Another reason could be the lack of knowledge

⁷⁵⁴ See Purkey (2010) 22 *Fla J Int'l* 111 at 119. See also Katharina Stoll 'A Guide to Understanding Money Laundering Through Art and Associated Risks' (March 2019) *CAMS Audit* 1-26 at 14.

⁷⁵⁵ See Purkey (2010) 22 *Fla J Int'l* 111 at 119. See also Stefano Manacorda & Duncan Chappell 'From Cairo to Vienna and Beyond: Contemporary Perspectives on the Dialogue about Protecting Cultural Artefacts from Plunder' in Stefano Manacorda & Duncan Chappell (eds) *Crime in the Art and Antiquities World: Illegal Trafficking in Cultural Property* (2011) (hereinafter Manacorda & Chappell 'From Cairo to Vienna and Beyond') 3.

⁷⁵⁶ See Alessandra Dagirmanjian 'Laundering the Art Market: Proposal for Regulating Money Laundering through Art in the United States' (2019) 29 *Fordham Intellectual Property, Media & Entertainment Law Journal* 687-728 at 692 et seq.

⁷⁵⁷ See Purkey (2010) 22 *Fla J Int'l* 111 at 126. See also Simser (2012) 16 *JMLC* 41 at 50; Dagirmanjian (2019) 29 *Fordham Intell Prop, Media & Ent L J* 708.

⁷⁵⁸ See Hufnagel & King 'Anti-Money Laundering Regulation and the Art Market' (2019) *Legal Studies* 1 at 5.

⁷⁵⁹ [2005] EWHC 258 (QB).

⁷⁶⁰ *Idem* at 35.

⁷⁶¹ See Bernadine Benson 'The Illicit Trade in Heritage Objects: Fact or Fiction?' (2010) 1 *Acta Criminologica* 140-156 at 140.

⁷⁶² See Thompson 2017 'Artefacts Stolen from South African National Parks Museum' www.savingantiquities.org [Accessed on 3 March 2020].

⁷⁶³ See Benson (2010) 1 *Acta Criminologica* 140 at 140.

about the crime of art theft. This makes it easy for criminals to continue stealing and dealing in illicit artefacts.⁷⁶⁴

2.4.6.3 Speculative Price of Art

A few reasons can explain why the art market is becoming increasingly attractive to criminals for money-laundering purposes.⁷⁶⁵ One of them is the speculative price of art. The price of most pieces of art is speculative.⁷⁶⁶ It can be anything the parties to trade have agreed it to be. The price for a piece of art is easy to manipulate for TBML purposes.⁷⁶⁷ A price can be increased or decreased depending on whether the money launderers need to move money in or out of the country.⁷⁶⁸ For instance, in *US v The Painting Known as 'Hannibal' et al*⁷⁶⁹ a painting's price was declared to be worth USD\$100 when it was worth an estimated USD\$8million.⁷⁷⁰ Dealers in artworks are also at liberty to set the price of a piece of art.⁷⁷¹ A piece of art may be worth millions of dollars. Such amounts may be attractive to money launderers wishing to launder high sums of money. Due to the speculative aspect of prices in the art trade, it is difficult to establish if any money-laundering activity is occurring.⁷⁷²

2.4.6.4 Difficulty in Authenticating Prices of Art

The difficulty in authenticating the accurate price of art is also an impediment to law enforcement efforts in establishing if the piece of art is being used for TBML or not.⁷⁷³ A piece of art may be considered a 'masterpiece' thereby meriting a very high price. The involvement of a very high price in art trade may not be regarded as suspicious since most artefacts are that valuable.⁷⁷⁴ Authorities may find it absurd to question the

⁷⁶⁴ Ibid.

⁷⁶⁵ See Stoll (March 2019) *CAMS Audit* 1 at 14-17; Dagirmanjian (2019) 29 *Fordham Intell Prop, Media & Ent L J* 687 at 704-708.

⁷⁶⁶ See Dagirmanjian (2019) 29 *Fordham Intell Prop, Media & Ent L J* 687 at 708; Stoll (March 2019) *CAMS Audit* 1 at 14.

⁷⁶⁷ See Purkey (2010) 22 *Fla J Int'l* 111 at 126; Simser (2012) 16 *JMLC* 41 at 50.

⁷⁶⁸ See Simser (2012) 16 *JMLC* 41 at 50. See again para 2.3.4.2 above.

⁷⁶⁹ 08 Civ 1511 (RJS) (2013).

⁷⁷⁰ See Hufnagel & King (2019) *Legal Studies* 1 at 6.

⁷⁷¹ See Purkey (2010) 22 *Fla J Int'l* 111 at 125.

⁷⁷² See Hufnagel & King (2019) *Legal Studies* 1 at 6; Purkey (2010) 22 *Fla J Int'l* 111 at 118.

⁷⁷³ See Dagirmanjian (2019) 29 *Fordham Intell Prop, Media & Ent L J* 687-728.

⁷⁷⁴ See Purkey (2010) 22 *Fla J Int'l* 111 at 118. See also Dagirmanjian (2019) 29 *Fordham Intell Prop, Media & Ent L J* 687-728 at 708.

amount paid for a single piece of art even if money laundering is taking place due to the subjectivity in the pricing of artworks.

2.4.6.5 The Regulatory Arbitrage in the Art Market

The export and import laws about the art trade from one country to another are different.⁷⁷⁵ This regulatory arbitrage makes it difficult to trace the provenance of a piece of art once it has been moved from one country to another. The provenance of art is significant in establishing whether its origins are illicit or not.⁷⁷⁶ It would also help in identifying the true owner of the piece of art and whether they are not involved in any form of criminality that may taint the trade deal. In *Kurtha v Marks*⁷⁷⁷ it was remarked that:

“... a dealer in valuable works of art who pays in large amounts of cash, keeps no records, and asks no questions as to provenance of his supplier, exposes himself and those who buy from him, to other very serious risks”.⁷⁷⁸

Many countries, particularly in Europe, regulate the sale of artworks in a lenient manner that allows criminals to resell pieces of stolen art.⁷⁷⁹ Examples of such countries include France, Germany, Switzerland and Italy. Switzerland in particular is a favourite destination for stolen art due to its financial secrecy and the country's unwillingness to cooperate in matters regarding the illicit art trade.⁷⁸⁰

2.4.6.6 Secrecy in the Illegal Art Market

In addition to the foregoing, the illegal art market is shrouded in secrecy.⁷⁸¹ There is limited knowledge about what is going on in the market. Benson argues that the

⁷⁷⁵ See Purkey (2010) 22 *Fla J Int'l* 111 at 119; Sultan (1998) 18 *Nw J Int'l L & Bus* 759 at 765.

⁷⁷⁶ See Basel Institute on Governance (2018) *Art Trade Anti-Money Laundering Principles* 8-9; Stoll (March 2019) *CAMS Audit* 1 at 9.

⁷⁷⁷ [2008] EWHC 336.

⁷⁷⁸ [2008] EWHC at 140.

⁷⁷⁹ See Purkey (2010) 22 *Fla J Int'l* 111 at 122; Sultan (1998) 18 *Nw J Int'l L & Bus* 759-810.

⁷⁸⁰ See Purkey (2010) 22 *Fla J Int'l* 111 at 119.

⁷⁸¹ See Katie L Steiner 'Dealing with Laundering in the Swiss Art Market: New Legislation and Its Threats to Honest Traders' (2017) 49 *Case Western Reserve Journal of International Law* 351-386 at 360-363; Stoll (March 2019) *CAMS Audit* 1 at 15; and Purkey (2010) 22 *Fla J Int'l* 111 at 121.

secrecy of the illicit art trade is the very reason that fuels its continuance.⁷⁸² Art dealers do not disclose much about purchasers of art and the source of their income. Consequently, organised criminals increasingly use the international art market as a money-laundering vehicle.⁷⁸³ The lack of transparency in the art market is an attraction to money launderers in the sector.⁷⁸⁴ As far back as the 18th century, works of art have been sold without revealing the identity of the seller or that of the buyer. The anonymity was presumed desirable in order to protect the parties to the sale from becoming targets of theft after the auction.⁷⁸⁵ Even in modern times, the element of anonymity is still rife and is achieved by using intermediaries to represent both the buyer and the seller.⁷⁸⁶ It has been observed that, “there is a dark side to the confidentiality surrounding the identity of an auctioneer’s principal”.⁷⁸⁷ The presence of anonymity plays perfectly well to the advantage of money launderers who desire secrecy in the hiding of illicit funds. This makes the art trade attractive to them.

2.4.6.7 Absence of AML Rules for the Art Market

The art market is vulnerable to TBML because of lack of AML rules that govern the sector.⁷⁸⁸ To date much focus pertaining to the control of money laundering has been directed to other sectors such as banks, real estate agents, lawyers and casinos.⁷⁸⁹ Little attention has been paid to the art market.⁷⁹⁰ Unlike in these other regulated markets, in the art market anyone can buy a piece of art without being asked for identification or the source of their funds. The lax regulatory environment in the art market attracts money launderers.⁷⁹¹ For instance, Edemar Cid Ferreira who was founder and former president of Banco Santos in Brazil was convicted for money

⁷⁸² See Benson (2010) 1 *Acta Criminologica* 140 at 140. See also Dagirmanjian (2019) 29 *Fordham Intell Prop, Media & Ent L J* 687 at 705.

⁷⁸³ See Purkey (2010) 22 *Fla J Int'l* 111 at 121. See also Manacorda & Chappell ‘From Cairo to Vienna and Beyond’ 4; Stoll (March 2019) *CAMS Audit* 1 at 16.

⁷⁸⁴ See Geldenhuys (December, 2020) 113 *Servamus* 39 at 40.

⁷⁸⁵ See Hufnagel & King (2019) *Legal Studies* 1 at 5.

⁷⁸⁶ Ibid. See also Dagirmanjian (2019) 29 *Fordham Intell Prop, Media & Ent L J* 687 at 705.

⁷⁸⁷ See *Rachmaninoff v Sotheby's and Teranyi* [2005] EWHC 258 (QB) para 35.

⁷⁸⁸ See De Sanctis *Money Laundering Through Art* 60; Lehr ‘Art and Antiquities: Conduits for Money Laundering and Terrorist Financing’ <https://www.acamstoday.org> [Accessed on 29 February 2020]; Basel Institute on Governance (2018) *Art Trade AML Principles* 3.

⁷⁸⁹ See Dagirmanjian (2019) 29 *Fordham Intell Prop, Media & Ent L J* 687 at 691; Steiner (2017) 49 *Case W Res J Int'l L* 351 at 360.

⁷⁹⁰ See Hufnagel & King (2019) *Legal Studies* 1 at 3.

⁷⁹¹ See Teichmann ‘European Antiques Trade: A Refuge for Money Laundering and Terrorism Financing’ (2019) 22 *Journal of Money Laundering Control* 410-416 at 412.

laundering partly involving artworks. Ferreira had collected a substantial amount of art valued in millions of dollars, including '*Hannibal*' by Jean-Michael Basquiat. The painting was actually subject to civil-forfeiture proceedings in the US courts of law.⁷⁹²

The absence of AML rules in the art trade means that art dealers do not file suspicious transaction reports.⁷⁹³ This is worrying considering that works of art often involve large sums of cash, which could be reportable in other sectors such as the banking sector. In the case of the *US v Kyriacou and Others*⁷⁹⁴ criminal charges were filed alleging money laundering through using a piece of art, namely, '*Personnages* 1965' by Pablo Picasso. In that case, it was pointed out by the defendants that the art market was chosen because it is "the only market that is unregulated".⁷⁹⁵ The US have since responded to plug this loophole in the art market by passing the Illicit Art and Antiquities Trafficking Prevention Act.⁷⁹⁶ The Act is not comprehensive in scope but simply amends and makes the Bank Secrecy Act applicable in the art and antiquities trade.⁷⁹⁷

The Basel Institute on Governance has published some Art Trade AML standards.⁷⁹⁸ The institute recognises that "the art trade is not immune to the risks of money laundering".⁷⁹⁹ The standards, therefore, recommend an AML framework for art dealers akin to that applicable to the financial sector. The standards prescribe the application of the RBA, the KYC screening procedures, reporting and record keeping obligations by art market operators.⁸⁰⁰ Since the standards do not have the force of law, they are a good source of inspiration for law reform in the area of TBML in art trade.

⁷⁹² See *US v The Painting Known as 'Hannibal' et al* 08 Civ 1511(RJS) (2013).

⁷⁹³ See Purkey (2010) 22 *Fla J Int'l* 111 at 121-122.

⁷⁹⁴ Indictment No CR180102 28 February 2018 (Eastern District of New York).

⁷⁹⁵ *Idem* at 16.

⁷⁹⁶ H.R.5886.

⁷⁹⁷ See s 2 of the Act.

⁷⁹⁸ See Basel Institute on Governance (2018) *Art Trade AML Principles* passim.

⁷⁹⁹ *Idem* at 3.

⁸⁰⁰ *Idem* at 5-10.

2.4.6.8 Conclusion

Art trade provides an environment that is vulnerable for TBML.⁸⁰¹ Certain factors make art trade a ready-made system that perfectly fits in TBML operations. The subjectivity in valuation of pieces of art being traded and the absence of AML reporting requirements for art traders, *inter alia*, make art trade a target for TBML by organised crime groups.⁸⁰² A piece of art is capable of fetching and transferring a high value of money. Such qualities are desirable to most money launderers in moving huge sums of illegal funds from one jurisdiction to another. There is a need, therefore, for heightened monitoring for TBML in the art trade due to the vulnerabilities it poses.

2.4.7 Cryptocurrencies and the Risk of TBML

2.4.7.1 General

The emergence of cryptocurrencies as a new technology-enabled means of payment provides new opportunities in the financing of international trade.⁸⁰³ Cryptocurrencies offer a chance to digitalise classical methods of payment such as letters of credit.⁸⁰⁴ However, with these advantages of cryptocurrencies also come challenges of cybercrime particularly the risk of TBML. This section briefly discusses the risk of TBML in cryptocurrencies. Although bitcoin is used as an example of cryptocurrency, the section does not limit itself to bitcoin only but adopts a general approach to the concept of cryptocurrencies. Other cryptocurrencies that are not bitcoin are referred to as altcoins and examples include Ripple, Litecoin and Ethereum.⁸⁰⁵ However, under this section the term 'cryptocurrency' is used to refer to either bitcoin or altcoins. The mentioning of bitcoin in specific terms in certain instances is only meant to bring clarity to the concept and operation of cryptocurrencies.

⁸⁰¹ See para 2.4.6 et seq above.

⁸⁰² See para 2.4.6.3 above.

⁸⁰³ See Sieg Eiselen 'What to Do with Bitcoin and Blockchain' (2019) 82 *Journal of Contemporary Roman-Dutch Law* 632-640 at 633.

⁸⁰⁴ Ibid.

⁸⁰⁵ See Eveshnie Reddy & Vivienne Lawack 'An Overview of the Regulatory Developments in South Africa Regarding the Use of Cryptocurrencies' (2019) 31 *SA Merc L J* 1-28 at 6.

2.4.7.2 The Meaning and Operation of Cryptocurrencies

Cryptocurrencies are a form of virtual currency that are convertible and rely on Blockchain technology.⁸⁰⁶ They operate through a decentralised system that does not use a central issuing authority such as central banks.⁸⁰⁷ Cryptocurrencies such as bitcoin were originally created to facilitate the exchange of value but they have since evolved to serve the function of store of value due to their high-market value.⁸⁰⁸ At the centre of bitcoin operation, is the Blockchain technology.⁸⁰⁹ The bitcoin Blockchain operates just like a decentralised bank for the bitcoin cryptocurrency. It does this without the need for banks to facilitate the bitcoin transactions.⁸¹⁰ Although all transactions on the Blockchain ledger can be viewed publicly, the system still offers a level of anonymity desirable to money launderers.⁸¹¹ In contrast to the operation of bank accounts, bitcoin wallets can be registered under pseudonyms without any verification by reporting institutions, which may not be involved in such transactions.⁸¹²

Cryptocurrencies can be traded on an open market and have the ability to transfer value between parties through private transactions that are conducted anonymously.⁸¹³ It is this quality of anonymity, which makes the detection, and regulation of cryptocurrency transactions by central authorities difficult unless the digital value involved has been exchanged for fiat currency through the banking system.⁸¹⁴

⁸⁰⁶ See Eiselen (2019) 82 *THRHR* 632 at 634.

⁸⁰⁷ *Ibid.*

⁸⁰⁸ See Reddy & Lawack (2019) 31 *SA Merc L J* 1 at 2.

⁸⁰⁹ See Danton Bryans 'Bitcoin and Money Laundering: Mining for an Effective Solution' (2014) 89 *Ind L J* 441-472 at 442; Eveshnie Reddy & Anthony Minnaar 'Cryptocurrency: A Tool and Target for Cybercrime' (2018) 31 *Acta Criminologica: Southern African Journal of Criminology* 71-91 at 72.

⁸¹⁰ See Rolf van Wegberg, Jan-Jaap Oerlemans & Oskar van Deventer 'Bitcoin Money Laundering: Mixed Results? An Explorative Study on Money Laundering of Cybercrime Proceeds Using Bitcoin' (2018) 25 *Journal of Fin Crime* 419-435; Bryans (2014) 89 *Ind L J* 441 at 442.

⁸¹¹ See Reddy & Lawack (2019) 31 *SA Merc L J* 1 at 14.

⁸¹² *Ibid.* See also Van Wegberg, Oerlemans & Van Deventer (2018) 25 *Journal of Fin Crime* 419 at 422.

⁸¹³ See Eiselen (2019) 82 *THRHR* 632 at 634.

⁸¹⁴ *Ibid.*

2.4.7.3 Cryptocurrencies as a Means of Payment

Based on cryptography and peer-to-peer technology, bitcoin is a virtual, decentralised, and partially anonymous cryptocurrency.⁸¹⁵ It is possible to acquire any form of good or service using bitcoins in a secure and timely manner.⁸¹⁶ The buying and selling of illegal goods such as weapons and drugs on the online underground markets or the dark web, has been made easy by cryptocurrencies.⁸¹⁷ Transactions do not need to be approved by a central authority but all platform users validate them. Just because it is nearly difficult to compromise the Blockchain protocol, the system is completely safe.⁸¹⁸

Cryptocurrencies have also become a currency of choice in international trade due to the advantages they offer to traders.⁸¹⁹ Some of the advantages include the absence of an exchange rate. International trade involves the use of various exchange rates due to different countries that may be participating in it. With cryptocurrencies as a form of payment, all traders deal with the currency of the same value. Cryptocurrency transactions also offer fast movement of money because the transfers are almost instantaneous.⁸²⁰ The validation of bitcoin payments in the Blockchain, for example, takes only a few minutes.⁸²¹ The peer-to-peer cryptocurrency also do not attract taxes and fees because there are no banks to facilitate the payment. However, with these advantages, there is also the risk that cryptocurrency may be used in facilitating TBML. Money laundering is the most significant risk linked with the use of bitcoins.⁸²² In one of its reports, the DEA has cautioned that the use of cryptocurrencies in payment for goods and services in international trade may be prone for abuse through TBML.

⁸¹⁵ Ibid.

⁸¹⁶ See Gaspare Jucan Sicignano 'Money Laundering Using Cryptocurrency: The Case of Bitcoin!' (2021) 7 *AJL* 253-264 at 253.

⁸¹⁷ See Van Wegberg, Oerlemans & Van Deventer (2018) 25 *Journal of Fin Crime* 419 at 420; Reddy & Minnaar (2018) 31 *Acta Criminologica* 71 at 72-74.

⁸¹⁸ See Sicignano (2021) 7 *AJL* 253 at 253.

⁸¹⁹ Ibid.

⁸²⁰ Ibid.

⁸²¹ Ibid.

⁸²² Idem at 254.

2.4.7.4 Cryptocurrencies in South Africa

Cryptocurrencies such as bitcoin are becoming popular in South Africa where they are used both as a currency and as a payment system.⁸²³ However, there are no accurate figures regarding the number of cryptocurrency users in South Africa.⁸²⁴ The absence of accurate statistics may be due to the non-regulation of cryptocurrencies in the country and the consequent lack of regulatory requirements to report cryptocurrency transactions.⁸²⁵ South Africa is a significant jurisdiction in the general discourse and developments around bitcoin cryptocurrency. Since 2015, the country has hosted five conferences dubbed 'Blockchain Africa'.⁸²⁶ South Africa also offers training on bitcoin and Blockchain technology issues through the Blockchain Academy.⁸²⁷ The country is also home to Llew Classen who is the director of the international Bitcoin Foundation.⁸²⁸ Besides these bitcoin related issues, there are three cryptocurrency exchanges in South Africa, namely, Luno, ICE-X and VALR.⁸²⁹ These exchanges allow the purchase of bitcoin using the local currency, the Rand, through their platforms.⁸³⁰ There are also at least three cryptocurrency ATMs in South Africa and a special kind of cryptocurrency called 'Number 42'.⁸³¹ Although cryptocurrencies in South Africa are not illegal, they are not legal tender.⁸³² Under South African banking law, legal tender are bank notes and coins issued by the central bank under the South African Reserve Bank Act or the notes of any other bank for which the central bank has assumed responsibility.⁸³³ Therefore, legal tender laws applied by the South African Reserve Bank (SARB) do not work against the bitcoin system.⁸³⁴ The implication of excluding

⁸²³ See Reddy & Lawack (2019) 31 *SA Merc L J* 1 at 2; Reddy & Minnaar (2018) 31 *Acta Criminologica* 71 at 71.

⁸²⁴ See Reddy & Minnaar (2018) 31 *Acta Criminologica* 71 at 71.

⁸²⁵ *Ibid.*

⁸²⁶ See Reddy & Lawack (2019) 31 *SA Merc L J* 1 at 15.

⁸²⁷ *Ibid.*

⁸²⁸ *Ibid.*

⁸²⁹ *Ibid.*

⁸³⁰ See Reddy & Minnaar (2018) 31 *Acta Criminologica* 71 at 76.

⁸³¹ See Reddy & Lawack (2019) 31 *SA Merc L J* 1 at 15.

⁸³² See Deon Erasmus & Susan Bowden 'A Critical Analysis of South African Anti-Money Laundering Legislation with regard to Cryptocurrency' (2020) 41 *Obiter* 309-327 at 316; Reddy & Lawack (2019) 31 *SA Merc L J* 1 at 14. See also Eiselen (2019) 82 *THRHR* 632 at 635.

⁸³³ See s 17 of the South African Reserve Bank Act 90 of 1989.

⁸³⁴ See Reddy & Lawack (2019) 31 *SA Merc L J* 1 at 3.

cryptocurrencies from having legal tender status is that no creditor is obliged to receive them in payment of debts.⁸³⁵

The SARB has also indicated that cryptocurrencies are not regarded as currency but rather as crypto tokens or crypto assets.⁸³⁶ However, for tax purposes the South African Revenue Services (SARS) regard cryptocurrencies as a form of intangible asset.⁸³⁷ The SARS stance raises two difficult questions around the issue of legal tender and currency status of cryptocurrencies. First, cryptocurrencies are not legal tender in South Africa and are not widely used and accepted as a medium of payment in the country. Secondly, the Income Tax Act under which tax on income is realised does not define the word currency. The SARS regard cryptocurrencies as assets that are intangible in nature.⁸³⁸ Eiselen argues that the classification of cryptocurrencies as intangible assets should result in the collection of value added tax on bitcoins under the Value Added Tax Act.⁸³⁹ However due to the anonymity of cryptocurrency transactions, the tax-collection exercise may be difficult to implement.⁸⁴⁰

2.4.7.5 The Risk of TBML in Cryptocurrencies

Organised crime groups have become more creative in their money laundering activities in response to increasing AML efforts to combat them.⁸⁴¹ TBML through digital trading is one such method organised crime groups use in response to stronger AML efforts against other forms of money laundering.⁸⁴² They have wasted no time to embrace the advantages that come with technology in their criminal enterprises.⁸⁴³ Whenever criminals engage in money laundering, they need a waterproof cash out plan such as the use of cryptocurrency to avoid detection by law enforcement

⁸³⁵ See Eiselen (2019) 82 *THRHR* 632 at 635. See also WG Schulze 'E Money and Electronic Fund Transfers-A Shortlist of Some of the Unresolved Issues' (2004) 16 *SA Merc L J* 50-66 at 51; Loubser & Swart (1999) 10 *Stell L Rev* 354 at 368.

⁸³⁶ See Eiselen (2019) 82 *THRHR* 632 at 635.

⁸³⁷ Ibid. See also 'SARS Stance on the Tax Treatment of Cryptocurrencies' <https://www.sars.co.za> [Accessed on 2 October 2021].

⁸³⁸ See Eiselen (2019) 82 *THRHR* 632 at 635.

⁸³⁹ 89 of 1991.

⁸⁴⁰ See Eiselen (2019) 82 *THRHR* 632 at 636.

⁸⁴¹ See Robert Stokes 'Virtual Money Laundering: The Case of Bitcoin and the Linden Dollar' (2012) 21 *Information & Communications Technology Law* 221-236 at 221.

⁸⁴² See Van Jaarsveld (2004) 16 *SA Merc L J* 685-702. See also Ch 2 para 2.3 et seq above.

⁸⁴³ See Bryans (2014) 89 *Ind L J* 441 at 441.

agencies.⁸⁴⁴ The advent of cryptocurrencies have enabled criminals to distance themselves from the proceeds of crime by allowing them to buy and sell goods anonymously without any physical interaction.⁸⁴⁵

Cryptocurrencies such as bitcoin have certain features that make them attractive to money launderers.⁸⁴⁶ Two components of the bitcoin trading system are significant to the laundering process using cryptocurrency.⁸⁴⁷ These are bitcoin mixers or tumblers and bitcoin exchanges. On the one hand, bitcoin mixers offer services that can easily disconnect bitcoins from their original illegal source.⁸⁴⁸ On the other hand, bitcoin exchange services are services that anonymously convert bitcoins to actual money that can be spent freely in the open market.⁸⁴⁹ With these bitcoin exchange platforms, a money launderer could exchange illegal funds for bitcoin without the fear of being tracked by law enforcement authorities.⁸⁵⁰ In order to buy or sell bitcoin, two users can simply meet and exchange cash for bitcoins. This eliminates the need to provide information that identifies them to bitcoin exchanges.⁸⁵¹

The Blockchain technology used in bitcoin transactions and its lack of adequate personal identification make bitcoin a currency of choice for illegal transactions.⁸⁵² This can be achieved through two forms of cyber-laundering, namely, instrumental cyber-laundering or online laundering.⁸⁵³ On one hand, instrumental cyber-laundering occurs when at least one of the stages of money laundering is conducted through digital means. Purchasing virtual money with cash proceeds of crime is a common example of instrumental cyber-laundering using bitcoin.⁸⁵⁴ On the other hand, online cyber-laundering occurs when all aspects of the money-laundering process takes place

⁸⁴⁴ See Van Wegberg, Oerlemans & Van Deventer (2018) 25 *Journal of Fin Crime* 419 at 420.

⁸⁴⁵ See Bryans (2014) 89 *Ind L J* 441-472 at 441; Van Jaarsveld (2004) 16 *SA Merc L J* 685 at 695.

⁸⁴⁶ See Stokes (2012) 21 *Info & Com Tech L* 221 at 224.

⁸⁴⁷ See Erasmus & Bowden (2020) 41 *Obiter* 309 at 315.

⁸⁴⁸ *Ibid.*

⁸⁴⁹ See Van Wegberg, Oerlemans & Van Deventer (2018) 25 *Journal of Fin Crime* 419 at 420; Erasmus & Bowden (2020) 41 *Obiter* 309 at 315.

⁸⁵⁰ See Sicignano (2021) 7 *AJL* 253 at 260.

⁸⁵¹ See Kelsey L Penrose 'Banking on Bitcoin: Applying Anti-Money Laundering and Money Transmitter Laws' (2014) 18 *North Carolina Banking Institute* 529-552 at 534.

⁸⁵² See Penrose (2014) 18 *North Carolina Banking Institute* 529 at 536.

⁸⁵³ See Sicignano (2021) 7 *AJL* 253 at 259.

⁸⁵⁴ *Ibid.*

through digital means. In this case, the funds to be laundered are already in digital form thereby making the laundering operations simple and fast.⁸⁵⁵

Due to the anonymous nature of bitcoin transactions, law enforcement authorities find it difficult to trace criminal activities occurring through them.⁸⁵⁶ The operation of bitcoin is based on a decentralised system with no central authority that interferes with the process.⁸⁵⁷ The absence of a central authority in bitcoin transactions makes oversight difficult since there is no obligation for bitcoin users to file suspicious transaction reports.⁸⁵⁸ An automatic algorithm on a peer-to-peer network manages the bitcoin system.⁸⁵⁹ Users in a cryptocurrency transaction could transfer value between them through TBML without the involvement of a financial institution due to the decentralised nature of the Blockchain technology used in cryptocurrency.⁸⁶⁰

The design and technology of cryptocurrencies can easily compress all the three stages of the money-laundering process into one.⁸⁶¹ For example, cryptocurrencies do not need to be placed into the financial system because they are already in an encrypted form of an unregulated currency.⁸⁶² The cryptocurrencies, therefore, do not require any 'cleaning' because there are bitcoin mixers and exchanges that do the converting processes from 'dirty' to 'clean'.⁸⁶³ This is a challenge because AML efforts are largely centred on the use of intermediaries such as financial institutions to combat money laundering.⁸⁶⁴

TBML through bitcoin is also made possible because bitcoin transactions allow the transfer of value without any face-to-face contact. Such transfers are usually

⁸⁵⁵ Ibid.

⁸⁵⁶ See Sicignano (2021) 7 *AJL* 253 at 260; Penrose (2014) 18 *North Carolina Banking Institute* 529 at 529; and Van Wegberg, Oerlemans & Van Deventer (2018) 25 *Journal of Fin Crime* 419 at 420.

⁸⁵⁷ See Penrose (2014) 18 *North Carolina Banking Institute* 529 at 529; Bryans (2014) 89 *Ind L J* 441 at 442.

⁸⁵⁸ See Van Wegberg, Oerlemans & Van Deventer (2018) 25 *Journal of Fin Crime* 419 at 420; and Stokes (2012) 21 *Info & Com Tech L* 221 at 225.

⁸⁵⁹ See Erasmus & Bowden (2020) 41 *Obiter* 309 at 309; Sicignano (2021) 7 *AJL* 253 at 260; and Penrose (2014) 18 *North Carolina Banking Institute* 529 at 529.

⁸⁶⁰ See Reddy & Lawack (2019) 31 *SA Merc L J* 1 at 2; Stokes (2012) 21 *Info & Com Tech L* 221-236 at 225.

⁸⁶¹ See Erasmus & Bowden (2020) 41 *Obiter* 309 at 313; Reddy & Minnaar (2018) 31 *Acta Criminologica* 71 at 76.

⁸⁶² See Reddy & Minnaar (2018) 31 *Acta Criminologica* 71 at 76.

⁸⁶³ Ibid.

⁸⁶⁴ See Stokes (2012) 21 *Info & Com Tech L* 221 at 225.

international in nature cutting across jurisdictions with varying laws designed to combat money laundering through cryptocurrencies.⁸⁶⁵ The transfer of value through bitcoin transactions is anonymous due to the use of pseudonyms on the accounts used to transact.⁸⁶⁶ In response to the increasing threat of ever evolving methods of money laundering, the FATF has revised its international standards against the money-laundering problem. For instance, the revised recommendations enhanced the KYC by improving the CDD policy that captures the beneficial owners to understand the ownership and control structure of a legal person.⁸⁶⁷ In this regard, financial institutions are encouraged by the FATF not to keep anonymous accounts and to put in place such policies and procedures that address risks associated with business that are not face to face.⁸⁶⁸ It is central to the obligations of a financial institution not to deal with a client without adequately identifying them. At a minimum, the financial institution should obtain a certain amount of information from potential customers and verify its correctness before transacting with the business.⁸⁶⁹ With cryptocurrencies, however, such CDD processes are difficult due to the anonymity involved and the absence of a central authority to facilitate payments.

2.4.7.6 Conclusion

Cryptocurrencies are the future of payments.⁸⁷⁰ However, they also come with the dangers of being hijacked by organised crime groups for criminal ends. There is an inherent danger of money laundering in the use of cryptocurrencies due to the absence of regulation and the anonymous nature of cryptocurrency transactions.⁸⁷¹ The use of bitcoins to buy and sell goods online has also made them ideal for abuse through TBML.⁸⁷² Transactions involving TBML thrive through the illegal transfer of value between parties exchanging goods or services.⁸⁷³ The speed with which cryptocurrency transactions facilitate trading online without any regulation make them

⁸⁶⁵ Ibid. See also Van Wegberg, Oerlemans & Van Deventer (2018) 25 *Journal of Fin Crime* 419 at 420.

⁸⁶⁶ See Stokes (2012) 21 *Info & Com Tech L* 221 at 225.

⁸⁶⁷ See Van Jaarsveld (2004) 16 *SA Merc L J* 685 at 698.

⁸⁶⁸ Ibid.

⁸⁶⁹ Idem at 700.

⁸⁷⁰ See para 2.4.7 et seq above.

⁸⁷¹ See para 2.4.7.3 above.

⁸⁷² See para 2.4.7.5 above.

⁸⁷³ See para 2.3 et seq above.

vulnerable particularly to TBML.⁸⁷⁴ Therefore, the use of cryptocurrencies to facilitate payments in international trade should be monitored closely for the risk of TBML.

2.4.8 Free-Trade Zones and the Risk of TBML

2.4.8.1 General

Free-Trade Zones (FTZs) are central drivers of the global economy. They promote economic growth and have a significant role to play in international trade.⁸⁷⁵ As early as the 18th century FTZs were significant locations on international trade routes that served as hubs for trade and transshipment.⁸⁷⁶ Examples of such early centres that functioned as free zones and transshipment conduits are Gibraltar in 1704, Singapore in 1819 and Copenhagen in 1891.⁸⁷⁷ The first modern FTZ is the Shannon Free-Trade Zone and was established in Ireland in 1959. It was meant to be a duty free industrial location for industries at the time. However, it ended up becoming the evolutionary origins of the concept as it is perceived in the modern times.⁸⁷⁸ Depending on the jurisdiction in question, FTZs are known by different names.⁸⁷⁹ Due to the economic and trade advantages they offer, FTZs have emerged in numerous countries around the world, including in South Africa.⁸⁸⁰ To date there are roughly 3000 FTZs in 135 countries around the world with the number expected to increase over time.⁸⁸¹

2.4.8.2 Definition of FTZs

The FATF defines FTZs as “designated areas within jurisdictions in which incentives are offered to support the development of exports, foreign direct investment and local

⁸⁷⁴ See again para 2.4.7.5 above.

⁸⁷⁵ See FATF (2010) *Money Laundering Vulnerabilities of Free-Trade Zones Report* (hereinafter ‘FATF (2010) *Vulnerabilities of Free-Trade Zones Report*’) 5. See also H Christian AW Schulze ‘The Free-Trade-Zone Programmes of Namibia and Mauritius and the latest Developments in Europe: Lessons for South Africa’ (1999) 32 *CILSA* 169-207 at 169.

⁸⁷⁶ See FATF (2010) *Vulnerabilities of Free-Trade Zones Report* 9.

⁸⁷⁷ See Cassara *Next Frontier* 128.

⁸⁷⁸ See FATF (2010) *Vulnerabilities of Free-Trade Zones Report* 9.

⁸⁷⁹ They are also known by such names as ‘free zones’, ‘free-port zones’, ‘commercial free-trade zones’, ‘hi-tech industry parks’, ‘investments zones’, ‘special economic zones’ and ‘border economic cooperation zones’, see Cassara *Next Frontier* 129; FATF (2010) *Vulnerabilities of Free Trade Zones Report* 9.

⁸⁸⁰ See Special Economic Zones Act 16 of 2014; H Christian AW Schulze ‘The Legal Implications of the Establishment of Free Trade Zones in South Africa’ (1998) 31 *CILSA* 1-17.

⁸⁸¹ See Liao & Acharya (2011) 14 *JMLC* 79 at 85; Simser (2012) 16 *JMLC* 41 at 50.

employment”.⁸⁸² Such zones are designed for attracting trade and related businesses through applying relaxed regulations and favourable taxes within the zone.⁸⁸³ In South Africa, the Special Economic Zones Act (SEZ Act)⁸⁸⁴ regulates the operations of FTZs. The SEZ Act considers a FTZ as a subcategory of SEZs.⁸⁸⁵ Under the SEZ Act, a FTZ is defined as a duty free area offering storage and distribution facilities for value-adding activities within the SEZ for subsequent export.⁸⁸⁶ The SADTI defines a SEZ as geographically designated areas of a country that are set aside for specifically targeted economic activities, supported through special arrangements, including laws and systems that are often different from those that apply in the rest of the country.⁸⁸⁷

2.4.8.3 The Risk of TBML in FTZs

Despite their obvious potential in boosting economic growth, FTZs present a significant vulnerability for TBML.⁸⁸⁸ There is a challenge in FTZs of striking a balance between promoting an open business environment and the control of money laundering.⁸⁸⁹ TBML schemes are easy to structure where there are a series of systemic vulnerabilities existing in one place. FTZs seem to offer such. The very reasons for setting up FTZs are the ones that present such areas as problematic for TBML. The rapid development of FTZs over the years has not been up to date with the latest AML developments. Most laws governing the operations of FTZs do not take into account the money–laundering vulnerabilities presented by such zones. The laws focus mainly on promoting growth and attracting investments.⁸⁹⁰ In addition to this, FTZs have separate laws governing them that are different from the rest of the country.⁸⁹¹ They have relaxed policies and regulations that are good for unhindered

⁸⁸² See FATF (2010) *Vulnerabilities of Free Trade Zones Report* 4.

⁸⁸³ See Liao & Acharya (2011) 14 *JMLC* 79 at 85; FATF (2010) *Vulnerabilities of Free Trade Zones Report* 4.

⁸⁸⁴ 16 of 2014.

⁸⁸⁵ Four categories of special economic zones are identified under the Act, namely, Industrial Development Zone, Free Port, Free Trade Zone and Sector Development Zone, see s 24(5) of the Act.

⁸⁸⁶ S 24 (5) of the Act.

⁸⁸⁷ The DTI https://www.thedti.gov.za/industrial_development/sez.jsp [Accessed on 10 March 2020].

⁸⁸⁸ See APG (2012) *Trade-Based Money Laundering Report* 35; Simser (2012) 16 *JMLC* 41 at 50; and Liao & Acharya (2011) 14 *JMLC* 79 at 85.

⁸⁸⁹ See FATF (2010) *Vulnerabilities of Free Trade Zones Report* 15. See also Liao & Acharya (2011) 14 *JMLC* 79 at 85.

⁸⁹⁰ See FATF (2010) *Vulnerabilities of Free Trade Zones Report* 15.

⁸⁹¹ *Ibid.*

trade operations. Usually, these are coupled with lenient law enforcement mechanisms. However, this means that AML regulations operating in the zone are also a bit relaxed.⁸⁹² Simser notes that FTZs have become a vulnerable location for financial crimes such as TBML and carousel tax frauds due to a relaxed law enforcement.⁸⁹³ Many factors increase the risk exposure of FTZs to TBML and I briefly explain a few of them below.

2.4.8.4 The Use of Cash in FTZs

FTZs also have “a more permissive atmosphere for high-risk behaviour such as the use of cash”.⁸⁹⁴ Cash transactions are a frequent occurrence within FTZs because of the convenience they offer in trade transactions. The use of cash does not usually involve financial institutions that can screen suspicious transactions, therefore, presents a heightened money-laundering risk in the FTZs.⁸⁹⁵ Cash is easily portable, grants anonymity to the user and leaves no audit trail.⁸⁹⁶ This attracts criminal operatives within the zones wishing to launder the proceeds of crime.

2.4.8.5 Relaxed Oversight and Lack of Transparency

It is also a characteristic of FTZs to have relaxed oversight and to lack in transparency.⁸⁹⁷ An environment with poor regulations and a reduced level of transparency constitutes a high risk of TBML. This is most evident in company formation processes within the FTZs. Companies registering and operating in FTZs are not subjected to a rigorous vetting system like those in the rest of the country.⁸⁹⁸ To attract new investors, the ease of setting up a company is used as a marketing tool. Little or no ownership information of the companies setting shop within FTZs is usually provided. Consequently, details such as those of the ultimate beneficial owner are

⁸⁹² See APG (2012) *Trade-Based Money Laundering Report* 35.

⁸⁹³ See Simser (2012) 16 *JMLC* 41 at 50.

⁸⁹⁴ See Liao & Acharya (2011) 14 *JMLC* 79 at 86. See also Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 11.

⁸⁹⁵ See FATF (2010) *Vulnerabilities of Free Trade Zones Report* 15; Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 11.

⁸⁹⁶ See Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 11.

⁸⁹⁷ See FATF (2010) *Vulnerabilities of Free Trade Zones Report* 16.

⁸⁹⁸ See APG (2012) *Trade-Based Money Laundering Report* 35.

usually not readily available.⁸⁹⁹ The absence or lack of such information presents a challenge to AML investigators when trying to connect criminal activities, the company and the mastermind behind the whole scheme.

2.4.8.6 *Types of Goods Vulnerable to TBML*

FTZs handle a variety of goods that are vulnerable to TBML.⁹⁰⁰ Certain types of goods are vulnerable to TBML due to their size, high-tariff rate, value, and volume. Goods such as cigarettes and alcohol are high-tariff items that are vulnerable to smuggling and carousel VAT-refund fraud.⁹⁰¹ Goods passing through FTZs often undergo a series of transformative processes. These include repacking, sub-dividing, consolidation and relabelling.⁹⁰² To be successful, a TBML scheme often relies on false documentation about contents or value of goods.⁹⁰³ The size and scope of FTZs make it a challenge to effectively monitor incoming and outgoing goods as well as the processes of repacking and relabelling. The lack of diligent oversight within FTZs give much room for TBML schemes to be carried out.⁹⁰⁴

2.4.8.7 *Conclusion*

In order to boost economic growth, South Africa has a number of areas designated as FTZs.⁹⁰⁵ Despite their significant role in boosting economies; FTZs are a potential source for the risk of TBML in South Africa.⁹⁰⁶ A number of factors make FTZs prone to abuse through TBML.⁹⁰⁷ These include the presence of separate laws that govern them, which are different from those that apply in the rest of the country's economy.⁹⁰⁸

⁸⁹⁹ See FATF (2010) *Vulnerabilities of Free Trade Zones Report* 16; APG (2012) *Trade-Based Money Laundering Report* 35.

⁹⁰⁰ See Liao & Acharya (2011) 14 *JMLC* 79 at 86; FATF (2010) *Vulnerabilities of Free Trade Zones Report* 17-18; and Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 11.

⁹⁰¹ See Liao & Acharya (2011) 14 *JMLC* 79 at 86; FATF (2010) *Vulnerabilities of Free Trade Zones Report* 16.

⁹⁰² See Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 11; Liao & Acharya (2011) 14 *JMLC* 79 at 86; and FATF (2010) *Vulnerabilities of Free Trade Zones Report* 16.

⁹⁰³ See APG (2012) *Trade-Based Money Laundering Report* 35; Liao & Acharya (2011) 14 *JMLC* 79 at 86; and FATF (2010) *Vulnerabilities of Free Trade Zones Report* 16. For a discussion of the basic methods often used in TBML schemes, see para 2.3.4 above.

⁹⁰⁴ See FATF (2010) *Vulnerabilities of Free Trade Zones Report* 20.

⁹⁰⁵ See para 2.4.8 et seq above.

⁹⁰⁶ See para 2.4.8.3 above.

⁹⁰⁷ See para 2.4.8.3 above.

⁹⁰⁸ See para 2.4.8.5 above.

FTZs are also characterised by relaxed regulations that are meant for unhindered trade operations. Of particular concern with regards to the risk of TBML in FTZs is the absence of strict law enforcement and relaxed oversight of operations.⁹⁰⁹ The existence of transshipment centres within FTZs, and their handling of volumes of goods with high value, have also been associated with the risk of TBML.⁹¹⁰ There is a need to strike a balance between boosting economic growth through FTZs and the controlling of TBML. Increasing AML law enforcement would be a good starting point in fighting TBML within FTZs.

2.4.9 Tax Havens and the Risk of TBML

2.4.9.1 General

Tax havens⁹¹¹ are a major player in the global financial markets.⁹¹² More than half of international bank lending and roughly a third of foreign direct investment passes through tax havens.⁹¹³ An estimated 50 per cent of the global trade passes, at least on paper, through tax havens.⁹¹⁴ The majority of these transactions are facilitated by the use of shell or front companies domiciled in these tax haven destinations.⁹¹⁵ To date, the world has more than 60 tax havens, which can conveniently be divided into four groups, namely, a set of continental European havens, a British zone comprised of its former colonial empire, particularly in the Caribbean Islands, certain states within the US and a category of unclassified territories such as Somalia and Uruguay.⁹¹⁶ With this large network of tax havens comes the problem of TBML.

⁹⁰⁹ See again para 2.4.8.5 above.

⁹¹⁰ See para 2.4.8.6 above.

⁹¹¹ Tax havens are also known by different names such as 'safe havens', 'secrecy jurisdictions', 'off-shore financial centres', 'tax-favourable jurisdictions', 'profit-shifting destinations', see Main (2016) 28 *Tax Professional* 1-30 at 6; Baker *Capitalism* 35-36; Nicholas Shaxson *Treasure Islands: Tax Havens and the Men Who Stole the World* (2011) (hereinafter 'Shaxson *Treasure Islands*') 15-16; and Zoppei *Tax Evasion as a Predicate Offence* 15.

⁹¹² See Shaxson *Treasure Islands* 15-16; OECD (1998) *Harmful Tax Competition: An Emerging Global Issue* (1998) 21.

⁹¹³ See GFI 'Tax Havens/Bank Secrecy' <https://www.gfintegrity.org> [Accessed on 25 January 2021]; Shaxson *Treasure Islands* 15-22.

⁹¹⁴ See Zoppei *Tax Evasion as a Predicate Offence* 15.

⁹¹⁵ See John Christensen 'The Looting Continues: Tax Havens and Corruption' (2011) 7 *Critical Perspectives on International Business* 177-196 at 178. See also Baker *Capitalism* 35 et seq.

⁹¹⁶ See Shaxson *Treasure Islands* 4. See also Barber *Tax Havens Today* 131 et seq for a review of profiles of various tax havens.

2.4.9.2 Definition of a Tax Haven

A tax haven is a jurisdiction that offers a lax regulation, low or zero taxation on income and capital of non-residents.⁹¹⁷ It also provides secrecy facilities for banking or corporate ownership.⁹¹⁸ Tax havens also lack effective information exchange with the authorities of third-party countries.⁹¹⁹ These features capture the general characteristics of a tax haven given by the Organisation for Economic Co-operation and Development (OECD) in 1998.⁹²⁰ The organisation states that a tax haven has four main features. First, it has no or low taxes. Secondly, it lacks an effective exchange of information. Thirdly, it lacks transparency; and fourthly, it has no requirement of substantial activity.⁹²¹ It must be noted that these features have changed over time although they describe what is largely known as a tax haven.⁹²²

2.4.9.3 Vulnerability of Tax Havens to TBML

Tax havens are a weak point for TBML operations.⁹²³ The schemes used in TBML sometimes require that dummy or front companies be created to present an image of legitimacy in the business arrangement.⁹²⁴ The creation of these dummy or shell corporations is made easy in a tax haven.⁹²⁵ A shell company is a corporate entity that has no active business operations or significant assets.⁹²⁶ It needs to be distinguished from a front company. A front company is a corporate entity which has active business

⁹¹⁷ See Christensen (2011) 7CPOIB 177 at 178; OECD (1998) *Harmful Tax Competition* 21.

⁹¹⁸ See Christensen (2011) 7CPOIB 177 at 178; OECD (1998) *Harmful Tax Competition* 21.

⁹¹⁹ See Christensen (2011) 7CPOIB 177 at 177. See also Fabiano Angélico & Lúgia Zagato (2017) *Sao Paulo: Does Corruption Live Next Door? Shell Companies and the Real Estate Sector in the Largest City in the Southern Hemisphere Report* at 16 who define or rather explain tax havens as 'jurisdictions, including cities, states and countries that grant favourable tax treatment even to non-residents. They host many financial service providers and often are also known as secrecy jurisdictions. At least one of the FATF money-laundering stages is usually carried out in tax havens'.

⁹²⁰ See OECD (1998) *Harmful Tax Competition* 21-23.

⁹²¹ Idem at 23. See also Gregory Rawlings 'Shifting Profits and Hidden Accounts: Regulating Tax Havens' in: Peter Drahos (ed) *Regulatory Theory: Foundations and Applications* (2017) (hereinafter Rawlings 'Shifting Profits and Hidden Accounts') 656.

⁹²² See Barber *Tax Havens Today* 15. See also Rawlings 'Shifting Profits and Hidden Accounts' 656-657 for a brief historical development of tax havens.

⁹²³ See APG (2012) *Trade-Based Money Laundering Report* 35; Baker *Capitalism* 35 et seq.

⁹²⁴ See Christensen (2011) 7CPOIB 177 at 183; APG (2012) *Trade-Based Money Laundering Report* 35; and Baker *Capitalism* 35 et seq.

⁹²⁵ See Sullivan & Smith (2012) *Australian Institute of Criminology* 1 at 10; Barber *Tax Havens Today* 33.

⁹²⁶ See Chandna *Black Money* 53. See also Angélico & Zagato (2017) *Sao Paulo: Corruption Live Next Door Report* 16; and De Koker 'Money Laundering in South Africa' 90.

operations that serve as a 'front' or 'face' for illegal activities.⁹²⁷ As a matter of practice shell companies generally have no employees, facilities and they avoid doing business in jurisdictions where they are established.⁹²⁸ More often than not, these corporations are set up for the sole purpose of acquiring a bank account while hiding behind layers of secrecy offered by tax havens.⁹²⁹ Shell companies may also exist as corporate entities in artificial form by way of a mere address.⁹³⁰ For example, in Luxembourg, money-laundering investigators have identified number 5 Rue Guillaume Kroll as home to more than 1600 companies.⁹³¹ Similarly, in Cayman Islands, Ugland House is a home address for 12 748 companies.⁹³² Both shell and front companies can be used to facilitate TBML schemes.⁹³³

2.4.9.4 The Secrecy of Tax Havens

Tax havens do not only offer an escape from tax but also offer secrecy.⁹³⁴ The element of secrecy is a necessary ingredient for criminals who need to launder the proceeds of crime.⁹³⁵ Secrecy also creates an effective barrier to possible investigation of TBML activities that pass through tax havens.⁹³⁶ Tax havens are also a good destination for integrating proceeds of crime.⁹³⁷ In a typical money-laundering scheme together with the help of shell companies, an organised criminal group can initiate what is known as a round-tripping technique.⁹³⁸ Under the technique, proceeds of money laundering are deposited into the financial institutions domiciled in tax havens or transferred to shell

⁹²⁷ See Miller *et al* *TBML: Overview and Policy Issues* 3. See also De Koker 'Money Laundering in South Africa' 91.

⁹²⁸ See Baker *Capitalism* 35. See also Angélico & Zagato (2017) *Sao Paulo: Corruption Live Next Door Report* 16.

⁹²⁹ See Baker *Capitalism* 35. See also Zoppei *Tax Evasion as a Predicate Offence* 16; OECD (1998) *Harmful Tax Competition* 22.

⁹³⁰ See Christensen (2011) *7CPOIB* 177 at 183.

⁹³¹ See Cassara *Next Frontier* 121-122.

⁹³² See Barber *Tax Havens Today* 131 et seq.

⁹³³ See APG (2012) *Trade-Based Money Laundering Report* 36.

⁹³⁴ See Zoppei *Tax Evasion as a Predicate Offence* 16; Christensen & Zoppei 'What Do a Tax Evader and a Money Launderer have in Common?' 35; and Schlenzter (2013) 16 *JMLC* 126 at 128.

⁹³⁵ See Zoppei *Tax Evasion as a Predicate Offence* 16; Christensen & Zoppei 'What Do a Tax Evader and a Money Launderer have in Common?' 35; and Schlenzter (2013) 16 *JMLC* 126 at 128.

⁹³⁶ See Christensen (2011) *7CPOIB* 177 at 183. See also Zoppei *Tax Evasion as a Predicate Offence* 16 et seq.

⁹³⁷ See again para 2.2.4.3 above and para 2.4.9 above.

⁹³⁸ *Ibid.*

companies where minimal records are kept and then shipped back as some kind of clean investment money.⁹³⁹

2.4.9.5 Conclusion

Tax havens are a significant component in TBML operations.⁹⁴⁰ They provide an opportunity for organised crime groups to hide criminal proceeds beyond the reach of law enforcement authorities.⁹⁴¹ Tax havens make the integration of the proceeds of TBML easier due to differences in AML-regulatory regimes across the world.⁹⁴² Where there are more than two jurisdictions, TBML thrives better due to the absence of an effective AML information-sharing system.⁹⁴³ With tax havens present, a layer of secrecy is added to the complexity of TBML operations. Consequently, this decreases the probability of detecting such money-laundering schemes.⁹⁴⁴ Thus, tax havens play a key role in the promotion of TBML. There is a need, when designing an AML regulatory regime for South Africa, to factor in the role of tax havens in the organised criminal enterprise.

2.5 EFFECTS OF TRADE-BASED MONEY LAUNDERING

2.5.1 General

Just like traditional money laundering, the occurrence of TBML comes with both short and long-term effects. A discussion of TBML in trade finance would miss the whole point if it were not preceded by the possible effects of the problem. To understand how devastating TBML can be, there is a need to review its effects.⁹⁴⁵ The next section is an attempt to review the effects of TBML. The effects have been broken into two broad categories of short⁹⁴⁶ and long⁹⁴⁷ term for convenience in discussion. The short-term effects are those that usually happen within one or two years. Long-term effects

⁹³⁹ See OECD (1998) *Harmful Tax Competition* 22.

⁹⁴⁰ See para 2.4.9 et seq above. See also para 2.3 et seq above.

⁹⁴¹ See again para 2.4.9 et seq above.

⁹⁴² See para 2.4.9.3 above.

⁹⁴³ See again para 2.4.9.3 above.

⁹⁴⁴ See para 2.4.9.4 above.

⁹⁴⁵ See para 2.5.2 and para 2.5.3 below.

⁹⁴⁶ See para 2.5.2 below.

⁹⁴⁷ See para 2.5.3 below.

usually take more than four years to manifest but others can take even more than ten years before they are likely to occur.

2.5.2 Short-Term Effects

2.5.2.1 Losses to the State and Gains to the Money Launderer

The commission of a predicate offence is key to the crime of money laundering. This implies that resources are moved illegally from one victim of the crime to the perpetrator.⁹⁴⁸ The money-laundering process is a necessary activity to the criminal in that it makes 'dirty money' appear as if it has been earned legitimately.⁹⁴⁹ Money laundering, therefore, facilitates the unfair reallocation of wealth from those who have legitimately earned it to those who have not.⁹⁵⁰ The process makes it difficult to follow the proceeds of crime and reconcile them with the deprived legitimate owners. Thus, money laundering makes crime to pay by giving legitimacy to illegally-acquired wealth while depriving the law-abiding taxpayers of the same benefits.⁹⁵¹

TBML is largely connected with the predicate offences of tax evasion and customs fraud.⁹⁵² These offences have a direct negative impact on the revenue collected by the government. Consequently, the stunted or no growth in the economy becomes a further effect.⁹⁵³

⁹⁴⁸ See Joras Ferwerda 'The Effects of Money Laundering' in: Brigitte Unger & Daan Van der Linde (eds) *Research Handbook on Money Laundering* (2013) (hereinafter Ferwerda 'The Effects of Money Laundering') 41.

⁹⁴⁹ See Unger & Busuioc 'Short-Term Effects of Money Laundering' in: Brigitte Unger & Elena Madalina Busuioc *The Scale and Impacts of Money Laundering* (2007) 113. For a discussion of the concept of money laundering and TBML, see para 2.2 and para 2.3 above respectively.

⁹⁵⁰ See Ferwerda 'The Effects of Money Laundering' 38-39.

⁹⁵¹ See Brigitte Unger 'Short-Term Effects of Money Laundering' in: Brigitte Unger & Elena Madalina Busuioc *The Scale and Impacts of Money Laundering* (2007) (hereinafter Unger 'Short-Term Effects of Money Laundering') 113. See also Ferwerda 'The Effects of Money Laundering' 41.

⁹⁵² See FATF (2007) *Report on VAT Carousel Fraud* 4; FATF (2010) *Global Money Laundering Threat Report* 29; Chhina (2014) 29 *JIBLR* 665 at 666; and Cassara *Next Frontier* 137.

⁹⁵³ See Nella Hendriyetty & Bhajan S Grewal 'Macroeconomics of Money Laundering: Effects and Measurements' (2017) 24 *Journal of Money Laundering Control* 65-81 at 69; Brent L Bartlett *The Negative Effects of Money Laundering on Economic Development* (2002) (hereinafter 'Bartlett *The Negative Effects of Money Laundering*') 9.

2.5.2.2 Distortion of Consumer Spending and Savings

Money launderers in TBML, just like in traditional money laundering, make investment choices that are mainly concerned with the desire to escape AML controls.⁹⁵⁴ They are not primarily guided by the desire to maximise returns on their investments. This kind of investment choices can be detrimental to the economy because it directs funds to assets with little or no economic activity or prospects of employment creation.⁹⁵⁵

Money launderers usually choose investments that give them a higher probability of concealment even if the profits from such investments are less attractive.⁹⁵⁶ This has the effect of diverging income from investments that are good to those that are risky and of poor quality. Thus, the main consideration for money launderers is not a high rate of return on money being laundered. Criminals try to find a type of investment that allows them to recycle the illegal money with ease.⁹⁵⁷ In this regard, money launderers have no problem moving funds from countries deemed to have good economic policies to those with poor economic policies and lower returns.⁹⁵⁸ As long as the movement of money from one jurisdiction to another assists the concealment of the illicit nature of the funds, money launderers are prepared to embark on that circuitous route. The implication at a global level is that world capital is disproportionately invested due to money laundering.⁹⁵⁹ Consequently, money laundering redirects income from better investments to those that are of low quality and motivated by criminal behaviour.⁹⁶⁰

2.5.2.3 Distortion of Pricing Models and Influencing Price Increases

The buying behaviour of money launderers and their investments choices are rather irrational judged from the behaviour of an average consumer in the market.⁹⁶¹ In this

⁹⁵⁴ See Bartlett *The Negative Effects of Money Laundering* 17; Ferwerda 'The Effects of Money Laundering' 35.

⁹⁵⁵ See Unger 'Short-Term Effects of Money Laundering' 129.

⁹⁵⁶ See Ferwerda 'The Effects of Money Laundering' 41-42.

⁹⁵⁷ See Unger 'Short-Term Effects of Money Laundering' 129.

⁹⁵⁸ See Bartlett *The Negative Effects of Money Laundering* 17; Ferwerda 'The Effects of Money Laundering' 38-39.

⁹⁵⁹ See Unger 'Short-Term Effects of Money Laundering' 129.

⁹⁶⁰ See Idem at 130 et seq for a discussion of the kind of investments criminals usually prefer, the markets and jurisdictions.

⁹⁶¹ See Ferwerda 'The Effects of Money Laundering' 35.

regard, money launderers do not normally consider the price when they purchase assets. As long as a purchase gives them an incentive in the process of disguising the illicit nature and source of the funds, the money launderers are ready to seize such opportunity.⁹⁶² However, such purchases result in artificial increase in prices by creating a false demand of the products from 'customers'. Any market of choice for money-laundering 'investors' may end up increasing prices, due to the abnormal spike in demand.⁹⁶³ For example, in the 1980s in Colombia, the Medellin drug cartel bought large tracts of land using the proceeds of money laundered from drug sales. The purchases pushed prices upwards from USD\$500 to USD\$2000 per hectare.⁹⁶⁴

2.5.2.4 Creation of Unfair Competition

Criminals generally do not want to hold on to illegally obtained funds for too long because this can lead to possible detection and arrest by law enforcement authorities.⁹⁶⁵ To circumvent this, they launder the money through investing in legitimate businesses such as real estate, hotels, restaurants and other forms of businesses with a less chance of detection. Such investments give the proceeds of crime an appearance of legitimate wealth, which the money launderers so desperately require. In this regard, money launderers are prepared to purchase legitimate businesses and subsidise their products to the detriment of legitimate business people.⁹⁶⁶ They create unfair competition in the market by pouring in money in front businesses, which will then sell products at below market price without even making losses. The subsidising of legitimate businesses with criminal funds gives them a competitive advantage over legitimate businesses. This can result in the driving out of legitimate ventures from profitably running their operations.⁹⁶⁷

⁹⁶² See Bartlett *The Negative Effects of Money Laundering* 19-22.

⁹⁶³ See Ferwerda 'The Effects of Money Laundering' 39; McSkimming (2010) 15 *Deakin L Rev* 37 at 59.

⁹⁶⁴ See Unger 'Short-Term Effects of Money Laundering' 131.

⁹⁶⁵ See Peter J Quirk 'Money Laundering: Muddying the Macroeconomy' (March 1997) *Finance & Development* 7-9 at 8; Bartlett *The Negative Effects of Money Laundering* 18-23.

⁹⁶⁶ See Unger 'Short-Term Effects of Money Laundering' 132; McDowell & Novis (2001) 6 *Economic Perspectives* 6 at 7.

⁹⁶⁷ See Unger 'Short-Term Effects of Money Laundering' 132; McDowell & Novis (2001) 6 *Economic Perspectives* 6 at 7; and US Department of Treasury (2015) *National Money Laundering Risk Assessment Report* 29.

2.5.2.5 Affecting Imports and Exports

TBML activities can distort a country's imports and exports.⁹⁶⁸ The overpricing of imports and the under-pricing of exports in TBML results in capital flight from the country.⁹⁶⁹ Other techniques such as trade misinvoicing and abusive transfer pricing can also result in losses of revenue to the state and distort the export/import data of a given a country.⁹⁷⁰ These activities also give a false balance of payments for a country.⁹⁷¹ A true picture regarding the quantity of goods being purchased into or exported outside the country will be difficult to establish due the distortion that may be brought in by TBML.⁹⁷²

2.5.2.6 Impact on the Revenues for the Public Sector

Tax revenue is one of the most important contributors to the economy of South Africa.⁹⁷³ TBML can "have a detrimental effect on government revenues by decreasing government income from tax".⁹⁷⁴ TBML schemes such as over and under-pricing of imports /exports may result in the reduction of duties that are payable to government. Moodley points out that the tax gap in South Africa is worsened by the under-reporting of value in imports especially the textile imports.⁹⁷⁵ Other schemes such as the VAT-refund fraud and the missing-trader scam drain revenue from government without any meaningful economic activity of value to the state.⁹⁷⁶ These schemes also make it difficult for the SARS to efficiently exercise its tax collection mandate. In addition, combatting money laundering in general may require an increased public expenditure directed to the problem. The exercise has an indirect impact on honest taxpayers who have to endure increased tax rates.⁹⁷⁷ However, money laundering can also result in

⁹⁶⁸ See McSkimming (2010) 15 *Deakin L Rev* 37 at 59.

⁹⁶⁹ See Baker *Capitalism* 33; Unger 'Short-Term Effects of Money Laundering' 133. See again para 2.3.4 above.

⁹⁷⁰ See para 2.2.6.4 above.

⁹⁷¹ See Bartlett *The Negative Effects of Money Laundering* 24-28; Chhina (2014) 29 *JIBLR* 665 at 668.

⁹⁷² See Ferwerda 'The Effects of Money Laundering' 39.

⁹⁷³ See Moodley *Extent of Money Laundering* 73. See also Zoppei *Tax Evasion as a Predicate Offence* 11 on the role of tax as a contributor to government revenue.

⁹⁷⁴ See Unger 'Short-Term Effects of Money Laundering' 137; McDowell & Novis (2001) 6 *Economic Perspectives* 6 at 8; and Miller *et al TBML: Overview and Policy Issues* 5.

⁹⁷⁵ See Moodley *Extent of Money Laundering* 74.

⁹⁷⁶ The US Department of Treasury (2015) *National Money-Laundering Risk Assessment Report* 29.

⁹⁷⁷ Unger 'Short-Term Effects of Money Laundering' 137; McDowell & Novis (2001) 6 *Economic Perspectives* 6 at 8.

the increase of revenue for the public sector. In their bid to 'clean' the money and make it 'legal', criminals are prepared to pay huge taxes on their illicit income. Thus, they can declare high turnovers from their businesses to tax authorities in order to turn illegal money into taxable legal money. Money launderers regard the cost of high taxes for their dubious businesses as an acceptable risk of 'cleaning' the 'dirty money'.⁹⁷⁸

2.5.2.7 Volatility of Interest Rates and Exchange Rates

TBML and money laundering in general can lead to volatile exchange and interest rates due to unexpected capital movements in and out of the country.⁹⁷⁹ A large inflow of money from the laundering process can cause the domestic exchange rate to depreciate and expand a country's monetary base. An increase in exchange rates is closely linked to a reduction of exports and a reliance on imports. An expansion of the monetary base usually brings about inflation.⁹⁸⁰ It should be noted that money laundering could also reverse economic policies aimed at reducing inflation through reduction of money supply. The illegal activity does the opposite by increasing the money supply in any given economy thereby resulting in too much money chasing a few goods.⁹⁸¹

2.5.2.8 Creating Higher Capital In- and Outflows

It is typical of money launderers to move funds to those jurisdictions with lax AML regimes and higher secrecy laws.⁹⁸² This can result in capital flight from countries with stricter AML controls and sound economic policies to those with shady laws regarding money-laundering control and less efficient economic policies.⁹⁸³ Therefore, world capital will be invested in less optimal ways than what would be the case in the absence of TBML activities.⁹⁸⁴ Economic distortion and instability in South Africa

⁹⁷⁸ See Ferwerda 'The Effects of Money Laundering' 19-22.

⁹⁷⁹ See Unger 'Short-Term Effects of Money Laundering' 140; McDowell & Novis (2001) 6 *Economic Perspectives* 6 at 7.

⁹⁸⁰ See Unger 'Short-Term Effects of Money Laundering' 140. See also Hendriyetty & Grewal (2017) 24 *JMLC* 65 at 67.

⁹⁸¹ See Unger 'Short-Term Effects of Money Laundering' 141; McDowell & Novis (2001) 6 *Economic Perspectives* 6 at 7.

⁹⁸² See Unger 'Short-Term Effects of Money Laundering' 141. See also para 2.4.9 above.

⁹⁸³ See McSkimming (2010) 15 *Deakin L Rev* 37 at 60.

⁹⁸⁴ See Miller *et al* *TBML: Overview and Policy Issues* 5. See also McSkimming (2010) 15 *Deakin L Rev* 37 at 59.

depends on the anticipated impact of capital in and outflows.⁹⁸⁵ In the case of TBML, schemes such as over-invoicing of exports could create the impression that there is a high demand for certain goods involved in the scheme. Besides distorting the economy, wrong signals could be sent to both local and international suppliers. Local producers can shift production to a particular product perceived to be in demand. By the time it is discovered that the 'demand' was artificial, the producers would have suffered financial losses due to the distorted market signals sent through TBML.⁹⁸⁶

2.5.2.9 Distortion of Economic Statistics

TBML can also cause errors in macroeconomic statistics. These errors subsequently give rise to poor economic forecasts in policymaking.⁹⁸⁷ Two reasons can be given for this. First, money laundering 'investors' do not base their investment choices on the usual economic considerations used by rational and legitimate investors. Instead, they are motivated by other factors such as poor AML laws, avoiding detection and minimum penalties on being arrested.⁹⁸⁸ Therefore, capital movements associated with money laundering are not based on sound economic considerations that would benefit a country. Consequently, policy makers could misjudge and "make erroneous policy judgements on the basis of these unusual capital movements".⁹⁸⁹

Secondly, money laundering can cause economic data to be skewed due to its clandestine nature.⁹⁹⁰ TBML for instance, can affect a country's major economic sectors such as mining and FTZs.⁹⁹¹ In the mining sector targeted minerals are gold and diamonds.⁹⁹² Sometimes money laundering can take place within a country at a large scale. Money launderers have been known to finance construction and hotel industries not because of actual demand but due to the short-term interests accruing

⁹⁸⁵ See Moodley *Extent of Money Laundering* 71.

⁹⁸⁶ Idem at 73. See also Chhina (2014) 29 *JIBLR* 665 at 668.

⁹⁸⁷ See Unger 'Short-Term Effects of Money Laundering' 141; McDowell & Novis (2001) 6 *Economic Perspectives* 6 at 7.

⁹⁸⁸ See McDowell & Novis (2001) 6 *Economic Perspectives* 6 at 8. See also McSkimming (2010) 15 *Deakin L Rev* 37 at 59-60.

⁹⁸⁹ See Unger 'Short-Term Effects of Money Laundering' 141. See also McDowell & Novis (2001) 6 *Economic Perspectives* 6 at 7.

⁹⁹⁰ See Unger 'Short-Term Effects of Money Laundering' 142.

⁹⁹¹ See para 2.4.8 above.

⁹⁹² For a discussion of the vulnerabilities of gold and diamond to TBML, see para 2.4.4 and para 2.4.5 above.

to them. In the event that these industries are no longer in their interests, they abandon them causing a collapse in the sector and to the economy in general.⁹⁹³ When this happens, policy makers need to consider this fact in economic decision-making. Failure to do this can result in mistaken policy decisions being made.⁹⁹⁴ From a country-specific perspective, it is not well known how much of economic data distortion is attributable to money laundering in South Africa. Moodley notes that, “it is difficult to quantify the extent to which economic policy in South Africa is influenced by money laundering”.⁹⁹⁵ This is likely to be even more difficult for transactions involving TBML, which are less analysed in most jurisdictions, including in South Africa.

2.5.3 Long-Term Effects

2.5.3.1 Threatening of Privatisation of Industries

As part of the transformation agenda in the South African economy and in a bid to achieve global competitiveness, many parastatals have been privatised.⁹⁹⁶ This has allowed the South African government to gain revenue from the sale of these entities and to achieve economic efficiency.⁹⁹⁷ There has been liberalisation of the economy that has led to more investment opportunities in the country. However, the opening up of the economy to privatisation efforts has also attracted money launderers seeking legitimacy for their dirty funds.⁹⁹⁸ Government corporations that are up for privatisation are ideal vehicles for the laundering of illegal funds. Money launderers exploit these processes by bidding higher prices in a manner that undermines fair and legitimate competition.⁹⁹⁹

TBML activities can derail efforts aimed at privatisation in a country.¹⁰⁰⁰ Money launderers can induce unfair competition in the business sector through outbidding

⁹⁹³ See McDowell & Novis (2001) 6 *Economic Perspectives* 6 at 8.

⁹⁹⁴ See Unger ‘Short-Term Effects of Money Laundering’ 142. See also Quirk (March 1997) *Finance & Development* 7 at 8.

⁹⁹⁵ See Moodley *Extent of Money Laundering* 71.

⁹⁹⁶ Ibid.

⁹⁹⁷ Ibid.

⁹⁹⁸ See De Koker ‘Money Laundering in South Africa’ 92; Schlenther (2013) 16 *JMLC* 126 at 126-127.

⁹⁹⁹ See Moodley *Extent of Money Laundering* 74. See also Quirk (March 1997) *Finance & Development* 7 at 8; US Department of Treasury (2015) *National Money Laundering Risk Assessment Report* 29; and Cassara *Next Frontier* 9.

¹⁰⁰⁰ See also Quirk (March 1997) *Finance & Development* 7 at 8; US Department of Treasury (2015) *National Money Laundering Risk Assessment Report* 29; and Cassara *Next Frontier* 9.

honest and legitimate purchasers in the acquisition of formerly state-owned enterprises.¹⁰⁰¹ The consequence is that there will be a large-scale criminal presence in the economy. Criminal entrepreneurs are motivated by other considerations than those that motivate conventional entrepreneurs. They also react differently to stimuli within the business sector. For instance, criminal entrepreneurs can shift output and adjust pricing patterns in reaction to non-economic factors. These can amount from just a feeling that law enforcement is becoming tough to changing investment destinations due to an anticipated coming legislation. Consequently, the criminal presence in the economy can cause speculative practices and anti-competitive approaches to carrying out business in such sectors.¹⁰⁰²

2.5.3.2 Affects Foreign Direct Investment

To be able to attract foreign direct investment and be able to keep domestic sources of investments, South Africa must be seen to have a stable economy.¹⁰⁰³ Investor sentiments are usually driven by perceptions particularly in those jurisdictions, which are generally regarded as emerging markets, including South Africa. Therefore, it follows that perceptions about the extent of money laundering in South Africa may negatively influence the way potential investors see the country and impede on its economic growth.¹⁰⁰⁴

An economy and a financial sector that are associated with money-laundering activities have challenges attracting foreign direct investments. Once a country's financial and commercial systems are perceived as being under the control of organised crime groups, a country's reputation is damaged and its potential foreign investment is threatened.¹⁰⁰⁵ Consequently, a country that appears on the non-cooperative lists of the FATF and the OECD can find itself attracting less foreign direct investment. Similarly, a country that is perceived as having a lax regulatory

¹⁰⁰¹ See McDowell & Novis (2001) 6 *Economic Perspectives* 6 at 8.

¹⁰⁰² See Brigitte Unger 'Long-Term Effects of Money Laundering' in: Brigitte Unger & Elena Madalina Busuioc *The Scale and Impacts of Money Laundering* (2007) (hereinafter Unger 'Long-Term Effects of Money Laundering') 143.

¹⁰⁰³ See Moodley *Extent of Money Laundering* 74. See also Bartlett *The Negative Effects of Money Laundering* 17; Ferwerda 'The Effects of Money Laundering' 35.

¹⁰⁰⁴ See Moodley *Extent of Money Laundering* 74.

¹⁰⁰⁵ See Unger 'Long-Term Effects of Money Laundering' 144. See also McDowell & Novis (2001) 6 *Economic Perspectives* 6 at 8.

environment and permissive tax regime can “increasingly attract capital of an illegal nature”.¹⁰⁰⁶ Once a country’s financial reputation is damaged, reviving it is difficult. It would require more input of resources than would have been required for the establishment of a proper AML regime in the first place.¹⁰⁰⁷

2.5.3.3 Distortion of Solvency and Liquidity in the Financial Sector

When carried out at a large-scale, money laundering can affect the solvency and liquidity of financial institutions as well as the general financial soundness of the banking sector.¹⁰⁰⁸ The economic behaviour and choices money launderers make are less predictable than those of conventional investors. Sometimes large sums of money of illicit origins can arrive at a bank only to disappear without notice usually in response to non-market factors such as law enforcement.¹⁰⁰⁹ Consequently, financial institutions can make wrong policy choices about the proportion of assets that they may need to remain liquid. This may cause them to fail to satisfy unexpected liquidity requirements and ultimately becoming insolvent.¹⁰¹⁰ A contagion effect of this risk is possible given the integrated nature of the financial system. This has the potential of further creating a systemic monetary instability in the financial sector as a whole.¹⁰¹¹

2.5.3.4 Harming of Financial-Sector Reputation

Financial institutions may be used in TBML operations unwittingly.¹⁰¹² South Africa has a well-developed financial system. Nevertheless, criminals in the country find opportunities to abuse the financial system for money-laundering purposes from time to time.¹⁰¹³ A common trend in the country is to use legitimate bank accounts of family members or third parties to launder money.¹⁰¹⁴ An arrangement would be done with a family member to allow criminals to deposit and withdraw money from the family

¹⁰⁰⁶ See Unger ‘Long-Term Effects of Money Laundering’ 144.

¹⁰⁰⁷ See McDowell & Novis (2001) 6 *Economic Perspectives* 6 at 8.

¹⁰⁰⁸ See Ferwerda ‘The Effects of Money Laundering’ 40; Bartlett *The Negative Effects of Money Laundering* 9.

¹⁰⁰⁹ See McDowell & Novis (2001) 6 *Economic Perspectives* 6 at 7.

¹⁰¹⁰ See Ferwerda ‘The Effects of Money Laundering’ 40; Bartlett *The Negative Effects of Money Laundering* 9.

¹⁰¹¹ See Unger ‘Long-Term Effects of Money Laundering’ 145.

¹⁰¹² See Miller *et al* *TBML: Overview and Policy Issues* 4. See also Ch 3 para 3.2 below.

¹⁰¹³ See De Koker ‘Money Laundering in South Africa’ 92; FATF& ESAAMLG *South Africa Mutual Evaluation Report* 17.

¹⁰¹⁴ See De Koker ‘Money Laundering in South Africa’ 92-93.

member's account. The first two convictions for money laundering in South Africa were based on such arrangements.¹⁰¹⁵

Criminals using sophisticated methods are also exploiting banking products such as credit and debit card facilities to launder money in South Africa.¹⁰¹⁶ This method is used particularly to move money outside the borders of South Africa.¹⁰¹⁷ Money laundering impacts negatively on the reputation of the financial sector.¹⁰¹⁸ It impedes the development of the financial sector in two ways. First, it destroys the financial institutions themselves. This is because there is a direct connection between money laundering and fraudulent activities sometimes undertaken by employees in the financial institutions.¹⁰¹⁹ Secondly, it erodes customer trust, which is fundamental to the growth of sound financial institutions.¹⁰²⁰ Financial markets are prone to being adversely affected when money launderers invest or withdraw from them. Criminals can also use front companies to trade using illicit funds. Usually, these are the companies that are already in business and are generally not subjected to increased AML scrutiny.¹⁰²¹ Bank authorities already regard the front companies' routine deposits as not suspicious and not reportable hence can easily circumvent AML controls.¹⁰²² Once a financial institution is involved in money-laundering activities or is perceived to be, it loses its credibility and the confidence of customers in general.¹⁰²³ As rational economic agents, customers will avoid institutions perceived to be associated with money laundering and can transfer their deposits elsewhere. The perception of money-laundering risk within financial institutions can move from one institution to eventually affect the reputation of the entire financial sector.¹⁰²⁴

¹⁰¹⁵ Idem at 92. See also *S v Dustigar* (Case No CC6/2000, D &CLD, unreported); and *S v Van Zyl* (Case no 27/180/98, RCCT).

¹⁰¹⁶ See Kersop & Du Toit (2015) 18 *PER / PELJ* 1603-135.

¹⁰¹⁷ See De Koker 'Money Laundering in South Africa' 92.

¹⁰¹⁸ See Ferwerda 'The Effects of Money Laundering' 40; Bartlett *The Negative Effects of Money Laundering* 9.

¹⁰¹⁹ See Unger 'Long-Term Effects of Money Laundering' 145.

¹⁰²⁰ See Bartlett *The Negative Effects of Money Laundering* 5-8; Ferwerda 'The Effects of Money Laundering' 40.

¹⁰²¹ See De Koker 'Money Laundering in South Africa' 90-91. See again para 2.4.9 above.

¹⁰²² See Moodley *Extent of Money Laundering* 69.

¹⁰²³ See Bartlett *The Negative Effects of Money Laundering* 5-8; Ferwerda 'The Effects of Money Laundering' 40.

¹⁰²⁴ See Unger 'Long-Term Effects of Money Laundering' 145-146.

2.5.3.5 Threatening the Existence and Profitability of Legitimate Businesses

Money-laundering activities can infiltrate legitimate business operators.¹⁰²⁵ This is particularly so with TBML activities that can easily be employed to infiltrate legitimate trade operations. Associating with such illegalities can result in loss of credibility in the infiltrated sectors.¹⁰²⁶ TBML has a “more destructive impact of legitimate commerce than other money-laundering schemes”.¹⁰²⁷ Legitimate businesses can be infiltrated by money launderers at all the stages of money laundering. To place, layer or integrate illicit funds, money launderers can infiltrate legitimate trade operations, use financial instruments, rope in financial institutions or even deal with customs authorities. It is possible for criminal organisations to sell goods they have illegally acquired at below-market price, to expedite the money-laundering process.¹⁰²⁸ Selling goods at below market price disadvantages other competitor businesses. Such trade malpractices discourages entrepreneurship and crowds out other businesses out of the nation’s economic activities.¹⁰²⁹

TBML and money laundering in general are complex processes that cannot be planned and executed by criminals alone.¹⁰³⁰ Sometimes experts in certain lines of business assist criminals to launder illicit money.¹⁰³¹ These include such professionals as lawyers, financial advisers, accountants and real estate agents. Lawyers in particular are of significance to money launderers in that they can create complex arrangements such as trusts or other entities of complex nature.¹⁰³² They can also be used to buy or sell property and can also perform financial transactions on behalf of clients.¹⁰³³ The lawyer-client privilege creates the necessary secrecy desired by

¹⁰²⁵ See De Koker ‘Money Laundering in South Africa’ 90-93.

¹⁰²⁶ See Unger ‘Long-Term Effects of Money Laundering’ 147.

¹⁰²⁷ The US Department of Treasury (2015) *National Money Laundering-Risk Assessment Report* 29; Cassara *Next Frontier* 9.

¹⁰²⁸ See Hataley (2020) *JMLC* 1 at 7; The US Department of Treasury (2015) *National Money Laundering-Risk Assessment Report* 29.

¹⁰²⁹ See McDowell & Novis (2001) 6 *Economic Perspectives* 6 at 7; The US Department of Treasury (2015) *National Money Laundering-Risk Assessment Report* 29.

¹⁰³⁰ See De Koker ‘Money Laundering in South Africa’ 94.

¹⁰³¹ *Ibid.*

¹⁰³² See generally, Abraham J Hamman & Raymond A Koen ‘Cave Pecuniam: Lawyers as Launderers’ (2012) 15 *PER / PELJ* 69-100.

¹⁰³³ See Hamman *AML Legislation* passim.

money launderers in their operations.¹⁰³⁴ For instance, in *S v Dustigar*¹⁰³⁵ an attorney was heavily involved in the preparation and execution of money-laundering schemes. In that case, the lawyer offered to assist a robber invest the looted money in some nightclub venture. In order to conceal the identities of the criminals involved, the lawyer mediated the investment arrangement, provided the required investment funds, and altered his firm's and trust-account records.¹⁰³⁶

2.5.3.6 Promotion of Corruption and Bribery

Money-laundering activities can promote corruption and bribery in the economy.¹⁰³⁷ They affect financial institutions through which criminal proceeds pass and other professionals who act as facilitators in the scheme.¹⁰³⁸ Sometimes institutions and professionals facilitate money laundering unknowingly.¹⁰³⁹ However, through corruption and bribery, money launderers are able to rope in the cooperation of these entities and professionals with ease. In their schemes, money launderers can bribe bank managers and public officials under tax authorities.¹⁰⁴⁰ The corrupting effect is not restricted to one sector only. Once money launderers infiltrate a particular sector of the economy, they will further go into other sectors until they control the entire nation's economy.¹⁰⁴¹ This will drive out business owners and introduce anti-competitive approaches to doing business. Small businesses that remain in business can be corrupted and effectively become agents of the money launderers themselves.¹⁰⁴²

2.5.3.7 Undermining of Political Institutions

A cartel of money launderers that has gained control of a country's economy can go further to even control the political actors in the country as well. Once the arms of

¹⁰³⁴ See Unger 'Long-Term Effects of Money Laundering' 148.

¹⁰³⁵ (Case No CC6/2000, D&CLD).

¹⁰³⁶ See *S v Dustigar* (Case No CC6/2000, D&CLD).

¹⁰³⁷ See Miller *et al TBML: Overview and Policy Issues* 5. See also Bartlett *The Negative Effects of Money Laundering* 18; and Ferwerda 'The Effects of Money Laundering' 40.

¹⁰³⁸ See para 2.5.3.4 above.

¹⁰³⁹ See para 2.5.3.5 above.

¹⁰⁴⁰ See Miller *et al TBML: Overview and Policy Issues* 5. See also Bartlett *The Negative Effects of Money Laundering* 18; and Ferwerda 'The Effects of Money Laundering' 40.

¹⁰⁴¹ See Unger 'Long-Term Effects of Money Laundering' 148.

¹⁰⁴² Ibid.

government are captured, in return they can begin to be less strict in AML control. Corruption and bribery are key in facilitating a money laundering cartel's efforts at controlling political institutions in a country. A money-laundering ring that succeeds in capturing political institutions can end up undermining democratic processes by tampering with national elections.¹⁰⁴³ In South Africa, organised criminal groups have been reported to have links with politicians and law enforcement agents.¹⁰⁴⁴ This has had the effect of undermining the criminal justice system through eroding public trust in the law enforcement institutions.

2.5.3.8 Creating Multiplier Effects on Crime

Money laundering may cause criminal activities to multiply thereby giving economic power to criminals.¹⁰⁴⁵ It makes crime worthwhile by allowing criminals to enjoy the proceeds of crime as if it were legitimately earned money. As MacDowell and Novis put it, money laundering is the criminal's way of profiteering from crime.¹⁰⁴⁶ South Africa is home to organised criminal syndicates.¹⁰⁴⁷ The country is an ideal jurisdiction for them to launder proceeds of crime and expand new markets in the criminal underworld.¹⁰⁴⁸ To money launderers the proceeds of crime are less valuable than laundered funds. 'Clean' money from the laundering process can be spent with less fear of detection by law enforcement authorities.¹⁰⁴⁹ Therefore, money laundering fuels crime in that it provides criminals with an avenue of making criminal proceeds legitimate.¹⁰⁵⁰

2.6 CONCLUSION

Money is the goal of major financial-crime activities. When money is obtained legally, it can be spent without obstacles.¹⁰⁵¹ However, when money has been acquired through illegal means, it is termed 'dirty' money or illegal money. 'Dirty money' cannot

¹⁰⁴³ Idem at 156. See also Geldenhuys (April 2016) 109 *Servamus* 10-13 at 10.

¹⁰⁴⁴ See Geldenhuys (April 2016) 109 *Servamus* 10-13 at 12.

¹⁰⁴⁵ See Unger 'Long-Term Effects of Money Laundering' 160; Ferwerda 'The Effects of Money Laundering' 41.

¹⁰⁴⁶ See MacDowell & Novis (2001) 6 *Electronic Journal of the US Dep of State* 6 at 6.

¹⁰⁴⁷ See Geldenhuys (April 2016) 109 *Servamus* 10-13 at 12.

¹⁰⁴⁸ Ibid.

¹⁰⁴⁹ See Alldridge *Money Laundering Law* 1; Levi & Reuter (2006) 34 *Crime and Justice* 289 at 289.

¹⁰⁵⁰ See Unger 'Long-Term Effects of Money Laundering' 160.

¹⁰⁵¹ See para 2.2.2 above.

be spent with ease because it attracts suspicion from law enforcement authorities or even lead to arrest.¹⁰⁵² It is because of this challenge that criminals go an extra mile to ensure that money is 'cleaned', hidden and untraceable. Money laundering is the process that ensures that eventually crime pays. It gives peace of mind to criminals by ensuring that their ill-gotten funds are enjoyed as 'clean' after a successful deceptive money-laundering process.¹⁰⁵³ Money laundering is a global challenge that also affects South Africa.¹⁰⁵⁴ Due to increased efforts to counter money laundering in general, organised crime groups have switched to new and complex money-laundering methods such as TBML.¹⁰⁵⁵

TBML is an advanced method of money laundering which depends on the transfer of value through trade in goods or services whether fictitiously or in real terms.¹⁰⁵⁶ This type of money laundering is becoming popular with organised crime groups due to its ability to evade AML regulations among other factors. Thus, TBML is a threat to commerce and international trade.¹⁰⁵⁷ This calls for stronger AML regimes to combat this challenge. There are no exact statistics for the size of TBML globally and in South Africa.¹⁰⁵⁸ This is partly because TBML is an opaque process. It has no agreed methods of quantifying its operations or impact in either economics or law.¹⁰⁵⁹

TBML relies on what the FATF terms basic and complex methods of money laundering.¹⁰⁶⁰ These methods facilitate the transfer of value through TBML across jurisdictions. Of particular concern is that TBML thrives under certain environments that present different vulnerabilities for money laundering. Among others, high-risk jurisdictions, barter and countertrade, the international gold or diamond trade, the presence of FTZs and tax havens, heighten the risk of TBML for a country due to their vulnerabilities.¹⁰⁶¹

¹⁰⁵² See again para 2.2.2 above.

¹⁰⁵³ See para 2.2.3 above.

¹⁰⁵⁴ See Ch 4 and Ch 5 below generally.

¹⁰⁵⁵ See para 2.3 et seq above.

¹⁰⁵⁶ See again para 2.3 et seq above.

¹⁰⁵⁷ See again para 2.3 et seq above.

¹⁰⁵⁸ See para 2.3.3 above.

¹⁰⁵⁹ See again para 2.3.3 above.

¹⁰⁶⁰ See para 2.3.4 and para 2.3.5 above.

¹⁰⁶¹ See para 2.4 et seq above.

It should be noted that TBML comes with consequences for South Africa.¹⁰⁶² The effects of TBML are not far removed from those of money laundering in general.¹⁰⁶³ Among other factors, TBML distorts economic data for a country, which may lead to poor planning for other socio-economic challenges. It also affects the financial system of a country through reputational risk and distortion of bank liquidity.¹⁰⁶⁴ Thus, TBML needs to be countered through strengthening AML regimes.¹⁰⁶⁵ It should be noted that financial institutions are integral in the financing aspect of international trade through trade finance.¹⁰⁶⁶ TBML has been touted as a potential risk to the smooth flow of trade-finance processes.¹⁰⁶⁷ This chapter has presented TBML in its general context to establish its nature. The next chapter will, therefore, discuss how selected trade-finance instruments may be tainted by TBML.¹⁰⁶⁸

¹⁰⁶² See para 2.5 et seq above.

¹⁰⁶³ See again para 2.5 et seq above.

¹⁰⁶⁴ See again para 2.5 et seq above.

¹⁰⁶⁵ See Ch 10 below generally.

¹⁰⁶⁶ See Ch 3 para 3.2 below.

¹⁰⁶⁷ See Ch 3 para 3.3 et seq below.

¹⁰⁶⁸ See Ch 3 para 3.3 et seq below.

CHAPTER 3: TBML IN TRADE-FINANCE INSTRUMENTS

3.1 GENERAL

Historically, money laundering has not been regarded as a high-risk activity in trade finance.¹ This view has since changed with organised crime groups increasingly resorting to new methods of money laundering, including TBML in trade-finance transactions.² The trade-finance sector has since become one of the new frontiers of TBML.³

In the previous chapter, I discussed the general concept of TBML and how it may affect various sectors of the economy.⁴ In that chapter, I also examined the methods employed in TBML.⁵ This chapter sets out to do three things. First, it examines the role of financial institutions in providing trade finance in the context of the emerging risk of TBML.⁶ In this regard, the chapter briefly touches on the threat of TBML to financial institutions when providing trade-finance services.⁷ Secondly, the chapter deals with the potential risk of TBML in each trade-finance instrument.⁸ In this regard, the chapter briefly reviews each particular instrument, its operation, governance and its associated vulnerability to TBML.⁹ Thirdly, the chapter explores a possible defence framework against TBML that can be applied in the trade-finance sector.¹⁰

¹ The Wolfsberg Group (2011) *Trade-Finance Principles* 2-3. See also para 3.4.1 below.

² See generally, Mario Menz 'Beyond Placement, Layering and Integration — the Perception of Trade-Based Money Laundering Risk in UK Financial Services' (2019) 22 *Journal of Money Laundering Control* 614-625 at Hataley (2020) *JMLC* 1-20.

³ See Cassara *Next Frontier* 4; JMLSG (2020) *Prevention of Money Laundering/Combating Terrorist Financing: Guidance for the UK Financial Sector Part II: Sectoral Guidance* (hereinafter 'JMLSG (2020) *Sectoral Guidance*') 157-158; and The Wolfsberg Group, ICC and BAFT (2019 Amendment) *Trade-Finance Principles* 8. See also Ch 2 para 2.3 above.

⁴ See Ch 2 para 2.3 et seq above.

⁵ See again Ch 2 para 2.3 et seq above.

⁶ See para 3.2 below.

⁷ See para 3.2.2 below. See also Ch 2 para 2.3 et seq.

⁸ See para 3.3 et seq below.

⁹ See para 3.3 et seq below.

¹⁰ See para 3.4 below. Most jurisdictions use a typically similar defence framework for TBML the differences being in the role and initiatives of the AML institutions of each jurisdiction, see Ch 5 para 5.3.4; Ch 6 para 6.3.4; Ch 7 para 7.3.4; and Ch 8 para 8.3.4 below.

3.2 THE ROLE OF FINANCIAL INSTITUTIONS IN TRADE FINANCE

3.2.1 General

The demands of global trade have led to the development of specialised financial institutions that are devoted to the provision of trade finance.¹¹ Trade finance is a key component in maintaining a competitive and productive economy.¹² Recent estimates suggest that roughly one fifth of world trade is conducted in trade-finance instruments and the remainder through open accounts.¹³ According to the FATF, trade finance is the financial aspect of an international trade transaction that includes a range of operations such as guaranteeing, issuing documentary credits, standby letters of credit, and handling payments for open account trading.¹⁴ The financing of international trade is a significant element of international banking.¹⁵ International-trade finance is defined as the provision of bank-credit facilities to a business to meet its borrowing needs in connection with international trade activities.¹⁶ In this capacity, financial institutions offer trade-finance services through instruments such as documentary credits to mitigate any risks that may be involved.¹⁷ Trade-finance instruments are available to trade participants interested in facilitating their payment arrangements. However, due to their accessibility, these instruments are susceptible to abuse through TBML activities.¹⁸

3.2.2 The Threat of TBML in Trade-Finance Transactions

It has been noted that where international trade goes, money laundering follows.¹⁹ International trade has become an important channel for money launderers.²⁰ The FATF has reported that TBML is an emerging-risk area where trading in goods or

¹¹ See Bishop *Finance* 7; Nkechikwu Valerie Azinge-Egbiri 'Beyond Banks: A Case for Interagency Collaboration to Combat Trade-based Money Laundering in Africa' (2023) 15 *African Journal of Legal Studies* 38–68 at 39.

¹² Eren 'Financing of International Trade' 259; Bhogal & Trivedi *International Trade Finance* 1; and The Financial Conduct Authority (FCA) (2013) *Financial-Crime Risks Report* 4.

¹³ See JMLSG (2020) *Sectoral Guidance* 155; Eren 'Financing of International Trade' 259; and Bhogal & Trivedi *International Trade Finance* 10.

¹⁴ See FATF (2008) *Best Practices on TBML* 2. See also Eren 'Financing of International Trade' 259; JMLSG (2020) *Sectoral Guidance* 155.

¹⁵ See Bhogal & Trivedi *International Trade Finance* 4; Eren 'Financing of International Trade' 259.

¹⁶ Eren 'Financing of International Trade' 259.

¹⁷ See Bishop *Finance* X; Eren 'Financing of International Trade' 259-260.

¹⁸ See APG (2012) *Trade-Based Money Laundering Report* 5. See also para 3.2.2 below.

¹⁹ See Mei & Li (2015) 6 *Modern Economy* 747 at 747.

²⁰ See Ch 2 para 2.3 et seq above.

services are manipulated to function as a value-transfer channel for money-laundering proceeds.²¹ Three factors partly contribute to the rise of TBML as a global problem. First, the success of AML efforts against other methods of laundering money has made international trade attractive to criminals for TBML activities. Secondly, the growth in world trade presents a significantly vulnerable avenue for TBML operations.²² Thirdly, because international trade involves lengthy supply chains, it is susceptible to misuse through TBML.²³ This is because multiple sectors become involved in the chain, thereby making the monitoring exercise for TBML more complex.²⁴ Additionally, while supply-chain participants see a portion of the trade process, not all of them are sufficiently aware of the red flags of TBML.²⁵ It has been suggested that the foundation of an effective approach against TBML should be the dismantling of TBML frameworks while permitting lawful trade to continue undisturbed.²⁶ However, policymakers face the dilemma of balancing between ensuring efficient-trade processes with the need to regulate the abuse of trade through TBML.²⁷ The threat of TBML affects both the trade and finance sector.²⁸ It thrives on manipulating both sectors. The next section, therefore, explores the role of financial institutions in international trade.²⁹

3.2.3 The Role of Financial Institutions in International Trade

The function of financial institutions in the fight against TBML is strongly correlated with their facilitatory role in international trade.³⁰ The payment role played by financial institutions in international trade properly places them in a suitable position to combat TBML.³¹ With calls for strong AML regimes gaining traction among regulatory authorities, financial institutions are being challenged to refocus their attention on the threat of TBML.³²

²¹ See APG (2012) *Trade-Based Money Laundering Report* 6. See also FATF (2006) *TBML Report* 2; Liao & Acharya (2011) 14 *JMLC* 79 at 80; and Ch 2 para 2.3 above.

²² See FATF (2006) *TBML Report* 5. See also Azinge-Egbiri (2023) 15 *AJLS* 38 at 43.

²³ See Hataley (2020) *JMLC* 1 at 1-11; APG (2012) *Trade-Based Money Laundering Report* 10.

²⁴ See FATF& Egmont Group (2020) *TBML Trends & Developments Report* 38-39.

²⁵ Ibid.

²⁶ See APG (2012) *Trade-Based Money Laundering Report* 6.

²⁷ Idem at 10.

²⁸ See again Ch 2 para 2.3 et seq above. See also Azinge-Egbiri (2023) 15 *AJLS* 38 at 39.

²⁹ See para 3.2.3 below.

³⁰ See Naheem *Exploring TBML* 111; FATF (2008) *Best Practices on TBML* 4.

³¹ See Naheem *Exploring TBML* 111; FATF (2008) *Best Practices on TBML* 4.

³² See Naheem *Exploring TBML* 114; FCA (2013) *Banks' Control of Financial-Crime Risks in Trade Finance* 25.

Internationally significant organisations in the fight against money laundering like the FATF, the Wolfsberg Group, and the Joint Money Laundering Steering Group (JMLSG),³³ have all drawn attention to the misuse of international trade by criminal organisations.³⁴ Furthermore, various monetary authorities across the world such as the Financial Conduct Authority (FCA)³⁵ in England and the Monetary Authority of Singapore (MAS)³⁶ in Singapore have taken action based on the FATF and Wolfsberg Principles in response to the threat of TBML in trade finance. For example, in its guidance note, the MAS, states that as a trading and transportation hub, Singapore is highly prone to the money-laundering risks associated with trade finance.³⁷

Further complicating matters in TBML control, is the notion that money is being laundered through a seemingly legitimate trade process but with falsified book entries.³⁸ Methods of transferring value in a typical TBML scheme in trade finance

³³ For a detailed discussion of the JMLSG and its role in combatting TBML in trade-finance instruments, see Ch 6 para 6.5.4 below.

³⁴ See FCA (2013) *Financial-Crime Risks Report*; FATF (2006) *TBML Report*; FATF (2008) *Best Practices on TBML*; The Wolfsberg Group (2011) *Trade-Finance Principles*; and JMLSG (2020) *Sectoral Guidance passim*. For the contributory roles of the FATF and the Wolfsberg Group against TBML in trade-finance transactions, see Ch 4 para 4.3.2 and para 4.4.5 below respectively.

³⁵ In 2013 the FCA published FCA (2013) *Financial-Crime Risks Report* based on a review of 17 banks in the UK. For a broader discussion of the role of the FCA in mitigating the risk of TBML in trade-finance transactions, see Ch 6 para 6.5.2 below.

³⁶ The MAS in October 2015 published 'Guidance on anti-money laundering and countering the financing of terrorism controls in trade finance and correspondent banking'.

³⁷ See the MAS www.mas.gov.sg [Accessed on 25 March 2022]. For a detailed discussion of the AML regime of Singapore in relation to the control of TBML in trade-finance instruments, see Ch 8 below generally.

³⁸ See Cassara *Next Frontier* 4. See again Ch 2 para 2.3 et seq above.

include over-invoicing,³⁹ under-invoicing,⁴⁰ multiple-invoicing,⁴¹ short-shipping,⁴² over-shipping,⁴³ deliberate obfuscation of the type of goods,⁴⁴ and phantom shipping.⁴⁵

Trade-finance instruments are designed to facilitate international trade and commerce.⁴⁶ However, it should be noted that there is little regard to the emerging threat of TBML in the operations of the instruments.⁴⁷ This is arguably so if one considers the doctrines underpinning the operation of the instruments such as the autonomy of credit and strict compliance principles in documentary credits.⁴⁸

Article 4 of the Uniform Customs and Practices for Documentary Credits⁴⁹ (UCP) states that by its nature, a documentary credit is a transaction that occurs independently from the sale or other agreement it may be based on.⁵⁰ In this regard,

³⁹ The seller gains excess value in receiving payment secured through misrepresentation of the cost of the goods by listing a price higher than their actual value on the invoice and other supporting documents, see Ch 2 para 2.3.4.2 above.

⁴⁰ The buyer illegally acquires excess value when payment is made by putting a price on the invoice and other paperwork that is less than the actual value of the goods, thereby misrepresenting the pricing of the commodities, see again Ch 2 para 2.3.4.2 above.

⁴¹ In order to justify receiving several payments, a merchant may provide multiple invoices for the same goods, see Ch 2 para 2.3.4.3 above.

⁴² By shipping fewer goods than what is invoiced, either in number or quality, the vendor falsifies the commodities' genuine value on the paperwork. The effect is the same as that in over-invoicing, see Ch 2 para 2.3.4.5 above.

⁴³ The vendor misrepresents the true value of the goods in the documents by shipping more goods than the amount or quality listed on the invoice. The effect is similar to under-invoicing, see again Ch 2 para 2.3.4.5 above.

⁴⁴ Parties may arrange a transaction so as to keep a bank or other relevant third parties from becoming suspicious. It involves deleting information from pertinent documents or purposefully hiding, manipulating, or altering it, see Ch 2 para 2.3.4.5 above.

⁴⁵ All documents are completely falsified, and no goods are shipped at all: see Ch 2 para 2.3.4.4 above.

⁴⁶ See Hugo (2014) 4 *TSAR* 661-675 at 661; WG Schulze 'The UCP 600: A New Law Applicable to Documentary Letters of Credit' (2009) 21 *South African Mercantile Law Journal* 228-248 at 228; Kelly-Louw *Demand Guarantees* 38; Hugo *The Law Relating to Documentary Credits from a South African Perspective with Special Reference to the Legal Position of the Issuing and Confirming Banks* (published LLD Thesis University of Stellenbosch 1996) 1; and Hugo 'Financing of International Sale' 407.

⁴⁷ See Naheem *Exploring TBML* 115; Chhina (2016) 16 *JMLC* 158 at 158.

⁴⁸ For a review of these doctrines, see JP van Niekerk & WG Schulze *The South African Law of International Trade: Selected Topics* 4 ed (2016) (hereinafter 'Van Niekerk & Schulze *The South African Law of International Trade*') para 3.8 et seq; Nicholas P Manganaro 'About-Face: The New Rules of Strict Compliance under the Uniform Customs and Practice for Documentary Credits (UCP 600)' (2011) 14 *International Trade & Business Law Review* 273-290 at 277 et seq; Michelle Kelly-Louw 'The Doctrine of Strict Compliance in the Context of Demand Guarantees' (2016) 49 *Comparative & International Law Journal of Southern Africa* 85-129 at 86; Hugo (2014) *TSAR* 662; and Oelofse (1996) 8 *SA Merc L J* 56 at 65 et seq.

⁴⁹ ICC Publication No. 600.

⁵⁰ See Article 5 of the UCP which states that rather than dealing with the goods, services, or performances that the documents may be related to, banks deal with documents. See also generally, Van Niekerk & Schulze *The South African Law of International Trade*; AN Oelofse *The*

even if the documentary credit refers to the agreement, banks are not in any way obliged by or concerned with it.⁵¹ This international trade practice may run counter to the control efforts against TBML in that it may limit the level of AML scrutiny to be applied to a trade-finance transaction.⁵² It is also this overarching principle that determines the degree of scrutiny an accountable institution can exercise to identify suspicious TBML activity in documentary credits.⁵³ The question to be answered is the extent to which financial institutions should go in dealing with transactions suspected of TBML in documentary credits given the restricting rules of the UCP.⁵⁴

In light of some of these challenges, the Wolfsberg Group has had to have more conversations with the International Chamber of Commerce⁵⁵ (ICC) to establish a possible interface between trade-finance transactions and the risk of TBML.⁵⁶ The main issue was to establish how the trade-finance principles could better be disseminated to the ICC membership.⁵⁷ The Wolfsberg Group and the ICC also sought to raise and standardise the practice level of TBML compliance in the trade-finance industry.⁵⁸ In 2011, the Wolfsberg Group published trade-finance principles as part of its fight against TBML in the trade-finance industry.⁵⁹ These principles were later

Law of Documentary Letters of Credit (1997), (hereinafter 'Oelofse *The Law of Documentary Letters of Credit*'); Hugo *Documentary Credits* 113; Kelly-Louw *Demand Guarantees*; Easa A Fredericks & Jan L Neels 'The Proper Law of a Documentary Letter of Credit (Part I)' (2003) 15 *South African Mercantile Law Journal* 63-73; Easa A Fredericks & Jan L Neels 'The Proper Law of a Documentary Letter of Credit (Part II)' (2003) 15 *South African Mercantile Law Journal* 207-227; Schulze (2009) 30 *Obiter* 411-419; Hugo 'Bank Guarantees' 438; *Phillips v Standard Bank of South Africa Ltd* 1985 3 SA 301 (W); *Nedcor Bank Ltd v Hartzler* 1993 4 CLD 278 (W); *Ex parte Sapan Trading (Pty) Ltd* 1995 1 SA 218 (W); *Loomcraft Fabrics CC v Nedbank Ltd* 1996 1 SA 812 (A); Oelofse (1996) 8 SA Merc L J 56 at 56; Schulze (2009) 21 SA Merc L J 228-248; and Hugo (2017) 1 TSAR 1-20 at 1.

⁵¹ See Article 4 of the UCP. See also *Loomcraft Fabrics CC v Nedbank Ltd and Another* 1996 (1) SA 812 (A).

⁵² See Chhina (2016) 16 *JMLC* 158 at 158; Naheem *Exploring TBML* 115.

⁵³ See The Wolfsberg Group, ICC and BAFT (2019 Amendment) *Trade-Finance Principles* 33; Naheem *Exploring TBML* 115.

⁵⁴ For a discussion of documentary credits and how they may be affected by TBML, see para 3.3.2 et seq below.

⁵⁵ The ICC is the world's largest business organisation, which aims to advance global regulation, ethical corporate practices, and international trade to accelerate inclusive and sustainable growth to the benefit of all, see ICC <https://iccwbo.org/about-us/> [Accessed on 22 March 2022]. The acronym ICC must not be confused with that for the International Criminal Court. See also Hugo (2017) TSAR 1 at 1 note 3 who issues the same warning.

⁵⁶ See The Wolfsberg Group, ICC and BAFT (2019 Amendment) *Trade-Finance Principles* 5. For a discussion of both the Wolfsberg Group and the ICC in relation to the control of TBML in trade-finance instruments, see Ch 4 para 4.4.2 and 4.4.5 below.

⁵⁷ See again Ch 4 para 4.4.2 and 4.4.5 below.

⁵⁸ The Wolfsberg Group, ICC and BAFT (2019 Amendment) *Trade-Finance Principles* 4-5.

⁵⁹ See again Ch 4 para 4.4.2 and 4.4.5 below.

amended to incorporate inputs from the ICC, the Bankers Association for Finance and Trade (BAFT), and recent developments up to 2019.⁶⁰ The trade-finance principles outline the standards for the control of the risks of TBML associated with trade-finance transactions. Before this effort, the only other publicly available guidance was the January 2008 BAFT IFSA⁶¹ *Guidelines for Bank Secrecy Act/Anti-Money Laundering for Trade Services*⁶² and a follow-up global update from March 2015 of BAFT titled *Guidance for Identifying Potentially Suspicious Activity in Letters of Credit and Documentary Collections*.⁶³ These guidelines are part of the efforts by internationally significant institutions in trade finance to combat TBML.⁶⁴

Although the BAFT and ICC's guidelines are a step in the right direction, they lack the quality of enforceability as law.⁶⁵ They are just principles based on what is considered to be good banking practice. The guidelines are a product of supra-national banking bodies and they can easily pass as customary international law or international trade usage.⁶⁶ However, they can be used as a yardstick in law-reform initiatives against TBML in trade-finance instruments for different jurisdictions, including South Africa.⁶⁷ Although the guidelines may not bind a South African court of law, they may have

⁶⁰ See The Wolfsberg Group, ICC & BAFT (2019 Amendment) *Trade-Finance Principles* generally. For a discussion of the BAFT against TBML in trade-finance instruments, see Ch 4 para 4.4.6 below.

⁶¹ BAFT IFSA stands for Bankers Association for Finance and Trade (BAFT) and the International Financial Services Association (IFSA). The organisation is an international-transaction banking association in the USA, providing advocacy, thought leadership, education and training, and a global forum for its members in the areas of trade finance, payments, compliance, and regulations, see <https://www.baft-ifs.com/who-we-are> [Accessed on 22 March 2022].

⁶² These guidelines were for members of BAFT to assist them in complying 'with the Bank Secrecy Act in consideration of the examination procedures articulated in the *Bank Secrecy Act/Anti-Money Laundering Examination Manual*' which had been issued by the Federal Financial Institution Examination Council (FFIEC) in June 2005 and last revised in 2014. See BAFT (2015) *Guidance for Identifying Potentially Suspicious Activity in Letters of Credit and Documentary Collections* 1; The Wolfsberg Group, ICC and BAFT (2019 Amendment) *Trade-Finance Principles* 4.

⁶³ The Wolfsberg Group, ICC and BAFT (2019 Amendment) *Trade-Finance Principles* 5.

⁶⁴ For a detailed contribution of each international organisation against TBML in trade-finance instruments, see Ch 4 below generally.

⁶⁵ Regarding reasons for the non-binding nature of such principles, see Schulze 'The Sources of South African Banking Law a Twenty-First Century Perspective (Part II)' (2002) 14 *South African Mercantile Law Journal* 601-625 at 613; Schulze 'The Nature of Banking Law' 51.

⁶⁶ See Ch 4 para 4.3.2 et seq below.

⁶⁷ See s 232 of the Constitution which provides that unless it conflicts with the Constitution or another Act of Parliament, customary international law is enforceable in South Africa. See also Schulze (2002) 14 *SA Merc L J* 601 at 610 note 193 where the scholar gives the ICC as an example of a supra-national banking body whose publications can be regarded as having an international trade usage complexion. See also Schulze 'The Nature of Banking Law' 48.

persuasive value⁶⁸ by aiding in the interpretation of issues about money-laundering control in trade finance.

As already noted elsewhere in this thesis, trade finance encompasses a wide range of instruments, which can be used domestically and internationally.⁶⁹ This study considers trade-finance instruments in the context of an international contract of sale to capture the trans-boundary nature of international trade and TBML.⁷⁰ The most basic and commonly cited trade-finance payment methods are open accounts,⁷¹ documentary credits, documentary collections, demand guarantees, the standby letter of credit, forfaiting,⁷² vendor financing,⁷³ or specialised structured loan-based trade finance.⁷⁴ The study analyses the possible risk of TBML in four instruments, namely, documentary credits,⁷⁵ demand guarantees,⁷⁶ documentary collections,⁷⁷ and the standby letter of credit.⁷⁸ The joint research effort of the Wolfsberg Group, ICC and

⁶⁸ See Schulze (2002) 14 *SA Merc L J* 601 at 613; Schulze 'The Nature of Banking Law' 51. Customary international law or international trade usage is a secondary source of law in South Africa. See para 1.2.6 below for a brief discussion of primary and secondary sources of law in the context of comparative law.

⁶⁹ The concept of trade in this study is understood as 'the exchange of goods and related services across national borders, international boundaries or territories' in line with the FATF's definition of 'trader' in its TBML guidance report. See FATF (2008) *Best Practices on TBML* 2. For a brief explanation regarding the focus of this study on international trade, see Ch 1 para 1.4.2.3 above. In this regard, trade has to be understood in the context of an international sale of goods, see Ch 1 para 1.8 above.

⁷⁰ See again Ch 1 para 1.8 above.

⁷¹ Open account involves the buying and selling of services or goods or between two or more parties, either at the domestic or international level with the transaction largely depending on the trust between the parties. The third-party bank intermediation usually required to effect or guarantee payment or performance is not deemed necessary due to the mutual trust and relationship between the two parties. See Eren 'Financing of International Trade' 259 et seq; Bhogal & Trivedi *International Trade Finance* 9 et seq; Bishop *Finance* 22 et seq.

⁷² This is a form of trade and supply chain financing which involves the purchase of future payment obligations on a 'without recourse' basis, see ITFA <https://itfa.org/trade-forfaiting/what-is-forfaiting> [Accessed on 7 March 2022].

⁷³ Vendor financing is the advancing or lending of funds by a vendor to its customer to enable the vendor to purchase stock or services from the customer which transaction is also known as trade credit and usually takes the form of deferred loans from the vendor, see Michael J Brennan, Vojislav Maksimovic and Josef Zechner "Vendor Financing" (1988) 58 *The Journal of Finance* 1127-1141 at 1127; Jose Benedicto B Duhaylongsod *Vendor Financing and its Impact on Vendor's Optimal Policies* (unpublished Msc Dissertation, The State University of New Jersey, 2013) 1.

⁷⁴ See Eren 'Financing of International Trade' 259 et seq; Bhogal & Trivedi *International Trade Finance* 9 et seq; Bishop *Finance* 22 et seq; and The Wolfsberg Group, ICC and BAFT (2019 Amendment) *Trade-Finance Principles* 9.

⁷⁵ See para 3.3.2 below.

⁷⁶ See para 3.3.3 below.

⁷⁷ See para 3.3.4 below.

⁷⁸ See para 3.3.5 below.

BAFT has established that these instruments are prone to abuse by criminals in TBML operations.⁷⁹

3.2.4 Conclusion

The threat of TBML in trade-finance transactions is real.⁸⁰ The traditional perception that trade finance is less susceptible to crime is being eroded by the increasing threat of TBML.⁸¹ In the process of facilitating trade-finance transactions, financial institutions may be entrapped in the dangers of TBML and be abused for criminal gains.⁸² In this regard, they have a role to play in ensuring that only legitimate trade is facilitated through trade finance without becoming tainted by criminal elements through TBML.⁸³ Having highlighted the potential risk of TBML financial institutions may face, it is pertinent to briefly discuss the risk of TBML in each of the trade-finance instrument selected for examination in this study.⁸⁴ The following section sets out to accomplish that task.

3.3 THE RISK OF TBML IN SELECTED TRADE-FINANCE INSTRUMENTS

3.3.1 General

This section discusses selected trade-finance instruments and the possible risks of TBML that may affect them. The section covers documentary credits,⁸⁵ demand guarantees,⁸⁶ documentary collections,⁸⁷ and the standby letter of credit.⁸⁸ The discussion commences by examining the nature and operation of each instrument in general terms. The operational overview is then followed by a review of the potential weaknesses of the instrument and how it may be affected by the risk of TBML.

⁷⁹ See The Wolfsberg Group, ICC and BAFT (2019 Amendment) *Trade-Finance Principles* passim. For a discussion of these instruments, see para 3.3 et seq below.

⁸⁰ See para 3.2.2 above.

⁸¹ See again para 3.2.2 above.

⁸² See para 3.2.3 above.

⁸³ See again para 3.2.3 above.

⁸⁴ See Ch 1 para 1.8 above for the scope of this study.

⁸⁵ See para 3.3.2 below.

⁸⁶ See para 3.3.3 below.

⁸⁷ See para 3.3.4 below.

⁸⁸ See para 3.3.5 below.

3.3.2 Documentary Credits

3.3.2.1 General

The documentary credit is one of the most important instruments used to finance trade in the context of the international contract of sale.⁸⁹ The origins of the documentary credit is subject to various accounts. Leon notes that the documentary credit could be traced back to the 12th century.⁹⁰ At that time, the instrument was just a two-party arrangement between a wealthy individual who would issue a documentary credit in favour of the merchant so that the merchant may deliver goods to a specified agent of the individual.⁹¹ This seems to be in agreement with Kelly-Louw who traces the origins of the documentary credit to as early as the 19th century where it was used by merchants in financing their trade transactions.⁹² Adding to the different narratives, Carr and Stone note that the origins of the documentary credit could be traced to various cultures such as those of Rome, China and Egypt around the 18th century.⁹³ However, it is difficult to state with certainty which culture is responsible for the introduction or modification of documentary credits as a mechanism of financing international trade.⁹⁴

The documentary credit is an instrument of payment that is used widely in international business transactions.⁹⁵ It has been characterised as the “life blood of commerce” by English judges due to the central role it plays in international trade.⁹⁶ The documentary credit is popular because it offers a secure form of payment in circumstances where

⁸⁹ See Hugo ‘Financing of International Sale’ 403; Schulze (2009) 21 *SA Merc L J* 228 at 228.

⁹⁰ See Christopher Leon ‘Letters of Credit: a Primer’ (1986) 45 *Maryland Law Review* 432-464 at 433.

⁹¹ See Leon (1986) 45 *Md L Rev* 432 at 433.

⁹² See Michelle Kelly-Louw ‘The Law Applicable to Demand Guarantees and Standby Letters of Credit’ (2010) 2 *Speculum Juris* 1-148 at 1.

⁹³ See Indira Carr & Peter Stone *International Trade Law* 6 ed (2018) (hereinafter ‘Carr & Stone *International Trade Law*’) 454. For a discussion of the history of documentary credits, see Hugo *Documentary Credits* 54 et seq.

⁹⁴ See Carr & Stone *International Trade Law* 454.

⁹⁵ See Van Niekerk & Schulze *The South African Law of International Trade* para 3.1; Charl Hugo ‘Documentary Credits: The Basis of the Bank's Obligation’ (2000) 117 *South African Law Journal* 224-225 at 224.

⁹⁶ See *United City Merchants (Investments) Ltd v Royal Bank of Canada (The American Accord)* [1982] 2 QB 208 at 222.

trust may be absent.⁹⁷ It is also regarded as a reliable trade-finance instrument guaranteeing certainty in payment.⁹⁸

A definition of a documentary credit may help in illustrating the nature of this instrument. However, Hugo warns that giving an accurate definition of a documentary credit is not easy and the instrument is better off described in general terms.⁹⁹ This is what will be done in brief to provide just a general overview. A documentary credit has simply been defined as “a banker’s assurance of payment against presentment of specified documents”.¹⁰⁰ The UCP¹⁰¹ defines it as any agreement, regardless of name or description that is binding and, as such, represents a firm commitment from the issuing bank to honour a compliant presentation.¹⁰² These two definitions provide a good starting point for a brief and general review of what constitutes a documentary credit.

First, the documentary credit is issued in favour of a specified beneficiary, which is the seller in the context of an international contract of sale.¹⁰³ Secondly, the assurance may adopt different forms regarding the issue of payment. It may specify that payment may be made on delivery of stipulated documents or payment may be done on a specified date after delivery of stipulated documents and acceptance of a time draft usually a bill of exchange.¹⁰⁴ A draft is sometimes referred to as a ‘draft credit’.¹⁰⁵ Under the draft credit, the issuing bank undertakes to accept and pay drafts drawn by the beneficiary on the issuing bank.¹⁰⁶ The draft or bill of exchange is usually made payable at a future date regarded as its maturity date according to the documentary credit’s

⁹⁷ See Hugo ‘Financing of International Sale’ 403; Oelofse (1996) 8 *SA Merc L J* 56 at 68.

⁹⁸ See Leon (1986) 45 *Md L Rev* 432 at 432.

⁹⁹ See Hugo (2017) *TSAR* 1 at 6.

¹⁰⁰ See Roy Goode & Ewan McKendrick *Goode on Commercial Law* (2010) 1059; Cayle Selwyn Lupton *Letters of Credit and Demand Guarantees: A Legal Study on the Impact of Targeted Financial Sanctions from a South African Perspective* (Unpublished LLD Thesis, University of Johannesburg, 2022) 11.

¹⁰¹ See para 3.3.2.3 below for a brief discussion about the governance of documentary credits through the UCP 600.

¹⁰² Article 2 of the UCP600. See also Grath *Handbook of International Trade* 56; Eren ‘Financing of International Trade’ 268.

¹⁰³ See Van Niekerk & Schulze *The South African Law of International Trade* para 3.1; Hugo (2017) *TSAR* 1 at 6; Lupton *Letters of Credit and Demand Guarantees* 13.

¹⁰⁴ See Article 7 of the UCP600. See also Hugo (2017) *TSAR* 1 at 6; Van Niekerk & Schulze *The South African Law of International Trade* para 3.1; and Grath *Handbook of International Trade* 56.

¹⁰⁵ See Van Niekerk & Schulze *The South African Law of International Trade* para 3.5.4.

¹⁰⁶ *Ibid.*

terms.¹⁰⁷ Thirdly, the documents specified under a documentary credit are, typically, commercial documents such as the invoice, bill of lading, insurance documents and other relevant documents such as certificate of origins or quality of goods.¹⁰⁸

Two significant principles also emanate from the definition of the documentary credit. The first is that the beneficiary must tender documents that strictly comply with the description in the documentary credit.¹⁰⁹ The second principle is that the obligation of the bank comes from the delivery of conforming documents and not from proper performance by the seller of the underlying contract of sale.¹¹⁰ Thus, the bank's undertaking is independent of the underlying contract of sale.¹¹¹

3.3.2.2 Types of Documentary Credits

3.3.2.2.1 General

Documentary credits come in various types, such as transferable credits,¹¹² back-to-back credits,¹¹³ revolving credits,¹¹⁴ standby credits,¹¹⁵ red-clause credits; and receipt and undertaking credits.¹¹⁶ Documentary credits can also be categorised either as revocable or irrevocable, confirmed or unconfirmed.¹¹⁷ For purposes of examining documentary credits as instruments that can be abused through TBML later, three types of them are worthy exploring briefly.¹¹⁸

3.3.2.2.2 Transferable Documentary Credits

A transferable documentary credit is one, which can be transferred in whole or in part by the original beneficiary to one or further beneficiaries either in the same jurisdiction or in another.¹¹⁹ This type of documentary credit is globally used in international

¹⁰⁷ Ibid.

¹⁰⁸ See Hugo (2017) *TSAR* 1 at 6; Van Niekerk & Schulze *The South African Law of International Trade* para 3.1.

¹⁰⁹ See Schulze (2009) 21 *SA Merc L J* 228 at 239 et seq; Hugo (2017) *TSAR* 1 at 6; and Grath *Handbook of International Trade* 56.

¹¹⁰ Hugo (2017) *TSAR* 1 at 6.

¹¹¹ See Goode (1996) 22 *Brooklyn Brook J Int'l L* 1 at 12. See also para 3.3.2.2 et seq below.

¹¹² See para 3.3.2.2.2 below.

¹¹³ See para 3.3.2.2.3 below.

¹¹⁴ See para 3.3.2.2.4 below.

¹¹⁵ See para 3.3.5 below.

¹¹⁶ See Eren 'Financing of International Trade' 273-277.

¹¹⁷ See para 3.3.1 above.

¹¹⁸ See para 3.3.2.2.2 et seq below.

¹¹⁹ See Eren 'Financing of International Trade' 273. See also Hugo 'Financing of International Sale' 430.

trade.¹²⁰ The function of a transferable documentary credit is to enable the first beneficiary (intermediary) to pay its suppliers by transferring the credit to the second beneficiary. It is the second beneficiary, which presents documents under the credit and receive payment from the transferring bank.¹²¹

The arrangement of a transferable documentary credit is normally done where the first beneficiary does not supply all the goods themselves but acts as an intermediary between the supplier and the buyer.¹²² Therefore, the first beneficiary may be based in another country where they are responsible for placing orders for an overseas buyer.¹²³ In such circumstances, the documentary credit involved would normally be for large amounts for which the first beneficiary will be responsible for distributing to second beneficiaries.¹²⁴ The mechanics of a transferable documentary credit involves the first beneficiary requesting the buyer to arrange a transferable documentary credit so that the obligation to present documents for payment is transferred to the second beneficiary.¹²⁵ The rights and obligations of the first beneficiary under the transferable documentary credit are extended to the second beneficiary without the need for a second documentary credit to be issued.¹²⁶ The set-up of a transferable documentary credit is such that the buyer does not know the identity of the real supplier (second beneficiary).¹²⁷

3.3.2.2.3 Back-to-back Documentary Credits

a. General

Back-to-back documentary credits are used by merchants in purchasing goods for on-selling to another party.¹²⁸ They are mainly used by commodity traders such as those in the steel industry.¹²⁹ Back-to-back documentary credits are also known as

¹²⁰ See Belay Seyoum *Export-Import Theory, Practices and Procedures* 3 ed (2014) (hereinafter 'Seyoum *Export-Import Theory*') 248.

¹²¹ Hugo 'Financing of International Sale' 431.

¹²² See Hugo 'Financing of International Sale' 430; Seyoum *Export-Import Theory* 248.

¹²³ See Hugo 'Financing of International Sale' 430; Carr & Stone *International Trade Law* 474.

¹²⁴ See Grath *Handbook of International Trade* 63; Seyoum *Export-Import Theory* 248.

¹²⁵ See Carr & Stone *International Trade Law* 474; Hugo 'Financing of International Sale' 430.

¹²⁶ See Seyoum *Export-Import Theory* 248.

¹²⁷ See Eren 'Financing of International Trade' 273.

¹²⁸ Idem at 274. See also Carr & Stone *International Trade Law* 472.

¹²⁹ See Eren 'Financing of International Trade' 274. See also Hugo 'Financing of International Sale' 433; Grath *Handbook of International Trade* 63.

subsidiary documentary credits.¹³⁰ They are related to transferable credits in terms of function but are legally different.¹³¹ Back-to-back documentary credits are issued at the instance of the seller to the seller's supplier while relying on a documentary credit already requested by the buyer in favour of the seller.¹³² They are suitable where the goods to be delivered by the other suppliers need to be changed, upgraded or altered before delivery to the ultimate buyer.¹³³

Back-to-back documentary credits consist of two separate documentary credits. The first documentary credit acts as a form of security for the second documentary credit and a potential source of reimbursement.¹³⁴ The second documentary credit under a back-to-back credit arrangement is different from the first documentary credit.¹³⁵ On one hand, the first documentary credit is issued in favour of an intermediary, which is not the supplier of the goods.¹³⁶ On the other hand, the intermediary becomes the applicant for a second documentary credit in favour of the supplier of the goods to be sold further to the intermediary's client.¹³⁷ This type of documentary credit enables an intermediary with limited financial resources to purchase goods from a supplier who is willing to sell only on documentary credit terms.¹³⁸

3.3.2.2.4 Revolving Documentary Credits

A revolving documentary credit has been defined as one, which states that the amount is renewed or reinstated automatically without specific amendments.¹³⁹ This type of credit offers flexibility to importers and sellers in their commercial dealings especially where regular shipments of goods of the same type are involved.¹⁴⁰ A revolving credit thus, avoids the need for repetitive processes in applying for the issuance of credit

¹³⁰ See Hugo 'Financing of international Sale' 433.

¹³¹ Ibid. For a discussion of transferable documentary credits, see para 3.3.2.2.2 above.

¹³² See Hugo 'Financing of International Sale' 433; Seyoum *Export-Import Theory* 249.

¹³³ Grath *Handbook of International Trade* 63.

¹³⁴ See Eren 'Financing of International Trade' 274. See also Seyoum *Export-Import Theory* 249; Carr & Stone *International Trade Law* 472-474.

¹³⁵ See Hugo 'Financing of International Sale' 433. See also Seyoum *Export-Import Theory* 249.

¹³⁶ See Bishop *Finance* 123; Eren 'Financing of International Trade' 274.

¹³⁷ See Eren 'Financing of International Trade' 274; Bishop *Finance* 123.

¹³⁸ See Grath *Handbook of International Trade* 63; Eren 'Financing of International Trade' 274.

¹³⁹ See Eren 'Financing of International Trade' 276. See also Grath *Handbook of International Trade* 63.

¹⁴⁰ See Seyoum *Export-Import Theory* 250; Eren 'Financing of International Trade' 276.

where single-value goods are constantly bought and sold.¹⁴¹ The credit revolves around an agreed value and/ or time.¹⁴²

Where a revolving credit is used, its value can be reinstated automatically or by way of amendment after presentation of conforming documents or on reaching a certain lower level.¹⁴³ Thus, key characteristics of a revolving documentary credit are regularity of transactions between importers and exporters, an agreed value and/or period of the credit within which it will be automatically be reinstated.¹⁴⁴

3.3.2.3 Governance of Documentary Credits

Documentary credits are generally governed by the UCP, the latest version of which, is the Uniform Customs and Practice for Documentary Credits, ICC Publication No 600, Paris (2007) (UCP600).¹⁴⁵ These are a set of rules issued by the ICC and meant to standardise banking practice relating to documentary credits.¹⁴⁶ The UCP governs most, but not all aspects of the relationships under the documentary credit by way of contractual incorporation.¹⁴⁷ After more than 70 years of effort and periodic revision, attempts at unification in this area of law has been regarded as successful. As Murray *et al* put it “the UCP now have almost universal effect”.¹⁴⁸ Under South African law, Schulze submits that the use of the UCP in governing documentary credits has perhaps achieved the status of a trade usage.¹⁴⁹ However, Oelofse argues that because many of the UCP's provisions are amended on a regular basis, the best one can say about them is that they reflect customary law or commercial usage.¹⁵⁰ This

¹⁴¹ See Eren ‘Financing of International Trade’ 276. See also Seyoum *Export-Import Theory* 250.

¹⁴² Carr & Stone *International Trade Law* 475.

¹⁴³ See Seyoum *Export-Import Theory* 250; Grath *Handbook of International Trade* 63; and Carr & Stone *International Trade Law* 475.

¹⁴⁴ See Eren ‘Financing of International Trade’ 276; Grath *Handbook of International Trade* 63; Seyoum *Export-Import Theory* 250; and Carr & Stone *International Trade Law* 475.

¹⁴⁵ See Van Niekerk & Schulze *The South African Law of International Trade* para 3.4.2; Hugo ‘Financing of International Sale’ 403. The UCP600 took effect on 1 July 2007.

¹⁴⁶ See Van Niekerk & Schulze *The South African Law of International Trade* para 3.4.2; Murray, Holloway & Timson-Hunt *Schmitthoff's Export Trade: Law and Practice of International Trade* (2007) 11th edition 185.

¹⁴⁷ Hugo ‘Financing of International Sale’ 403.

¹⁴⁸ See Carole Murray, David Holloway, Daren Timson-Hunt, Brian Kennelly, & Giles Dixon *Schmitthoff's Export Trade: The Law and Practice of International Trade* 12 ed (2016) (hereinafter ‘Murray *et al* Schmitthoff's Export Trade’) 186. See also Grath *Handbook of International Trade* 65.

¹⁴⁹ See Schulze (2009) 21 *SA Merc L J* 228 at 232. See also WG Schulze ‘The South African Banking Adjudicator-A Brief Overview’ (2002) 12 *SA Merc L J* 38 at 50-2.

¹⁵⁰ See Oelofse *The Law of Documentary Letters of Credit* 16-18.

view is based on the argument that trade usage must be long-established before it could be recognised as such.¹⁵¹ However, in a fast-moving sector such as the banking industry, the belief that trade usage must be long established should not be a requirement.¹⁵² Schulze's views on this aspect seem to make practical sense considering the fast-paced nature of developments in the banking sector where the phrase 'long-established' may mean a period shorter than its traditional meaning.

The UCP applies only where parties have expressly incorporated them into their contract.¹⁵³ However, parties may choose not to be governed by the UCP in their trade relations, although the general international standard banking practice is to rely on the UCP.¹⁵⁴

3.3.2.4 Potential Risks of TBML in Documentary Credits

3.3.2.4.1 General

Documentary credits may be prone to abuse through TBML. The fact that the instruments are less likely to be used in money-laundering processes may attract professional money launderers to rope them in their operations. The risk of TBML presents itself in documentary credits due to a number of vulnerabilities, a few of which are briefly explained below.

3.3.2.4.2 The Vulnerability of Documentary Credits to TBML

The use of documentary credits may be prone to the risk of TBML.¹⁵⁵ Documentary credits are generally understood to offer the safest form of payment for the seller while at the same time giving the buyer ownership of goods upon receipt of goods.¹⁵⁶ The traditional risk usually experienced within a documentary credit transaction is that of fraud, either in the goods supplied or documents involved.¹⁵⁷ However, as has already

¹⁵¹ See Schulze 'The Nature of Banking Law' 48 fn 176. See also Oelofse *The Law of Documentary Letters of Credit* 16-18.

¹⁵² See Schulze 'The Nature of Banking Law' 48 para 2.4.3 (ii).

¹⁵³ See Schulze (2009) 21 *SA Merc L J* 228 at 232; Hugo *Documentary Credits* 172.

¹⁵⁴ See article 1 of the UCP600. See also Murray *et al Schmitthoff's Export Trade* 186-87; Roy Goode 'Abstract payment undertakings and the rules of the international chamber of commerce' (1995) 39 *Saint Louis University Law Journal* 725-744 at 727.

¹⁵⁵ See Madinger *Money Laundering* 158; Naheem *Exploring TBML* 115; and JMLSG (2020) *Sectoral Guidance* 156.

¹⁵⁶ See para 3.3.2.1 above.

¹⁵⁷ See again para 3.3.2.1 above.

been noted, the use of documentary credits may also be prone to the risk of TBML. This risk is increasingly affecting international trade and trade finance.¹⁵⁸ Preference for the use of documentary credits in TBML comes from the fact that the instrument gives the transaction a legitimate look. The documentary credit also makes the transaction appear more genuine even if it is contrived for criminal intentions.¹⁵⁹ Unlike the fraud risk, which may affect either the buyer or seller, the risk of TBML affects the financial institution that processes the payment under a trade deal.¹⁶⁰ It is a risk in the sense that a financial institution may unwittingly be used to facilitate a money-laundering process under the pretext of providing trade finance. Financial institutions caught in the web of money-laundering risks suffer many damages, including being affected by the phenomenon of de-risking.¹⁶¹

Two factors make documentary credits attractive and useful for TBML. First, documentary credit transactions are documentary in nature.¹⁶² This means that the entire transaction revolves around documents exchanged between the buyer and the seller.¹⁶³ There is room that fraudulent documents can be generated to facilitate a sham documentary credit transaction.¹⁶⁴ Shell companies may be used to issue inflated fictitious invoices for goods supplied or not supplied at all in TBML schemes using documentary credits.¹⁶⁵ Buyers and sellers in a TBML scheme can collude to ensure that documents meet bank officials' approval as quickly as possible to expedite payment.¹⁶⁶ For instance, Cassara gives a case study of a TBML scheme through false invoicing of propylene pellets from the US to Mexico using documentary credits.¹⁶⁷ The documentary credits were stopped when bank compliance inspectors

¹⁵⁸ See para 3.2.2 above and Ch 2 para 2.3 et seq above.

¹⁵⁹ See Chandna *Black Money* 124; APG (2012) *Trade-Based Money Laundering Report* 34. See again Ch 2 para 2.3 et seq above.

¹⁶⁰ See para 3.2.2 above.

¹⁶¹ See International Finance Corporation (IFC) (2016) 'De-risking by Banks in Emerging Markets-Effects and Responses for Trade' www.ifc.org [Accessed on 5 January 2022]. See also para 3.2.2 above.

¹⁶² See para 3.3.2.1 above.

¹⁶³ See again para 3.3.2.1 above.

¹⁶⁴ See Madinger *Money Laundering* 158; APG (2012) *Trade-Based Money Laundering Report* 45. See also Ch 2 para 2.3.4 above.

¹⁶⁵ See again Ch 2 para 2.3.4 above.

¹⁶⁶ See FATF (2006) *TBML Report* 4-5; Zdanowicz (2009) 5 *Review of Law and Economics* 856 at 858. See again Ch 2 para 2.3.4 above.

¹⁶⁷ See Cassara *Next Frontier* 22.

became aware of the practice.¹⁶⁸ The TBML scheme was apparently being operated by one individual who masqueraded as both seller and buyer generating paperwork on both ends of the scheme.¹⁶⁹ The documentary credits were only used in the scheme to create an appearance of legitimacy of the transactions while masking an ongoing operation of TBML.¹⁷⁰

Secondly, the bank-to-bank relations that exist between documentary credit transactions are capable of moving millions of dollars between countries and around the globe.¹⁷¹ More often than not, parties to a documentary credit are domiciled in different jurisdictions from which they conduct trade transactions.¹⁷² The inter-jurisdictional nature of the international trade also means that the funds involved may move from one correspondent bank to another depending on the arrangements of the parties. Digital methods of payment, such as electronic fund transfers and internet banking, make the movement of illegal funds even faster with funds being moved at the click of a button.¹⁷³ This flexibility is desirable to money launderers for fast moving of illicit funds.¹⁷⁴

3.3.2.4.3 The Nature of the UCP and the Risk of TBML

The UCP does not address the risk of TBML at all.¹⁷⁵ Two reasons can be given for this. First, the rules are designed to facilitate the smooth flow of international trade.¹⁷⁶ Secondly, the ICC, which is responsible for the issuance of the UCP rules, is not a specialised body for TBML issues.¹⁷⁷ Its thrust is restricted to formulating a set of contractual rules that would create uniformity in the practice of documentary credits.¹⁷⁸ The most common risk of fraud found in documentary credits is not even addressed

¹⁶⁸ Ibid.

¹⁶⁹ See Cassara *Next Frontier* 22. See also JMLSG (2020) *Sectoral Guidance* 157.

¹⁷⁰ See Cassara *Next Frontier* 22. APG (2012) *Trade-Based Money Laundering Report* 45.

¹⁷¹ See Madinger *Money Laundering* 158; APG (2012) *Trade-Based Money Laundering Report* 34.

¹⁷² See Madinger *Money Laundering* 158; APG (2012) *Trade-Based Money Laundering Report* 34. See also para 3.3.2.1 above.

¹⁷³ See Baker *Capitalism* 25. For a discussion of the concept of e-money and electronic fund transfers, see Schulze (2004) 16 *SA Merc L J* 50 at 54 et seq; Loubser & Swart (1999) 10 *Stell L Rev* 354 at 356.

¹⁷⁴ See Madinger *Money Laundering* 158.

¹⁷⁵ See Azinge-Egbiri (2023) 15 *AJLS* 38 at 47.

¹⁷⁶ See para 3.3.2.3 above.

¹⁷⁷ See foreword to the UCP600. See also Azinge-Egbiri (2023) 15 *AJLS* 38 at 48.

¹⁷⁸ See foreword to the UCP600.

in the UCP although fraud is normally accepted as an exception to both the independence and autonomy of credit doctrines.¹⁷⁹

Naheem believes that the wording of the UCP as it stands may promote rather than hinder TBML by restricting the obligation of banks to the examination of documents at the exclusion of the underlying contract of the credit.¹⁸⁰ For instance, under the UCP the bank's only duty is to scrutinise the documents on their face and not to investigate transactions outside their knowledge.¹⁸¹ The bank has an obligation to review the documents in order to determine if they conform to the requirements set out under the documentary credit.¹⁸² Where the beneficiary has submitted documents conforming to the requirements of the documentary credit to the bank, the bank has no option but to pay the beneficiary.¹⁸³ However, the bank has no obligation to pay the beneficiary where the documents presented do not conform to the requirements stated in the documentary credit.¹⁸⁴ The standard expected is that of strict conformity.¹⁸⁵ Thus, the bank is not obliged to investigate the quality, quantity or description of traded goods or the alleged breach of the underlying transaction to determine whether the documents are conforming or not.¹⁸⁶

The UCP stipulates that the issuing bank should discourage any attempt by the applicant to include, as an integral part of the credit, copies of the underlying contract, such as the proforma invoice.¹⁸⁷ This kind of stipulations, work to the advantage of money launderers in TBML operations because it allows for a few documents to be presented with little or scanty detail about the transaction. Therefore, even contrived

¹⁷⁹ For more on the fraud exception, see Oelofse *The Law of Documentary Letters of Credit* 470 et seq; Kelly-Louw, Michelle 'Limiting Exceptions to the Autonomy Principle of Demand Guarantees and Letters of Credit' in: Coenraad Visser, JT Pretorius & Michel Koekemoer (eds) *Essays in Honour of Frans Malan* (2014) at 197-218; and Van Niekerk & Schulze *The South African Law of International Trade* para 3.9.3 et seq.

¹⁸⁰ See Naheem *Exploring TBML* 115. See also Article 5 of the UCP600.

¹⁸¹ See Article 14(b) of the UCP600.

¹⁸² See Hugo 'Financing of International Sale' 415-416; Schulze (2009) 30 *Obiter* 411 at 415. See also *Midland Bank Ltd v Seymour* [1955] 2 Lloyd's Rep 147 at 151.

¹⁸³ See Schulze (2009) 30 *Obiter* 411 at 415.

¹⁸⁴ Ibid. See also *OK Bazaars (1929) Ltd v Standard Bank of South Africa Ltd* 2002 (3) SA 688 (SCA) at 697G-698C.

¹⁸⁵ See *Delfs v Kuehne & Nagel (Pty) Ltd* 1990 1 SA 822 (A) at 825D-E, 826D-I; Kelly-Louw (2016) 49 *CILSA* 85 at 113.

¹⁸⁶ See Chhina (2016) 19 *JMLC* 158 at 164.

¹⁸⁷ See Article 4 (b) of the UCP600.

and fictitious transactions to justify the movement of illegal funds may be conducted with little paperwork or none due to online payments.¹⁸⁸

It should be noted that the remit of the bank's trade-processing staff is only limited to ensuring compliance of the presented documents with the terms of the documentary credit and in fulfilling their obligations under the UCP.¹⁸⁹ Thus, in executing their mandate under the UCP, banks are not likely to consider the issue of compliance with AML obligations given the generally low perception of the risk of TBML in trade finance.¹⁹⁰ However, nothing prevents the banking staff from examining the trade transactions for possible TBML. The only limitation that may exist, in the absence of willingness, might be the lack of expertise to establish what may constitute TBML in the circumstances.

3.3.2.4.4 The Independence Principle and the Risk of TBML

The non-interfering approach prescribed by the UCP in documentary credit transactions may affect a bank's commitment to fulfil its AML obligations.¹⁹¹ Banks are only concerned with documents and not with the goods referred to in the underlying contract.¹⁹² Under the UCP, the bank's duty is limited to examining documents on their face and not to investigate underlying transactions.¹⁹³ This then proscribes the extent to which banks may scrutinise a documentary credit for further risks attendant to the transaction, including the risk of TBML.¹⁹⁴ This is disconcerting considering that banks have an equal role to play in TBML control as they have in the financing of international trade through documentary credits.¹⁹⁵

However, Chhina argues that stringent AML provisions for TBML in the trade-finance sector may hinder the smooth flow of trade processes.¹⁹⁶ It appears there are two

¹⁸⁸ See JMLSG (2020) *Sectoral Guidance* 157; APG (2012) *Trade-Based Money Laundering Report* 45. See also Ch 2 para 2.3.4 above.

¹⁸⁹ See Chhina (2016) 19 *JMLC* 158 at 164; Kelly-Louw *Demand Guarantees* 55.

¹⁹⁰ See Chhina (2016) 19 *JMLC* 158 at 164. See also generally Menz 'Beyond Placement, Layering and Integration — The Perception of Trade-Based Money Laundering Risk in UK Financial Services' (2019) 22 *Journal of Money Laundering Control* 614-625.

¹⁹¹ See Naheem *Exploring TBML* 115; Chhina (2016) 19 *JMLC* 158 at 164.

¹⁹² See Article 4 (a) of the UCP600; Schulze (2009) 21 *SA Merc L J* 228 at 235 et seq.

¹⁹³ See Article 14(b) of the UCP600.

¹⁹⁴ See Chhina (2016) 19 *JMLC* 158 at 160.

¹⁹⁵ See The Wolfsberg Group, ICC and BAFT (2019 Amendment) *Trade-Finance Principles* 8; Naheem *Exploring TBML* 115. See also para 3.2 above.

¹⁹⁶ Chhina (2016) 19 *JMLC* 158 at 160.

competing interests that need to be balanced whenever a bank is dealing with a documentary credit in the context of TBML control.¹⁹⁷ On the one hand, a bank needs to abide by the rules and customs governing documentary credits generally, especially the UCP.¹⁹⁸ On the other hand, despite the need to observe the rules of commerce in trade finance, banks still need to combat TBML.¹⁹⁹ It should be noted that balancing these competing interests can be a difficult exercise. Too many AML regulations in trade finance may discourage and frustrate legitimate users of documentary credits. At the same time, a relaxed trade-finance environment without AML regulations may attract organised crime groups that are ready to exploit the sector for TBML purposes.²⁰⁰

3.3.2.4.5 The Possibility of Missing TBML in Document Examination

The short period required under the UCP to examine presented documents may facilitate TBML.²⁰¹ In processing documentary credits, banks are under pressure to examine documents for compliance with the credit requirements within a short period.²⁰² The UCP rules give a bank a maximum of five days after the date of presentation to examine the documents for compliance with the terms of the credit.²⁰³ It is submitted that with the numerous documents and transactions involved in international trade, there is a less likely possibility that the risk of TBML may even be considered at all. The limited timeframes and the high volume of documents involved may affect the scope and efficiency of trade-finance staff when examining documents for potential TBML. This submission is made with the assumption that bank officials are capable of detecting potential risks of TBML even if this may not be the case. This is because in some studies conducted elsewhere, it has been found that most bank officials lack the expertise to identify what constitutes potential red flags for TBML.²⁰⁴

¹⁹⁷ See FATF (2008) *Best Practices on TBML* 8. See also para 3.3 above.

¹⁹⁸ See para 3.3.2.5 above.

¹⁹⁹ See Chhina (2016) 19 *JMLC* 158 at 160.

²⁰⁰ See FATF& Egmont Group (2020) *TBML Trends & Developments Report* 12; Menz (2019) 22 *JMLC* 614 at 617 et seq; and Hataley (2020) *JMLC* 1 at 1-11.

²⁰¹ See para 3.3.2.1 above.

²⁰² See Chhina (2016) 19 *JMLC* 158 at 164.

²⁰³ See Article 14(b) of the UCP.

²⁰⁴ See Ch 4 para 4.3.4 below.

3.3.2.4.6 The Abuse of Documentary Credits by Organised Crime Groups

From the viewpoint of transnational organised crime groups intending to launder illicit funds, the payment component of the scheme is the most critical piece.²⁰⁵ In their 2020 report, the FATF and the Egmont Group note that organised professional money launderers are the ones most likely to use TBML in the abuse of trade finance.²⁰⁶

To cover up the transfer of illegal funds, TBML depends on payments made in trading activities where goods or services are exchanged.²⁰⁷ The payment function of the documentary credit attracts organised crime groups, which desire to move illegal funds under the veneer of legitimacy.²⁰⁸ Therefore, the trade transaction is generally used as an additional layer of deception to avoid detection.²⁰⁹ The idea of collusion in constructing fictitious transactions and using fraudulent documents in most TBML techniques would most likely require the coordination of organised crime groups.²¹⁰

3.3.2.4.7 Documentary Credits as a Layering Method in TBML

It has been argued that TBML through documentary credits is likely to be employed using either layering or integration processes.²¹¹ The layering stage of money laundering is the most complicated stage in the whole deceptive scheme.²¹² Documentary credits are, therefore, ideal during the layering stage to completely obfuscate the illegal money trail by giving it a legitimate appearance.²¹³

Three factors make the layering and possibly the integration processes of money laundering ideal for the abuse of documentary credits in TBML. First, the huge volumes of trade are capable of obscuring individual transactions that may otherwise

²⁰⁵ See BAFT (2017) *Combatting Trade-Based Money Laundering: Rethinking the Approach* 3.

²⁰⁶ See FATF& Egmont Group (2020) *TBML Trends & Developments Report* 12. It should be noted that as of February 2024 the FATF has not yet published any follow up report on TBML to their 2020 one except the 2021 TBML Risk Indicators, see [https://www.fatf-gafi.org](https://www.fatf-gafi.org/Home) Home > Publications [Accessed on 25 February 2024].

²⁰⁷ See BAFT (2017) *Combatting TBML Report* 3. For a discussion of the various techniques employed in TBML, see Ch 2 para 2.3.4 et seq above.

²⁰⁸ See APG (2012) *Trade-Based Money Laundering Report* 45; JMLSG (2020) *Sectoral Guidance* 157; and Hataley (2020) *JMLC* 1 at 3.

²⁰⁹ BAFT (2017) *Combatting TBML Report* 3.

²¹⁰ See FATF (2006) *TBML Report* 4-5; Zdanowicz (2009) 5 *Review of Law and Economics* 856 at 858. For a discussion of the techniques used in TBML, see again Ch 2 para 2.3.4 et seq above.

²¹¹ See JMLSG (2020) *Sectoral Guidance* 155; Cassara *Next Frontier* 14. See also Ch 2 para 2.2.4 et seq above.

²¹² See JMLSG (2020) *Sectoral Guidance* 155. See also Ch 2 para 2.2.4 et seq above.

²¹³ See Madinger *Money Laundering* 259-60. See also Ch 2 para 2.2.4.3 above.

be legitimate.²¹⁴ Secondly, there are complexities associated with using multiple foreign-exchange transactions, a quality useful in the layering stage of money laundering.²¹⁵ Thirdly, the use of non-standard trade-related financing arrangements may allow the mixing of 'clean' and 'dirty' funds with ease.²¹⁶ For example, in a documentary credit transaction, the process can be made complex by using back-to-back or transferable credits.²¹⁷ Back-to-back and transferable documentary credits promote the anonymity of the intermediary or the second beneficiary of the credit, a quality desirable in money-laundering processes.²¹⁸

3.3.2.4.8 Type of Documentary Credit as a Vulnerability for TBML

Certain types of documentary credits such as the transferable²¹⁹ and revolving credits²²⁰ may also be ideal for abuse in TBML. The characteristic of transferable credits of being able to be given to a second but unrelated beneficiary, may be perfect for the layering of 'dirty' funds through TBML.²²¹ It also enables their transfer to a third party that may be a part to a scheme of TBML. Transferable credits allow for the restructuring of the original credit by introducing another party to the transaction thereby increasing the complexity of the transaction.²²² The FATF, the Wolfsberg Group, ICC and BAFT have all labelled the restructuring or amending of the original documentary credit as a red flag for potential TBML.²²³ It should be noted that in standard business transactions, a transferable credit is an instrument that can be used for perfectly legitimate reasons.²²⁴ It is also not unusual for parties to a transferable documentary credit to amend it for legally acceptable reasons.²²⁵ However, it is these qualities of commercial flexibility and legitimacy under transferable credits that endear them to professional money launderers for abuse.

²¹⁴ For a discussion of these stages in the money-laundering cycle, see Ch 2 para 2.2.4 et seq above.

²¹⁵ See Ch 2 para 2.2.4.3 above.

²¹⁶ See the Wolfsberg Group, ICC and BAFT (2019 Amendment) *Trade-Finance Principles* 45.

²¹⁷ See Madinger *Money Laundering* 158. See also para 3.3.2.2.2 and para 3.3.2.2.3 above.

²¹⁸ See again para 3.3.2.2.2 and para 3.3.2.2.3 above.

²¹⁹ See again para 3.3.2.2.2 above.

²²⁰ See para 3.3.2.2.4 above.

²²¹ See again Ch 2 para 2.2.4.3 above.

²²² See again para 3.3.2.2.2 above.

²²³ See FATF (2006) *TBML Report* 24; BAFT (2017) *Combatting TBML Report* 14; and APG (2012) *Trade-Based Money Laundering Report* 34.

²²⁴ See again para 3.3.2.2.2 above.

²²⁵ See again 3.3.2.2.2 above.

Revolving credits may also be abused for TBML in transmitting funds repeatedly without the need to reapply for the credit.²²⁶ The revolving credit is convenient and flexible for long-term business relationships that involve repeatability in the transfer of large sums of funds.²²⁷ In this regard, they may be ideal for abuse by money launderers desiring to channel funds continuously through a seemingly legitimate route to other jurisdictions.²²⁸ The revolving documentary credit does not require a new application to be made for every new transaction to be conducted.²²⁹ This makes them vulnerable for abuse by money launderers that need not expose themselves to AML reporting obligations for banks and their CDD measures at every new application.²³⁰

3.3.2.7 Conclusion

Documentary credits are trade-finance instruments that are ideal for the facilitation of trade between buyers and traders that are yet to establish trust between themselves.²³¹ Documentary credits are secure against possible risks prevalent in the sphere of international trade such as fraud. The advent of TBML, however, threatens the viability of documentary credits in global commerce.²³² Professional money launderers may use documentary credits to transmit illegal funds across jurisdictions with minimal or no detection.²³³

The documentary credit has various weak points that may be exploited by organised crime groups in TBML operations.²³⁴ The legitimacy offered by documentary credits to genuine traders as a trade-finance instrument, is attractive to organised crime groups desiring to launder their illegal funds through TBML.²³⁵ To commit TBML, criminals may structure the entire documentary credit transaction based on fraudulent documents or to finance a non-existent trade transaction.²³⁶ In a typical TBML activity, documentary credits may be desirable during the layering stage of money laundering to further

²²⁶ See again para 3.3.2.2.4 above.

²²⁷ See again para 3.3.2.2.4 above.

²²⁸ See Baker *Capitalism* 43; Cassara *Next Frontier* 22; and APG (2012) *Trade-Based Money Laundering Report* 52.

²²⁹ See again para 3.3.2.2.4 above.

²³⁰ See para 3.4 et seq below.

²³¹ See para 3.3.2.1 above.

²³² See para 3.3.2.4 et seq above.

²³³ See again para 3.3.2.4 et seq above.

²³⁴ See again para 3.3.2.4 et seq above.

²³⁵ See para 3.3.2.6.6 above.

²³⁶ See again para 3.3.2.4.6 above. See also para 3.3.2.4.2 above.

disguise the nature of illegal funds involved.²³⁷ The UCP, which governs the operations of documentary credits, does not address the risk of TBML.²³⁸ The hands-off approach adopted by banks under the UCP towards underlying transactions in documentary credit transactions, leaves possible loopholes for TBML to thrive.²³⁹ Under the approach banks are in danger of unwittingly facilitating TBML in transactions that involve documentary credits because the UCP may restrict the financial institutions' remit when examining documents.²⁴⁰

Other factors also make documentary credits desirable trade-finance instruments in TBML. Due to lack of adequate time to examine documents and expertise to identify complex forms of money laundering, bank officials may also miss a possible TBML activity in documentary credit transactions.²⁴¹ Documentary credits come in various types.²⁴² Some types such as the transferable credit,²⁴³ the back-to-back credit,²⁴⁴ and the revolving credit,²⁴⁵ may be more suitable for TBML than others due to their vulnerable nature.²⁴⁶ Therefore, the general prevalent perception that trade finance is less likely to be used by money launderers needs to be revisited in the advent of possible TBML in transactions involving documentary credits.

3.3.3 Demand Guarantees

3.3.3.1 General

Demand guarantees are common instruments of security in international trade especially in construction and engineering projects as well as in international sales of goods.²⁴⁷ Buyers of goods sometimes insist on being given demand guarantees.²⁴⁸

²³⁷ See para 3.3.2.4.7 above.

²³⁸ See para 3.3.2.3 above. See also para 3.3.2.4.3 above.

²³⁹ See para 3.3.2.2.4 above.

²⁴⁰ See again para 3.3.2.2.4 above.

²⁴¹ See para 3.3.2.2.5 above.

²⁴² See para 3.3.2.2 et seq above.

²⁴³ See para 3.3.2.2.2 above.

²⁴⁴ See para 3.3.2.2.3 above.

²⁴⁵ See para 3.3.2.2.4 above.

²⁴⁶ See para 3.3.2.4.8 above.

²⁴⁷ See Kelly-Louw (2009) 21 *Merc L J* 710 at 712. See also Hugo 'Bank Guarantees' 438 et seq; and Tiny Musesengwa *Unconscionability and a Breach of a Negative Stipulation in the Underlying Contract as Exceptions to the Autonomy Principle of Demand Guarantees in South Africa* (unpublished LLD Thesis University of South Africa, 2022) 23.

²⁴⁸ See Kelly-Louw (2009) 21 *Merc L J* 710 at 712. See also Murray *et al Schmitthoff's Export Trade* 243.

Where such a guarantee is given, it provides the buyer with the security for the due performance of the seller's obligation under the terms of the sale agreement.²⁴⁹ To be effective, a third party, usually a bank, will give its personal undertaking to pay in the event that the seller fails to perform as per the guarantee. The bank is obliged to pay when the demand is called in accordance with the strict conditions under the guarantee, only to be indemnified by its customer, the principal.²⁵⁰ Thus, the purpose of the demand guarantee is to remedy an alleged default under the underlying contract granted by the principal by giving the beneficiary instant financial availability.²⁵¹ The rationale is to facilitate immediate payment under the guarantee while litigation regarding the alleged default can be pursued later.²⁵²

By way of a general definition, a demand guarantee is a short and simple instrument issued by a bank or other financial institution, such as an insurance company, in terms of which the obligation to pay a stated sum of money arises upon the mere making of a demand for payment.²⁵³ The demand for payment must be in prescribed form and presentation of documents stated in the guarantee must be within the guarantee's term of validity.²⁵⁴ The URDG defines a demand guarantee as any written agreement, regardless of name or description, which stipulates payment upon submission of a compliant demand.²⁵⁵ Thus, a demand guarantee is an instrument of security under which a guarantor guarantees a debtor's performance to the creditor (the guarantee beneficiary) by agreeing to pay the beneficiary a certain amount of money under the

²⁴⁹ See Kelly-Louw *Demand Guarantees* 20. See also Goode (1995) 39 *St Louis U L J* 725 at 730.

²⁵⁰ See Kelly-Louw (2009) 21 *Merc L J* 710 at 710; Musesengwa *Breach of a Negative Stipulation* 23.

²⁵¹ See Kelly-Louw *Demand Gurantees* 20; Karl Marxen *Demand Guarantees in the Construction Industry: A Comparative Legal Study of their Use and Abuse from a South African, English and German Perspective* (Unpublished LLD Thesis, University of Johannesburg, 2017) 75.

²⁵² See Kelly-Louw *Demand Guarantees* 20. See also Goode (1995) 39 *St Louis U L J* 725 at 730; Hugo (2014) 4 *TSAR* 661 at 662.

²⁵³ See Michelle Kelly-Louw 'The Documentary Nature of Demand Guarantees and the Doctrine of Strict Compliance (Part 1)' (2009) 21 *SA Merc L J* 306-321 at 306; Hugo (2017) 1 *TSAR* 1 at 14; and Lupton *Letters of Credit and Demand Guarantees* 33. See also definition for 'Demand Guarantee' under Article 2 of the URDG 758; Charl Hugo 'Demand Guarantees in the People's Republic of China and the Republic of South Africa' (2019) 6 *BRICS Law Journal* 4-32 at 9.

²⁵⁴ See Kelly-Louw *Demand Guarantees* 17; Cayle Lupton & Michelle Kelly-Louw 'Emergence of Illegality in the Underlying Contract as an Exception to the Independence Principle of Demand Guarantees' (2020) 53 *Comparative and International Law Journal of Southern Africa* 1-37 at 2-3.

²⁵⁵ Article 2 of the URDG 758. See also Kelly-Louw (2009) 21 *SA Merc L J* 306 at 306; Goode (1995) 39 *St Louis U L J* 725 at 730 fn 18.

conditions specified in the guarantee.²⁵⁶ A demand guarantee is independent in nature.²⁵⁷ All that is needed is for a complying demand to be presented in order to trigger payment.²⁵⁸ A demand guarantee can be used to secure any obligation.²⁵⁹ However, they are regularly used in the construction industry where they serve various purposes.²⁶⁰

3.3.3.2 Types of Demand Guarantee

3.3.3.2.1 General

Besides classifying demand guarantees as either direct or indirect,²⁶¹ they may also be grouped according to the phase or part of the performance they are created to secure.²⁶² Sometimes a single guarantee covering all the phases of performance may be designed. However, parties may find it convenient to create separate guarantees for different but specific phases of the performance.²⁶³ This enables the principal to limit its liability to that phase of the performance for which the specific guarantee has been created.²⁶⁴ The list of types of demand guarantees parties may design to secure

²⁵⁶ See Hugo 'Bank Guarantees' 438. A demand guarantee should not be confused with an accessory guarantee of the surety where the guarantor is liable to pay on the obligation when the debtor fails to pay on the loan agreement, see again Hugo 'Bank Guarantees' 438; Michelle Kelly-Louw 'Initiatives of the International Chamber of Commerce to Prevent Fraudulent Calls on Demand Guarantees and Standby Letters of Credit' (2009) 21 *SA Merc L J* 710–733 at 713.

²⁵⁷ See *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd* 2010 (2) SA 86 (SCA); Article 5 of the URDG 758; Michelle Kelly-Louw 'Beneficiary Fraud and Demand Guarantees' (2022) 25 *PER/ PELJ* 1-26 at 2; Hugo (2019) 6 *BRICS Law Journal* 24; and Michelle Kelly-Louw 'Fraud in the Wide Sense and Demand Guarantees' (2022) 85 *Journal for Contemporary Roman-Dutch Law* 522-533 at 522.

²⁵⁸ See Hugo 'Bank Guarantees' 438; Kelly-Louw (2009) 21 *SA Merc L J* 710 at 712; Lupton *Letters of Credit and Demand Guarantees* 35. See also *State Bank of India v Denel SOC Limited* [2015] 2 All SA 152 (SCA).

²⁵⁹ See Hugo 'Bank Guarantees' 438. See also Goode (1996) 22 *Brooklyn Brook J Int'l L* 1 at 15.

²⁶⁰ See Hugo 'Bank Guarantees' 438; Kelly-Louw *Demand Guarantees* 20; and Marxen *Demand Guarantees in the Construction Industry* generally. See also *Group Five Construction (Pty) Ltd v MEC for Public Transport, Roads and Works Gauteng* [2015] 2 All SA 716 (GJ); *Kristabel Developments (Pty) Ltd v Credit Guarantee Insurance Corporation of Africa Limited* (23125/2014) [2015] ZAGPJHC 264; *Compass Insurance Co Ltd v Hospitality Hotel Developments (Pty) Ltd* 2012 2 SA 537 (SCA); *Rey NO & another v Adowa Student Accommodation Co-ownership & others* (26787/2022) [2023] ZAGPJHC 290 (3 April 2023); Michelle Kelly-Louw 'An Interpretation of a "Compliant Demand" for a Demand Guarantee Gone Wrong: *Uitspan Colliery (Pty) Ltd v Lombard Insurance Company Ltd* (24814/2020) [2022] ZAGPJHC 389 925 May 2022' (2023) 86 *Journal of Contemporary Roman-Dutch Law* 261-273; and Lupton & Kelly-Louw (2020) 53 *Comp & Int'l L J S Afr* 2.

²⁶¹ See again para 3.4.2.2.2 above.

²⁶² See Schulze (2009) 30 *Obiter* 411 at 412; Kelly-Louw *Demand Guarantees* 27.

²⁶³ See Kelly-Louw *Demand Guarantees* 27.

²⁶⁴ *Ibid.*

their transactions is not exhaustive.²⁶⁵ The following are some of the most common types of the demand guarantees.

3.3.3.2.2 Tender Guarantee²⁶⁶

A tender guarantee is designed to give safety to the person calling for bids (the beneficiary) against possible breach of such undertaking.²⁶⁷ The tender guarantee prevents less serious bidders from submitting frivolous bids without serious intentions of being contractually bound.²⁶⁸ In the event that the tender is awarded to a tenderer, which could be either a supplier or contractor, and they fail to execute in terms of the contract, the amount of the tender guarantee will be forfeited for the beneficiary.²⁶⁹ The tender guarantee gives the beneficiary a source of funds to cover costs resulting from an unexpected non-execution of the tender by a successful tenderer.²⁷⁰

3.3.3.2.3 Performance Guarantee²⁷¹

A performance guarantee is a type of guarantee that is often given by a contractor, supplier or exporter of goods at the beginning of the project or an international contract of sale.²⁷² Its purpose is to ensure that a contract is completed as agreed or else a

²⁶⁵ See Kelly-Louw *Demand Guarantees* 27 et seq; Sang Man Kim *Payment Methods and Finance for International Trade* (2021) (hereinafter 'Kim *Payment Methods*') 148 et seq; Murray *et al Schmitthoff's Export Trade* 246 et seq; and Hugo 'Bank Guarantees' 443 et seq, for the many other types of demand guarantees that may be created.

²⁶⁶ Also called tender bond or bid bond, see Kelly-Louw *Demand Guarantees* 27; Marxen *Demand Guarantees in the Construction Industry* 82.

²⁶⁷ See Hugo 'Bank Guarantees' 445; Kim *Payment Methods* 145; Musesengwa *Breach of a Negative Stipulation* 101; and Lupton *Letters of Credit and Demand Guarantees* 42.

²⁶⁸ See Kelly-Louw *Demand Guarantees* 27-28; Grath *Handbook of International Trade* 89; Marxen *Demand Guarantees in the Construction Industry* 82; and Lupton *Letters of Credit and Demand Guarantees* 42.

²⁶⁹ See Hugo 'Bank Guarantees' 445; Kim *Payment Methods* 145; Kelly-Louw *Demand Guarantees* 27; and Marxen *Demand Guarantees in the Construction Industry* 82.

²⁷⁰ See Grath *Handbook of International Trade* 89; Kelly-Louw *Demand Guarantees* 27-28; Marxen *Demand Guarantees in the Construction Industry* 82; and Musesengwa *Breach of a Negative Stipulation* 101.

²⁷¹ Also called performance bond or completion bond, see Kelly-Louw *Demand Guarantees* 28; Musesengwa *Breach of a Negative Stipulation* 99.

²⁷² See Kelly-Louw *Demand Guarantees* 28; Murray *et al Schmitthoff's Export Trade* 245; Marxen *Demand Guarantees in the Construction Industry* 78; and Lupton *Letters of Credit and Demand Guarantees* 40. See also *Stefanutti & Bressan (Pty) Ltd v Nedbank Ltd* (case no 5311/2008) (D&CLD).

financial penalty will be meted out against the supplier or contractor that fails to perform its obligations as per the contract.²⁷³

3.3.3.2.4 Advance Payment Guarantee

An advance payment guarantee is designed to generate some form of liquidity for the contractor so that they finance their establishment at the project site.²⁷⁴ The amount of the guarantee is usually a portion of the contract price, for example, five per cent of the contract price.²⁷⁵ The beneficiary, therefore, will obtain a guarantee of this nature to secure the repayment of the money it paid in advance should the contractor fail to perform as per the contract.²⁷⁶ A simple demand for payment by the beneficiary, alleging that the contractor has failed to perform as per the stipulation of the contract, is all that is necessary to initiate payment under the guarantee.²⁷⁷

3.3.3.2.5 Money Retention Guarantee

A money retention guarantee entitles the beneficiary, often the employer in the context of construction contracts; to retain a part of the payment made to the contractor according to the terms of the issued payment certificates.²⁷⁸ The portion kept is usually between five and ten per cent and serves as security for defects that may be discovered later after the execution of the contract.²⁷⁹ In practice, the beneficiary pays

²⁷³ See Kim *Payment Methods* 143; Kelly-Louw *Demand Guarantees* 28; Grath *Handbook of International Trade* 90; Marxen *Demand Guarantees in the Construction Industry* 78; and Lupton *Letters of Credit and Demand Guarantees* 40.

²⁷⁴ See Kelly-Louw *Demand Guarantees* 28; Hugo 'Bank Guarantees' 444. See also Kim *Payment Methods* 146-147; Grath *Handbook of International Trade* 90; Marxen *Demand Guarantees in the Construction Industry* 83; and Lupton *Letters of Credit and Demand Guarantees* 41.

²⁷⁵ See Hugo 'Bank Guarantees' 444; Kelly-Louw *Demand Guarantees* 28; Marxen *Demand Guarantees in the Construction Industry* 83; and Musesengwa *Breach of a Negative Stipulation* 101.

²⁷⁶ See Grath *Handbook of International Trade* 90; Kim *Payment Methods* 146-147; Marxen *Demand Guarantees in the Construction Industry* 83; and Lupton *Letters of Credit and Demand Guarantees* 41.

²⁷⁷ Hugo 'Bank Guarantees' 444. See also Kim *Payment Methods* 146-147; Kelly-Louw *Demand Guarantees* 28; Marxen *Demand Guarantees in the Construction Industry* 83; and Lupton *Letters of Credit and Demand Guarantees* 41.

²⁷⁸ See Kelly-Louw *Demand Guarantees* 29; Grath *Handbook of International Trade* 90; Marxen *Demand Guarantees in the Construction Industry* 84; Musesengwa *Breach of a Negative Stipulation* 102; and Lupton *Letters of Credit and Demand Guarantees* 41.

²⁷⁹ See Kim *Payment Methods* 148; Hugo 'Bank Guarantees' 444-5; Marxen *Demand Guarantees in the Construction Industry* 84; and Musesengwa *Breach of a Negative Stipulation* 102.

the contractor the full amount, as per the payment certificates. In the event of defects being discovered after performance, the beneficiary will then call up the guarantee.²⁸⁰

3.3.3.3 Governance of Demand Guarantees

The ICC's Uniform Rules for Demand Guarantees (URDG) generally govern demand guarantees.²⁸¹ However, it should be noted that the application of the URDG to a demand guarantee transaction is voluntary.²⁸² In other words, the URDG applies only where the parties have specifically incorporated it into the guarantee.²⁸³ Where parties agree that certain provisions of the URDG should apply, they should include a statement in the guarantee that specifically state that the guarantee is subject to the URDG.²⁸⁴

Although there is a clear indication of the universal application of the URDG in demand guarantees, this is not the case in South Africa where its application is not that popular.²⁸⁵ Despite the absence of popular usage of the URDG in South Africa, there is a reasonable degree of uniformity in the use of demand guarantees particularly in the construction industry.²⁸⁶ This uniformity has been achieved through the use of standard form guarantees. Most guarantees in South Africa's construction industry are made subject to the Joint Building Contracts Committee's suite agreements and the General Conditions of Contract for Construction Works of the South African Institution of Civil Engineering.²⁸⁷ However, the URDG remains international in nature with a standard form guarantee, which parties can adopt and adapt to their needs. As Hugo puts it, "there is clear international evidence that the popularity of the URDG is growing".²⁸⁸

²⁸⁰ See Hugo 'Bank Guarantees' 444-5. See also Kelly-Louw *Demand Guarantees* 29; Grath *Handbook of International Trade* 90.

²⁸¹ The latest being the URDG 758. See also Marxen *Demand Guarantees in the Construction Industry* 44.

²⁸² See Goode (1996) 22 *Brook J Int'l L* 1 at 4; Article 1 (a) of the URDG 758.

²⁸³ See again Article 1 (a) of the URDG 758.

²⁸⁴ See Kelly-Louw (2010) 2 *Speculum Juris* 1 at 2. See again Article 1(a) of the URDG 758.

²⁸⁵ See Hugo 'Bank Guarantees' 439.

²⁸⁶ Ibid. See also Marxen *Demand Guarantees in the Construction Industry* generally.

²⁸⁷ See Hugo 'Bank Guarantees' 439; *Kristabel Developments (Pty) Ltd v Credit Guarantee Insurance Corporation of Africa Limited* (23125/2014) [2015] ZAGPJHC 264; and *Group Five Construction (Pty) Ltd v MEC for Public Transport, Roads and Works Gauteng* [2015] 2 All SA 716 (GJ). The discussion of demand guarantees in this study follows a generic understanding of the instruments as presented in the URDG.

²⁸⁸ See Hugo 'Bank Guarantees' 439.

3.3.3.4 Possible Risks of TBML in Demand Guarantees

3.3.3.4.1 General

The operation, governance and nature of the demand guarantee have certain vulnerable qualities that make the instrument attractive to money launderers in TBML.²⁸⁹ Few of these qualities are addressed below.

3.3.3.4.2 The Nature of the URDG and the Risk of TBML

The URDG, which are the rules governing demand guarantees generally, do not address the risk of TBML at all.²⁹⁰ It should be noted that the ICC²⁹¹ that championed the creation of the URDG is a commercial body geared towards the promotion of international commerce as opposed to the control of financial crime.²⁹² Consequently, the organisation does not address the emerging financial-crime risk of TBML in trade finance under its URDG. The rules are, therefore, not fit for purpose when it comes to dealing with TBML in the trade-finance sector.

Similar to the UCP, the URDG also impose restrictive obligations on banks regarding the scope and nature of examination they can conduct on documents presented under demand guarantees.²⁹³ These restrictive obligations leave loopholes for a potential suspicious transaction involving TBML to slip through undetected.

3.3.3.4.3 The Independence of Demand Guarantees as a Vulnerability for TBML

Demand guarantees are stand-alone commitments made by a bank to facilitate a transaction involving the beneficiary and the guarantee applicant.²⁹⁴ The doctrines of independence and that of strict compliance equally apply to demand guarantees as they do to documentary credits.²⁹⁵ The hands-off approach underpinned by these

²⁸⁹ See para 3.3.3.6.2 et seq below.

²⁹⁰ See, generally, the URDG 758. See also para 3.3.3.5 above.

²⁹¹ See the Wolfsberg Group, ICC and BAFT (2019 Amendment) *Trade-Finance Principles* 5-6. For a detailed discussion regarding the contributions of the ICC, see Ch 4 para 4.4.2 below.

²⁹² See 'Introduction' to the URDG758. See also Hugo (2017) 1 *TSAR* 1 at 3 et seq; Tomashot *The History of the International Chamber of Commerce, 1919-1925* (unpublished PhD Thesis Georgia State University, 2015) passim.

²⁹³ See para 3.3.3.1 above.

²⁹⁴ See again para 3.3.3.1 above.

²⁹⁵ See para 3.3.2.3 and 3.3.3.3 above.

doctrines may work to the advantage of organised crime groups intend on abusing demand guarantees for TBML purposes.²⁹⁶

The URDG makes it clear that banks are concerned with documents and not goods.²⁹⁷ This injunction may work to the advantage of criminals that wish to abuse the demand guarantee particularly in the context of an international contract of sale. In this regard, a demand guarantee may be structured to justify the movement of illegal funds.²⁹⁸

3.3.3.4.4 The Abuse of Demand Guarantees by Organised Crime Groups

Although demand guarantees function differently from both documentary credits and collections, criminals may still find them easy targets in TBML schemes due to the perceived low risk of detection.²⁹⁹ A key part of the demand guarantee useful to professional money launderers is the payment component.³⁰⁰ It is the payment component that attracts money launderers to these hitherto less used methods.³⁰¹ Although a demand guarantee is not a payment instrument in the sense of a documentary credit, it secures payment in the event of non-performance.³⁰² Due to the need to obliterate the illegal money trail, money launderers are likely to use a demand guarantee for layering and integration purposes.³⁰³ Placement may also be resorted to at minimal levels because money launderers generally regard it as risky due to KYC processes at the inception of the banker-customer relationship.³⁰⁴

3.3.3.4.5 Contrived Demand-Guarantees Transactions for TBML

The biggest risk of TBML in demand guarantees, as in documentary credits,³⁰⁵ is that the entire demand-guarantee transaction may be created to present a legitimate

²⁹⁶ See Chhina (2016) 19 *JMLC* 158 at 159; Naheem *Exploring TBML* 115; and the Wolfsberg Group (2011) *Trade-Finance Principles* 32 et seq.

²⁹⁷ See Article 5 (a) of the URDG 758. See again para 3.3.3.3 above.

²⁹⁸ See para 3.3.2.6 et seq above.

²⁹⁹ See the Wolfsberg Group (2011) *Trade-Finance Principles* 3 et seq; FATF (2006) *TBML Report* 5.

³⁰⁰ See BAFT (2017) *Combatting TBML Report* 3.

³⁰¹ Ibid. See also JMLSG (2020) *Sectoral Guidance* 158 and Ch 2 para 2.3.4 above.

³⁰² See the Wolfsberg Group (2011) *Trade-Finance Principles* 32 et seq. See also para 3.3.3.1 above.

³⁰³ See JMLSG (2020) *Sectoral Guidance* 157. See also Ch 2 para 2.2.4.3 and para 2.2.4.4 above.

³⁰⁴ See Ch 2 para 2.2.4.2 above; JMLSG (2020) *Sectoral Guidance* 158. See also Cassara *Next Frontier* 14.

³⁰⁵ See para 3.3.2.4 et seq above.

picture that justifies the movement of illegal funds from one point to another.³⁰⁶ Consequently, real or fictitious grounds may be established to call upon the guarantee in order to make the guarantor sanitise a money-laundering scheme unknowingly.³⁰⁷ The fact that the trade-finance sector is the least likely environment for TBML makes it even more attractive for such schemes.³⁰⁸

3.3.3.4.6 Collusion to Abuse Demand Guarantees for TBML

In most TBML schemes, there is an element of collusion between the parties, a characteristic common in organised crime-group operations.³⁰⁹ The collusion of parties could be a possibility in facilitating TBML through demand guarantees.³¹⁰ Parties may collude to execute a demand guarantee in a standard way while doing so for abusive purposes. For instance, in pursuit of the collusive plan, the applicant may 'default' in performing under the underlying contract thereby causing the beneficiary to 'claim' under the demand guarantee. The entire process would appear legitimate yet contrived.³¹¹

The idea, from a TBML perspective, is to have legitimate transactions backed by justifiable paperwork explaining the trail of illegal funds that criminals can enjoy eventually.³¹² Criminals regard the circuitous route they take in having illegally-acquired funds appear 'clean' as worth it more than the risk of being arrested with 'dirty money'.³¹³

3.3.3.4.7 Type of Demand Guarantee as a Vulnerability for TBML

Generally, the mechanics of TBML are such that anything of value can be used to launder money.³¹⁴ In this regard, almost any form of guarantee may be used for TBML particularly where the parties are colluding for the sole benefit of abusing the demand

³⁰⁶ See JMLSG (2020) *Sectoral Guidance* 157; APG (2012) *Trade-Based Money Laundering Report* 45. For a discussion of the methods commonly used in TBML schemes, see Ch 2 para 2.3.4 above.

³⁰⁷ See again Ch 2 para 2.3.4 above.

³⁰⁸ See again Ch 2 para 2.3 et seq above.

³⁰⁹ See again Ch 2 para 2.3.4 above.

³¹⁰ See APG (2012) *Trade-Based Money Laundering Report* 84; the Wolfsberg Group (2011) *Trade-Finance Principles* 3.

³¹¹ See again Ch 2 para 2.3 et seq above.

³¹² See again Ch 2 para 2.3.4 above. On the operation of demand guarantees, see 3.3.3.1 above.

³¹³ See again Ch 2 para 2.2 and para 2.3 et seq above.

³¹⁴ See Baker *Capitalism* 25. See also Ch 2 para 2.3.4 et seq above.

guarantee for their illegal motives.³¹⁵ However, certain types of demand guarantees seem to be ready-made vehicles for TBML. For example, the advance payment guarantee³¹⁶ and the money retention guarantee³¹⁷ seem to be well designed for easy co-option in the operation of TBML. Two reasons can be given for this view.

First, an advance payment guarantee is designed to generate liquidity for the contractor so that they finance their establishment at the beginning of the project.³¹⁸ The beneficiary of an advance guarantee secures this type of guarantee to obtain a payment of the funds they would have paid in the event that the contractor fails to perform.³¹⁹ A simple demand by the beneficiary from the guarantor alleging that indeed the contractor has failed to perform is enough to obtain a payment of the funds advanced.³²⁰

An advance payment demand guarantee may, therefore, be obtained from the guarantor by colluding parties engaging in TBML.³²¹ The parties intending to sanitise their illegal funds under TBML may call upon the demand guarantee alleging failure to perform by the contractor just to obtain a 'clean' payment. There is a high probability that a guarantee may be sought for a non-existent contract.³²² By using shell companies created in tax havens, it is possible to present company documents that appear genuine just to facilitate the TBML scheme.³²³

Secondly, the money retention guarantee allows the beneficiary to keep a certain percentage of the value of the contract as security for the defects that may later be found in the project.³²⁴ In practice, the beneficiary generally pays the contractor the full amount of the contract as per the payment certificates and upon failure to perform by the contractor, they may call upon the guarantee.³²⁵ The possible risk of TBML in the

³¹⁵ See para 3.3.3.4.6 above.

³¹⁶ See para 3.3.3.2.4 above.

³¹⁷ See para 3.3.3.2.5 above.

³¹⁸ See Hugo 'Bank Guarantees' 444; Kim *Payment Methods* 146-147; and Grath *Handbook of International Trade* 90. See also para 3.3.3.2.4 above.

³¹⁹ See again 3.3.3.2.4 above.

³²⁰ See again para 3.3.3.2.4 above.

³²¹ See the Wolfsberg Group (2011) *Trade-Finance Principles* 22 et seq. See also APG (2012) *Trade-Based Money Laundering Report* 37. See again para 3.3.3.2.4 above.

³²² See Ch 2 para 2.3.4 above.

³²³ For a discussion of the use of shell companies and tax havens in TBML, see Ch 2 para 2.4.9 above.

³²⁴ See para 3.3.3.2.5 above.

³²⁵ See again para 3.3.3.2.5 above.

money retention guarantee is similar to that in the advance payment. Professional money launderers may construct the guarantee for the sole purpose of ‘cleaning’ illegally obtained funds.³²⁶ TBML is a complex form of money laundering whose execution requires some form sophistication only professional money launderers can attempt.³²⁷ Thus, a money retention guarantee may be sought just to facilitate payment of TBML funds.

3.3.3.5 Conclusion

Although a demand guarantee is not a payment instrument in the sense of a documentary credit, it secures payment in the event of non-performance.³²⁸ Just like in documentary credits, the risk of TBML is also available in demand guarantees.³²⁹ Demand guarantees are ideal for TBML due to the perceived low risk of abuse through money laundering associated with them.³³⁰ Professional money launderers may venture into demand-guarantee transactions for the sole purpose of abusing them.³³¹ A demand guarantee may also be sought to justify the movement of illicit funds from one person to another between colluding parties engaged in TBML.³³²

The URDG, which sometimes govern the operations of demand guarantees, does not address the risk of TBML. The rules impose restrictions on the remit of banks not to go beyond the demand guarantee transaction when examining documents.³³³ The doctrine of autonomy of credit equally applies to demand guarantees as it does to documentary credits.³³⁴ The hands-off approach underpinned by this doctrine may leave room for banks to be less relaxed when examining documents under demand guarantee transactions. This may have the effect of allowing possible TBML.³³⁵

Demand guarantee transactions may also be created for the purpose of facilitating TBML. Real or fictitious reasons may be raised to call upon the demand guarantee in

³²⁶ See JMLSG (2020) *Sectoral Guidance* 157; the Wolfsberg Group (2011) *Trade-Finance Principles* 22 et seq; and APG (2012) *Trade-Based Money Laundering Report* 37.

³²⁷ See again Ch 2 para 2.3 et seq above.

³²⁸ See para 3.3.3.1 above.

³²⁹ See para 3.3.3.4 et seq above.

³³⁰ See para 3.3.3.4.4 above.

³³¹ See again para 3.3.3.4.4 above.

³³² See para 3.3.3.4.6 above.

³³³ See para 3.3.3.4.2 above.

³³⁴ See para 3.3.3.4.3 above.

³³⁵ See again para 3.3.3.4.3 above.

order to trigger payment.³³⁶ The abuse of demand guarantees through TBML activities may be made even more possible when parties to the transaction are colluding.³³⁷ Organised crime groups desire the legitimacy offered by demand guarantee transactions to sanitise their illegal funds through TBML activities.³³⁸

There are various types of demand guarantees with varying degrees of weaknesses that may be exploited in TBML activities by professional money launderers.³³⁹ The advance payment guarantee, the money retention guarantee and the direct pay guarantee, are some of the types that may be more vulnerable to TBML activities.³⁴⁰ As payment conduits, banks need to be more alert when dealing with payments under demand guarantee transactions due to an increase in TBML activities in trade finance.

3.3.4 Documentary Collections

3.3.4.1 General

Documentary collections are also a common method of settling payments in international trade.³⁴¹ They are a preferred method between a buyer and seller whose levels of trust are good.³⁴² Documentary collections are also a compromise between risky payment methods such as open account and payment in advance.³⁴³ The collection service under documentary collections is provided by banks that act as intermediaries between the seller and buyer.³⁴⁴ Thus, a documentary collection is a method of payment whereby the bank of the seller and that of the buyer assist by handling and forwarding documents to the buyer against payment or acceptance of an enclosed draft or bill of exchange.³⁴⁵ The buyer should either pay or accept the bill or

³³⁶ See para 3.3.3.4.5 above.

³³⁷ See para 3.3.3.4.6 above.

³³⁸ See again para 3.3.3.4.6 above.

³³⁹ See para 3.3.3.4.7 above.

³⁴⁰ See again para 3.3.3.4.7 above.

³⁴¹ See Van Niekerk & Schulze *The South African Law of International Trade* para 2.4.1; Seyoum *Export-Import Theory* 231.

³⁴² See Van Niekerk & Schulze *The South African Law of International Trade* para 2.4.1; Bishop *Finance* 22.

³⁴³ See Hugo 'Financing of International Sale' 399; Eren 'Financing of International Trade' 264; and Seyoum *Export-Import Theory* 231.

³⁴⁴ See Hugo 'Financing of International Sale' 399; Eren 'Financing of International Trade' 262.

³⁴⁵ See Grath *Handbook of International Trade* 49; Eren 'Financing of International Trade' 262. For a brief description of the concept of draft, see para 3.3.2.1 above.

draft before they can gain control of the documents representing the goods in the sale.³⁴⁶

The role of banks in a documentary collection transaction is limited to the presentation of documents to the buyer without the responsibility that they will be honoured by them.³⁴⁷ The collection process is no guarantee by the banks, which act on behalf of the seller, that the buyer will pay once the documents are presented.³⁴⁸

A documentary collection has been defined as the handling of documents by banks in compliance with instructions received to receive payment and/or acceptance.³⁴⁹ In a collection process, a bank deals with two types of documents, namely, commercial and financial documents.³⁵⁰ Commercial documents include invoices, transport documents, documents of title or other similar documents that are not financial documents.³⁵¹ Financial documents include bills of exchange, promissory notes or other comparable methods for collecting payment for goods and services.³⁵²

A collection can either be a 'clean' or 'documentary' collection.³⁵³ A clean collection is defined as a collection of financial documents not accompanied by commercial documents.³⁵⁴ A documentary collection is a collection of financial documents accompanied by commercial documents or commercial documents not accompanied by financial documents.³⁵⁵

³⁴⁶ See Van Niekerk & Schulze *The South African Law of International Trade* para 2.4.1; Grath *Handbook of International Trade* 50.

³⁴⁷ See Van Niekerk & Schulze *The South African Law of International Trade* para 2.4.1; Bishop *Finance* 26; and Grath *Handbook of International Trade* 50.

³⁴⁸ See Hugo 'Financing of International Sale' 399; Van Niekerk & Schulze *The South African Law of International Trade* para 2.4.1; and Grath *Handbook of International Trade* 50.

³⁴⁹ See Article 2(a) of the URC 522. See also Grath *Handbook of International Trade* 49; Bishop *Finance* 22.

³⁵⁰ See Article 2 (b) of the URC 522. See also Murray *et al Schmitthoff's Export Trade* 179.

³⁵¹ See again Article 2 (b) of the URC 522. See also Murray *et al Schmitthoff's Export Trade* 179.

³⁵² See again Article 2 (b) of the URC 522. See also Van Niekerk & Schulze *The South African Law of International Trade* para 2.4.1; Eren 'Financing of International Trade' 262.

³⁵³ See Article 2 (c) and (d) of the URC 522. See also Van Niekerk & Schulze *The South African Law of International Trade* para 2.4.1.

³⁵⁴ See Article 2 (c) of the URC 522. See also Bishop *Finance* 27; Murray *et al Schmitthoff's Export Trade* 179.

³⁵⁵ See Article 2 (d) of the URC 522. See also Murray *et al Schmitthoff's Export Trade* 179; Eren 'Financing of International Trade' 262.

3.3.4.1.1 A Generic Documentary-Collection Process

A typical documentary collection process is initiated by the buyer and seller agreeing under the international sales contract.³⁵⁶ The seller will prepare financial and commercial documents and forward them to its bank (the remitting bank) with collection instructions.³⁵⁷ The remitting bank will forward the documents to its correspondent bank (the collecting bank) in the buyer's country together with the instructions of the seller to release the documents either against payment³⁵⁸ or acceptance or other terms.³⁵⁹ The collecting bank contacts the buyer so that the buyer effects payment or accepts the seller's draft. Where the seller's instruction is documents against payment, for example, the buyer will pay the collecting bank in exchange for the documents.³⁶⁰ The collecting bank will then transfer the funds to the remitting bank for payment to the seller.³⁶¹

3.3.4.2 Types of Payments in Collections

3.3.4.2.1 General

A seller should state in its collection instructions how they wish the buyer to pay them.³⁶² There are two types of payments under a documentary collection that the seller may choose from in the instructions. These are documents against payment or documents against acceptance.³⁶³ I briefly explain these two below.

3.3.4.2.2 Documents against Payment

A payment instruction that requires the buyer to pay against documents means that the bill is payable at sight.³⁶⁴ The duty of the collecting bank on receiving documents under the documents against payment collection is to check if it has received a

³⁵⁶ See Hugo 'Financing of International Sale' 394 et seq; Seyoum *Export-Import Theory* 231 et seq.

³⁵⁷ See Van Niekerk & Schulze *The South African Law of International Trade* para 2.4.1; Bishop *Finance* 23-26; and Grath *Handbook of International Trade* 49.

³⁵⁸ See para 3.4.3.5.2 below. See also Van Niekerk & Schulze *The South African Law of International Trade* para 2.4.1.

³⁵⁹ See para 3.3.4.2.3 below.

³⁶⁰ See para 3.3.4.2.2 below. See also Van Niekerk & Schulze *The South African Law of International Trade* para 2.4.1.

³⁶¹ See Seyoum *Export-Import Theory* 231; Hugo 'Financing of International Sale' 399.

³⁶² See Van Niekerk & Schulze *The South African Law of International Trade* para 2.4.1; Eren 'Financing of International Trade' 263; Grath *Handbook of International Trade* 50; and Bishop *Finance* 22.

³⁶³ See Grath *Handbook of International Trade* 50; Bishop *Finance* 22.

³⁶⁴ See Hugo 'Financing of International Sale' 399; Eren 'Financing of International Trade' 263.

complete set without checking individual documents.³⁶⁵ The collecting bank will have to hand over commercial and financial documents only when the buyer has effected payment.³⁶⁶ The seller usually keeps control of the goods through the presenting bank until the buyer pays.³⁶⁷ Once the buyer pays against the documents, the bank releases the documents to it to enable it to assume control over the goods.³⁶⁸

3.3.4.2.3 Documents against Acceptance

The seller may also instruct that the buyer accept the bill of exchange or the draft enclosed together with the documents as a show of commitment to pay.³⁶⁹ A documents against acceptance collection means that the seller allows the buyer to collect the documents and claim title to the goods without any payment as in documents against payment collection.³⁷⁰ However, the buyer is given a period to settle the transaction after the collection.³⁷¹ The period of the credit is the term of the bill of exchange or the draft. The buyer is expected to accept the bill of exchange or the draft by signing it indicating a date they will pay.³⁷² Once the buyer has accepted the bill of exchange or the draft, they can take ownership of the documents to clear the goods. The collecting bank will hold on to the bill of exchange or the draft until its maturity.³⁷³ On or before maturity of the bill of exchange or draft, the collecting bank will present it for payment. When the buyer pays, the collecting bank will have to remit the funds according to the instructions from the seller.³⁷⁴

3.3.4.3 Governance of Documentary Collections

The roles and responsibilities of both the remitting and collecting bank when dealing with documentary collections are set out in the ICC's Uniform Rules for Collections

³⁶⁵ See Van Niekerk & Schulze *The South African Law of International Trade* para 2.4.1; Bishop *Finance* 26.

³⁶⁶ See Bishop *Finance* 26; Hugo 'Financing of International Sale' 399.

³⁶⁷ See Van Niekerk & Schulze *The South African Law of International Trade* para 2.4.1; Eren 'Financing of International Trade' 263; Grath *Handbook of International Trade* 50; and Bishop *Finance* 22.

³⁶⁸ See Hugo 'Financing of International Sale' 399; Bishop *Finance* 22.

³⁶⁹ See Seyoum *Export-Import Theory* 231; Hugo 'Financing of International Sale' 399.

³⁷⁰ See para 3.3.4.2.2 above.

³⁷¹ See Van Niekerk & Schulze *The South African Law of International Trade* para 2.4.1; Grath *Handbook of International Trade* 50; and Bishop *Finance* 22.

³⁷² See Eren 'Financing of International Trade' 263.

³⁷³ See Grath *Handbook of International Trade* 50; Eren 'Financing of International Trade' 263.

³⁷⁴ See Seyoum *Export-Import Theory* 231.

(URC).³⁷⁵ Equally, the relationship between the seller, the remitting bank and the collecting bank is often governed by the URC.³⁷⁶

The URC's primary goal is to provide for common standards and uniformity in the collection process and practice.³⁷⁷ However, it should be noted that the URC, do not have the force of law.³⁷⁸ Therefore, they do not have automatic application to a documentary collection unless they have expressly been incorporated into the contract between the parties.³⁷⁹ Eren and Grath posit that the URC are internationally recognised and are used by practically all international banks around the world.³⁸⁰ On the contrary, Van Niekerk and Schulze are of the view that the URC has not yet reached the level of international acceptance enjoyed by the UCP, which govern the documentary credits.³⁸¹ I submit that indeed the URC has not yet reached the popularity levels of the UCP but this could largely depend on the wide acceptance of the instruments governed by these rules. In this regard, documentary collections are largely not as preferred as documentary credits due to the minimal security they offer to the seller among other reasons.

3.3.4.4 Possible Risks of TBML in Documentary Collections

3.3.4.4.1 General

Documentary collections are also prone to abuse through TBML. Unlike documentary credits,³⁸² demand guarantees,³⁸³ and the standby letter of credit,³⁸⁴ documentary collections are not independent undertakings. Banks facilitate payments through documentary collections under the ICC's rules called the URC or some other rules

³⁷⁵ See Van Niekerk & Schulze *The South African Law of International Trade* para 2.4.2; Eren 'Financing of International Trade' 260; and Bishop *Finance* 26.

³⁷⁶ See Van Niekerk & Schulze *The South African Law of International Trade* para 2.4.2. See also *Montani Lounge (Pty) Ltd v Standard Bank of SA Ltd* 1995 (2) SA 498 (W).

³⁷⁷ See Van Niekerk & Schulze *The South African Law of International Trade* para 2.4.2; Murray *et al Schmitthoff's Export Trade* 178-9; and Grath *Handbook of International Trade* 55.

³⁷⁸ See Murray *et al Schmitthoff's Export Trade* 178-9.

³⁷⁹ See Van Niekerk & Schulze *The South African Law of International Trade* para 2.4.2; Hugo 'Financing of International Sale' 400. For a contrasting view, see Bishop *Finance* 26 who contends that the URC comes into force immediately after the remitting bank accepts documents for collection from the seller.

³⁸⁰ See Eren 'Financing of International Trade' 260; Grath *Handbook of International Trade* 55.

³⁸¹ See Van Niekerk & Schulze *The South African Law of International Trade* para 2.4.2.

³⁸² See para 3.4.1 above.

³⁸³ See para 3.4.2 above.

³⁸⁴ See para 3.4.4 below.

parties may agree to.³⁸⁵ The extent of a bank's reviewing activity of a documentary collection transaction is, therefore, determined by its responsibility as governed by the ICC rules. It should be noted that the URC is fundamentally different from the UCP,³⁸⁶ the URDG³⁸⁷ and the International Standard Practice (ISP).³⁸⁸ The documentary collection has vulnerable aspects that make it exploitable for TBML. Some of these aspects are briefly discussed below.

3.3.4.4.2 The URC and the Risk of TBML

Although parties to a documentary collection transaction may choose to have their relationship governed by some other contract law principles, the URC generally govern such transactions.³⁸⁹ However, it should be noted that the URC is not designed to counter TBML.³⁹⁰ The URC, just like the UCP, promotes the smooth flow of a payment system to facilitate commerce.³⁹¹

If anything, the documentary collection rules are silent on the question of financial-crime risks, including the risk of TBML.³⁹² This makes the rules of less help in efforts to combat TBML in the financial sector.

3.3.4.4.3 Documentary Collections as Facilitation Tools for TBML

Documentary collections can also be a ready-made vehicle for TBML.³⁹³ The risk of TBML in documentary collections comes from the fact that such transactions may be constructed for the exclusive objective of transmitting funds of illegal origins with minimal suspicion.³⁹⁴

Documentary collections may be abused to facilitate TBML in that, documents; either real or fraudulent, may be prepared to justify the movement of ill-gotten funds.³⁹⁵

³⁸⁵ See para 3.3.4.3 above.

³⁸⁶ See again para 3.3.4.1 et seq above.

³⁸⁷ See again para 3.3.4.2 et seq above.

³⁸⁸ See para 3.3.4.4 et seq below.

³⁸⁹ See again para 3.3.4.3 above.

³⁹⁰ See again para 3.3.4.3 above.

³⁹¹ See again para 3.3.4.3 above.

³⁹² See generally the URC 522.

³⁹³ See the Wolfsberg Group (2011) *Trade-Finance Principles* 22 et seq; JMLSG (2020) *Sectoral Guidance* 157.

³⁹⁴ See JMLSG (2020) *Sectoral Guidance* 157; the Wolfsberg Group, ICC and BAFT (2019 Amendment) *Trade-Finance Principles* 47 et seq.

³⁹⁵ See BAFT (2015) *Guidance for Identifying Potentially Suspicious Activity in Letters of Credit and Documentary Collections* 1-16.

Organised crime groups, may create fictitious or real trading companies with no meaningful business activity, which can collude under a documentary collection.³⁹⁶ Such fictitious companies will then be used to transact and layer or integrate funds of illegal origins from one point to another.³⁹⁷ Collusion may be possible especially where both parties to a collection process are being controlled by one entity or individual masterminding the criminal activity.³⁹⁸

3.3.4.4.4 The Process of Documentary Collections as a Vulnerability for TBML

A documentary collection should be simple, inexpensive and fast.³⁹⁹ However, the simplicity of the collection activity makes it vulnerable to the risk of TBML because criminals can easily simulate the process. Banks become easy pawns for TBML in documentary collections where their integrity is regarded as capital by criminals that desire the outcome of 'clean' funds.⁴⁰⁰

The collection process, particularly a 'clean' collection appears to be a ready-made mechanism of transferring funds between different jurisdictions through TBML.⁴⁰¹ A clean collection asks for a collection of financial documents only without transport documents.⁴⁰² Financial documents, particularly the commercial invoice, are easy to forge and cannot be authenticated easily through independent third parties, as would be the case with bills of lading from shipping companies.⁴⁰³

A clean collection is likely to be abused for TBML where it is conducted under a document against payment instructions.⁴⁰⁴ A document against payment collection is a sight payment, which is faster than a payment against acceptance.⁴⁰⁵ Professional money launderers are likely to desire a process, which is faster in ensuring that funds

³⁹⁶ See Hataley (2020) *JMLC* 1 at 6 et seq; Chhina (2016) 19 *JMLC* 158 at 163-164. See also Ch 2 para 2.3.4 above.

³⁹⁷ See again Ch 2 para 2.3.4 et seq above.

³⁹⁸ See Baker *Capitalism* 33 et seq. See also Ch 2 para 2.4.9 above.

³⁹⁹ See Bishop *Finance* 22. See again para 3.3.4.1 above.

⁴⁰⁰ See the JMLSG (2020) *Sectoral Guidance* 157.

⁴⁰¹ See the Wolfsberg Group (2011) *Trade-Finance Principles* 22 et seq. See again para 3.3.4.1 above.

⁴⁰² See again para 3.3.4.1 above.

⁴⁰³ See Baker *Capitalism* 33; FCA (2013) *Financial-Crime Risks Report* 32.

⁴⁰⁴ See the Wolfsberg Group (2011) *Trade-Finance Principles* 22 et seq. See also para 3.3.4.2.2 above.

⁴⁰⁵ See again para 3.3.4.2.2 para above.

are released to the other party in order to minimise chances of detection.⁴⁰⁶ Thus, a clean collection with few documents coupled with a payment instruction against documents is likely to achieve that desired outcome.

3.3.4.4.5 Banks' Preoccupation with Complying Collections as a Vulnerability for TBML

The preoccupation by banks in ensuring that a collection simply complies with the stipulations of the instructing party may hinder its efforts in scrutinising the collection for potential TBML.⁴⁰⁷ It should be noted that banks in documentary collections are not obliged to scrutinise individual documents for compliance as they would typically do under documentary credits.⁴⁰⁸ They should simply check if a complete set of documents as per instructions have been received. Therefore, a detailed examination of the documents is unlikely since there are no terms that specify how the documents must be checked as is the case with documentary credits.⁴⁰⁹

Even in cases where a bank wishes to thoroughly examine documents for possible TBML, this may not be possible due to the fragmented process of the documentary collection.⁴¹⁰ There are several parties involved in the process, and each party's level of knowledge regarding the transaction varies.⁴¹¹ It is, therefore, rare for a single financial institution to have a complete overview of the process to be able to review the entire trade-finance process for TBML.⁴¹²

3.3.4.5 Conclusion

Professional money launderers may use unsuspecting banks in cleaning 'dirty funds' through a documentary collection process.⁴¹³ The less the probability of detection the more preferable a method becomes for TBML purposes.⁴¹⁴ Thus, due to the rarity of using documentary collections for money laundering, organised crime groups are

⁴⁰⁶ See Ch 2 para 2.3 et seq above.

⁴⁰⁷ See again para 3.3.4.1 above. See also Article 4 (a) 1 and 2 of the Uniform Rules for Collections ICC Publication No 522, Paris (1996) (URC522).

⁴⁰⁸ See Bishop *Finance* 26. See also Article 12 (a) and (b) of the URC 522.

⁴⁰⁹ See the Wolfsberg Group (2011) *Trade-Finance Principles* 28.

⁴¹⁰ Ibid.

⁴¹¹ Idem at 22 et seq.

⁴¹² Idem at 28-29.

⁴¹³ See again para 3.3.4.7 et seq above.

⁴¹⁴ See para 3.2.2 above.

more likely to resort to them to launder illegal funds and repatriate proceeds of crime to preferred jurisdictions for safekeeping.⁴¹⁵

Documentary collections are intended to provide a fast and cheap way of transmitting funds from one party to another.⁴¹⁶ The process is ideal where parties to it trust each other enough such that the risk of non-payment is at its lowest level. However, documentary collections may be created to facilitate TBML without meaningful legitimate transactions to back them.⁴¹⁷ Collusion between parties in typical organised crime groups operations may make this possible.⁴¹⁸

Documentary collections are meant to be simple processes with minimal documents accompanying them.⁴¹⁹ The simplicity of the documentary collection process and the documents required to enable payment to get through, makes the collection process vulnerable to TBML.⁴²⁰ The process can easily be replicated through fraudulent means by money launderers in TBML activities.⁴²¹ With forged documents, a clean collection where collection of financial documents are required may be desirable for TBML due to the speed the process offers.⁴²²

In scrutinising documents under documentary collections, banks may be more preoccupied with ensuring that collections comply with given instructions. This may be done at the expense of detecting financial crimes such as TBML.⁴²³ In any case, banks are not required to conduct a detailed examination of documents under documentary collections except to ensure that a complete set of documents as per instructions have been received.⁴²⁴ This may allow a possible TBML activity to pass through without detection by banks. The rules, which commonly govern documentary collections, the URC, make this worse because they do not address the risk of TBML in trade-finance transactions at all.⁴²⁵ Several parties are also involved in a typical documentary-

⁴¹⁵ See again para 3.2.2 above.

⁴¹⁶ See para 3.3.4.1 above.

⁴¹⁷ See para 3.3.4.4.3 above.

⁴¹⁸ See again para 3.3.4.4.3 above.

⁴¹⁹ See again para 3.3.4.1 above.

⁴²⁰ See para 3.3.4.4.4 above.

⁴²¹ See again para 3.3.4.4.4 above.

⁴²² See again para 3.3.4.4.4 above.

⁴²³ See para 3.3.4.4.5 above.

⁴²⁴ See again para 3.3.4.4.5 above.

⁴²⁵ See para 3.3.4.4.2 above.

collection process with banks having minimal information to act upon thereby leaving them exposed to TBML.⁴²⁶

3.3.5 The Standby Letter of Credit

3.3.5.1 General

The standby letter of credit is an adapted version of the documentary credit designed to serve as another type of guarantee.⁴²⁷ It developed in the US as a form of payment undertaking that is primary in nature but used mainly as a secondary or fallback mechanism of payment when the principal defaults in the underlying contract.⁴²⁸ Historically, banks in the US were prohibited from giving guarantees to their customers. As a way of circumventing the prohibition, they came up with the standby letter of credit.⁴²⁹ This standby letter of credit operated in the same manner as the prohibited guarantees and was issued under the Uniform Commercial Code (UCC).⁴³⁰ Although the prohibition is no longer in place, the majority of banks still use the standby letter of credit because they regard it as a familiar instrument compared to demand guarantees proper.⁴³¹ It should be noted that the standby letter of credit is not a general method of payment of goods as in the sense of documentary credits.⁴³² However, it is a method of payment applicable in default situations where, for example, a seller or buyer defaults in their obligation under the contract of sale.⁴³³

By way of a general definition, a standby letter of credit is a legal undertaking made by the issuer, usually the applicant's bank, to pay on demand a sum certain in money to the named beneficiary if the applicant defaults in their obligation to the beneficiary.⁴³⁴ Thus, when a bank issues a standby letter of credit it guarantees that it will cover the beneficiary for losses incurred due to the applicant's failure to perform its part as per

⁴²⁶ See again para 3.3.4.4.5 above.

⁴²⁷ See Kelly-Louw *Demand Guarantees* 76. See also para 3.3.2 above.

⁴²⁸ See Sifri *Standby Letters* 2; Kelly-Louw *Demand Guarantees* 76.

⁴²⁹ The US' National Bank Act of 3 June 1864 (as amended) prohibited US banks from issuing bank guarantees as part of their banking activities, see Kelly-Louw *Demand Guarantees* 76.

⁴³⁰ See Kelly-Louw *Demand Guarantees* 76-77; Article 5 of the UCC.

⁴³¹ See Klein (2007) 40 *Uniform Com Code Law* 125 at 128; Kelly-Louw *Demand Guarantees* 77.

⁴³² See Van Niekerk & Schulze *The South African Law of International Trade* para 3.1; Goode (1996) 22 *Brook J Int'l L* 1 at 14 et seq; and Kelly-Louw (2009) 21 *SA Merc L J* 306 at 307.

⁴³³ See Van Niekerk & Schulze *The South African Law of International Trade* para 3.1; Bhogal & Trivedi *International Trade Finance* 89; and Kelly-Louw *Demand Guarantees* 76-77.

⁴³⁴ See Sifri *Standby Letters* 6; Kelly-Louw *Demand Guarantees* 78.

the agreement with the beneficiary.⁴³⁵ The value of a standby letter of credit is held in reserve or is paid only as a form of penalty for non-compliance by the applicant with the condition in the underlying contract.⁴³⁶ Thus, a standby letter of credit is issued mainly to demonstrate a commitment to honour the underlying contract.⁴³⁷ The standby letter of credit is sometimes confused with both documentary credits and demand guarantees.⁴³⁸ There are indeed some similarities and differences between the instruments.⁴³⁹ The following are some of the types of the standby letter of credits.

3.3.5.2 Types of the Standby Letter of Credit

3.3.5.2.1 General

The standby letter of credit is classified according to its uses.⁴⁴⁰ There are no limits regarding the types of transactions that can be covered by the standby letter of credit. Therefore, a few types of the classifications are listed below only for purposes of giving a general appreciation of some of the types the standby letter of credit can assume.⁴⁴¹

3.3.5.2.2 Bid or Tender Standby Letter of Credit

This is an undertaking by the issuer or bank to pay compensation to the beneficiary in the event that the applicant fails to accept a contract awarded after a competitive bid.⁴⁴² This type of a standby letter of credit is normally issued to cover major construction projects that are awarded after competitive bidding that requires the submission of a tender standby letter of credit. The tender standby letter of credit is usual for the percentage of the total contract amount ranging between five to fifteen per cent of the total project.⁴⁴³

To receive payment under the tender standby letter of credit, the beneficiary simply submits a statement that notifies the bank that the applicant (tenderer) has defaulted

⁴³⁵ See Sifri *Standby Letters* 6; Kelly-Louw *Demand Guarantees* 76-77.

⁴³⁶ See Van Niekerk & Schulze *The South African Law of International Trade* para 3.1; Bhogal & Trivedi *International Trade Finance* 88.

⁴³⁷ See Van Niekerk & Schulze *The South African Law of International Trade* para 3.1; Bhogal & Trivedi *International Trade Finance* 88.

⁴³⁸ For a discussion of these later two, see para 3.3.2 and para 3.3.3 above respectively.

⁴³⁹ For such similarities and differences, see Kelly-Louw *Demand Guarantees* 76-77.

⁴⁴⁰ See Sifri *Standby Letters* 125; Kelly-Louw *Demand Guarantees* 78.

⁴⁴¹ See Kelly-Louw *Demand Guarantees* 78-79.

⁴⁴² See Sifri *Standby Letters* 125; Kelly-Louw *Demand Guarantees* 79.

⁴⁴³ See Kelly-Louw *Demand Guarantees* 79; Sifri *Standby Letters* 125.

and thus, wish to be paid in terms of the tender standby letter of credit.⁴⁴⁴ The rationale behind the tender standby letter of credit is to provide assurance to the party inviting tenders that it needs not worry about wasting its energy, time and money in evaluating tenders from different bidders.⁴⁴⁵ The tender standby letter of credit also protects the beneficiary from potential losses that may arise because of ignoring what could have been profitable and serious bids from other participating tenderers.⁴⁴⁶

3.3.5.2.3 Performance Standby Letter of Credit

A performance standby letter of credit is an undertaking by the issuer to pay compensation to the beneficiary for losses incurred because of the applicant's failure to fulfil an obligation previously agreed upon with the beneficiary in the undersigned contract.⁴⁴⁷ This type of a standby letter of credit gives support to an obligation to perform anyhow other than through payment of money. In other words, it supports a non-monetary obligation.

Failure to complete or fulfil the obligation in the underlying contract, for example, a construction contract, may cause the beneficiary to call upon the performance standby letter of credit.⁴⁴⁸ The performance standby letter of credit may include an obligation to make good, losses arising from the applicant's defaulting in the underlying contract, through payment. Thus, the performance standby letter of credit assures the beneficiary that in the event of the applicant failing to fulfil their commitments as per agreement, the bank will compensate the beneficiary.⁴⁴⁹

3.3.5.2.4 Commercial Standby Letter of Credit

This is an undertaking by the bank or issuer, to pay the beneficiary for goods already shipped or services rendered, in the event that the applicant defaults in paying by other means agreed upon with the beneficiary.⁴⁵⁰ For instance, it is common for sellers and buyers to arrange for a commercial standby letter of credit to support their sales in order to avoid complex documentation associated with payment methods such as

⁴⁴⁴ See Sifri *Standby Letters* 125-126.

⁴⁴⁵ See Kelly-Louw *Demand Guarantees* 79.

⁴⁴⁶ Ibid. See also Sifri *Standby Letters* 125-126.

⁴⁴⁷ See Kelly-Louw *Demand Guarantees* 79.

⁴⁴⁸ Ibid.

⁴⁴⁹ Sifri *Standby Letters* 126.

⁴⁵⁰ See Kelly-Louw *Demand Guarantees* 80; Sifri *Standby Letters* 127.

documentary credits.⁴⁵¹ In such situations, the seller usually issues an invoice directly to the buyer but will only draw under the commercial standby letter of credit once the buyer fails to honour payment in terms of the invoice.⁴⁵²

3.3.5.2.5 Financial Standby Letter of Credit

A financial standby letter of credit is an undertaking by the issuer to compensate the beneficiary in the event that the applicant fails to pay back a loan to the beneficiary.⁴⁵³ This type of standby letter of credit supports loan repayment obligations and it usually becomes payable when the beneficiary presents documents that prove or allege the applicant's default on the loan agreement.⁴⁵⁴

3.3.5.2.6 Direct Pay Standby Letter of Credit

A direct pay standby letter of credit is an undertaking by the issuer to make a direct payment to the beneficiary, a certain amount of money, upon demand.⁴⁵⁵ Payment under the direct pay standby credit is normally of the capital sum, interest, or both.

The direct pay standby letter of credit is intended to be the primary means of payment and may not be based on any default situation as a precondition for its calling.⁴⁵⁶ Thus, this type of standby credit supports payment of an underlying payment obligation when it becomes due without regard to a default.⁴⁵⁷

3.3.5.3 Governance of the Standby Letter of Credit

The standby letter of credit is largely governed by the ICC's ISP.⁴⁵⁸ The ISP is a reflection of generally accepted custom and usage in the operations of the standby letter of credit and can either be accepted or modified.⁴⁵⁹ The ISP can apply to both the domestic and international standby letter of credit and are not intended to apply to documentary credits. In other words, the ISP provides separate and specific rules for

⁴⁵¹ Kelly-Louw *Demand Guarantees* 80.

⁴⁵² Ibid.

⁴⁵³ See Sifri *Standby Letters* 128; Kelly-Louw *Demand Guarantees* 80.

⁴⁵⁴ See Kelly-Louw *Demand Guarantees* 80.

⁴⁵⁵ See Sifri *Standby Letters* 125.

⁴⁵⁶ See Kelly-Louw *Demand Guarantees* 81.

⁴⁵⁷ Ibid.

⁴⁵⁸ The latest of which is the ISP98, ICC Publication No.590.

⁴⁵⁹ See Kelly-Louw *Demand Guarantees* 28.

the standby letter of credit in the same way the UCP do for documentary credits and the URDG do for demand guarantees.⁴⁶⁰

The ISP rules do not define the standby letter of credit.⁴⁶¹ The absence of a specific definition for the standby letter of credit has been necessitated by the need to avoid the tedious and frequently challenging effort of differentiating the standby letter of credit from documentary credits.⁴⁶² Therefore, the ICC found it prudent not to provide a technical definition and left it to the industry to decide which instruments should be governed by the ISP.⁴⁶³

It should be noted, however, that despite the absence of a clear definition, the ISP mentions the terms 'standby'⁴⁶⁴ and 'standby letter of credit'⁴⁶⁵. These terms are used in two different senses in the ISP.⁴⁶⁶ An undertaking is a 'standby' for the purposes of the ISP if it indicates that it is governed by the ISP.⁴⁶⁷ For example, where a demand guarantee is issued subject to the ISP, it would be regarded as a 'standby' for purposes of the rules.⁴⁶⁸ As regards a standby letter of credit, this is the type of an independent undertaking for which the ISP rules are intended.⁴⁶⁹ It should be noted that sometimes the standby letter of credit can be issued subject to the UCP rules, which were designed specifically for documentary credits.⁴⁷⁰ However, this practice is not desirable in that more than half of the UCP articles do not apply to the standby letter of credit.⁴⁷¹

⁴⁶⁰ Ibid. See also Klein (2007) 40 *Uniform Com Code Law* 125 at 128; and Rule 1.01 of the ISP98.

⁴⁶¹ See Kelly-Louw *Demand Guarantees* 28.

⁴⁶² See Sifri *Standby Letters* 3; Kelly-Louw *Demand Guarantees* 28.

⁴⁶³ See Kelly-Louw *Demand Guarantees* 28.

⁴⁶⁴ See Rule 1.01 (d) of the ISP98.

⁴⁶⁵ See Rule 1.01 (b) of the ISP 98.

⁴⁶⁶ See Rule 1.11 (b) of the ISP98.

⁴⁶⁷ See Rule 1.01 (d) and Rule 1.11 (b) of the ISP98.

⁴⁶⁸ See Kelly-Louw *Demand Guarantees* 29.

⁴⁶⁹ See Rule 1.11 (b) of the ISP98.

⁴⁷⁰ See Kelly-Louw (2010) 2 *Speculum Juris* 1 at 12; Sifri *Standby Letters* 3.

⁴⁷¹ See Sifri *Standby Letters* 3. See also Kelly-Louw (2010) 2 *Speculum Juris* 1 at 12.

3.3.5.4 Possible Risks of TBML in the Standby Letter of Credit

3.3.5.4.1 General

The nature, operation and governance of the standby letter of credit has vulnerable points that make them ideal for exploitation through TBML.⁴⁷² A few of these weak points are discussed below.

3.3.5.4.2 The Nature of the ISP and the Risk of TBML

It should be noted that the ISP was not designed with the risk of TBML in mind.⁴⁷³ The rules were developed purely to facilitate transactions in the commercial world.⁴⁷⁴ With the risk of TBML threatening the smooth operation of trade-finance instruments, the ISP has a number of provisions that may run counter with the spirit and desire to effectively combat TBML. For example, the independent principle governing the standby letter of credit may hinder the depth with which financial institutions scrutinise transactions for TBML.⁴⁷⁵ When a beneficiary makes a compliant demand under a standby letter of credit, a financial institution has no option but to pay on the mere allegation that the applicant has defaulted in carrying out its obligation as per the underlying contract.⁴⁷⁶

In trying to fulfil its obligations under a transaction involving a standby letter of credit, a bank may find it difficult to also comply with its AML obligations generally.⁴⁷⁷ This is because the extent of the transactional review the bank may perform is limited to the flexibility allowable by the ISP.⁴⁷⁸ The level of AML due diligence the bank should employ in its transactions seems to be more rigorous than what is required of them when scrutinising a beneficiary's claim for compliance under a standby letter of credit.⁴⁷⁹ In this regard, it is submitted that when AML obligations are strictly applied by the bank they are likely to interfere with the smooth flow of commerce through trade

⁴⁷² See the Wolfsberg Group (2011) *Trade-Finance Principles* 32 et seq. See also para 3.4.4.6.2 et seq below.

⁴⁷³ See para 3.3.5.3 above.

⁴⁷⁴ See Sifri *Standby Letters* 9. See again para 3.4.4.5 above.

⁴⁷⁵ See the Wolfsberg Group (2011) *Trade-Finance Principles* 32 et seq. See again para 3.3.5.3 above.

⁴⁷⁶ See para 3.3.5.1 above.

⁴⁷⁷ See the Wolfsberg Group (2011) *Trade-Finance Principles* 32 et seq; Chhina (2016) 19 *JMLC* 158 at 164.

⁴⁷⁸ See the Wolfsberg Group (2011) *Trade-Finance Principles* 33.

⁴⁷⁹ See Naheem *Exploring TBML* 107; Chhina (2016) 19 *JMLC* 158 at 164.

finance. There is a need, therefore, to strike a balance when assessing the risk of TBML and allowing the trade-finance instrument to function as desired in commerce.

3.3.5.4.3 Some ISP98 Provisions as a Vulnerability for TBML

Some provisions of the ISP98 make it possible for a typical transaction involving TBML to pass through without detection.⁴⁸⁰ For example, where a financial institution is involved in a transaction with a standby letter of credit as an issuer it does not bear any responsibility where it honours a false or fraudulent claim by the beneficiary as long as it complies with the terms and conditions of the credit.⁴⁸¹

Even in situations where the issuer has doubts about the beneficiary's presentation, it has to pay as long as the presentation complies with the terms of the standby credit.⁴⁸² Of course, such payments cannot be made when it is apparent that fraudulent activities are taking place. The standby letter of credit is also subject to the fraud exception just like the documentary credit.⁴⁸³

3.3.5.4.4 Banks Generally Obligated to Pay on Compliant Claim

The possibility that a bank may pay on a fraudulent but compliant claim, without consequences, may give room for possible TBML transactions being conducted through the bank.⁴⁸⁴ Most TBML operations, in general, rely on the falsification of documents and fraudulent dealing to facilitate the illegal transaction.⁴⁸⁵ This makes it easy for the money launderer in that, in terms of the ISP the issuer of a standby credit bears no responsibility for the genuineness of any document presented under the credit.⁴⁸⁶ Such exculpatory provisions under the ISP weaken the possibility of banks being held liable for facilitating criminal activities such as TBML.

⁴⁸⁰ See again para 3.3.5.3 above.

⁴⁸¹ See Rule 1.08(a) of the ISP98.

⁴⁸² See Sifri *Standby Letters* 17.

⁴⁸³ See para 3.3.5.1 above.

⁴⁸⁴ See Sifri *Standby Letters* 196. See also Rule 1.05 of the ISP98.

⁴⁸⁵ See again Ch 2 para 2.3.4 et seq above.

⁴⁸⁶ See Rule 1.08(b) of the ISP98.

3.3.5.4.5 Transferability of a Standby Letter of Credit as a Vulnerability for TBML

Where the standby letter of credit is issued as being ‘transferable’,⁴⁸⁷ it may also be useful for TBML. The fact that a standby credit may be transferable makes it useful for the layering or integration of the proceeds of crime.⁴⁸⁸ The ISP allows the beneficiary of the credit to transfer its drawing rights to a third party.⁴⁸⁹ The introduction of a third party makes the whole transaction more complex than before and difficult to scrutinise for TBML. Where the beneficiary intends to have the standby credit transferable, the credit must only be transferred in its entirety and cannot be transferred in parts.⁴⁹⁰

The term ‘transfer’ under the ISP should be distinguished from the phrase ‘assignment of proceeds’. The latter does not confer the right to draw on the standby letter of credit to a third party but merely gives the right to receive proceeds of the standby letter of credit already drawn by the original beneficiary.⁴⁹¹ The fact that a standby letter of credit is transferable to a third party may be ideal to the layering technique under TBML.⁴⁹² Thus, the quality of being issued as ‘transferable’ in itself makes a standby letter of credit open for abuse by potential money launderers through TBML.

3.3.5.4.6 The Possibility of Fictitious Transactions to Facilitate TBML

The biggest risk of TBML under standby letter of credit transactions is that fictitious business deals may be set up only for purposes of making dubious demands for payment after the applicant’s ‘default’.⁴⁹³

Standby letter of credit transactions can be a good mechanism for the layering and integration techniques in a typical TBML process.⁴⁹⁴ Thus, a standby letter of credit may be structured for the sole criminal purpose of distancing criminal proceeds either already in the financial system or in bringing them back in the mainstream economy.⁴⁹⁵

⁴⁸⁷ See Sifri *Standby Letters* 100. See also Rule 6.01 of the ISP98.

⁴⁸⁸ See again Ch 2 para 2.2.4.3 and para 2.2.4.4 above.

⁴⁸⁹ See again Rule 6.01 of the ISP98.

⁴⁹⁰ See Rule 6.02(b) (ii) of the ISP98.

⁴⁹¹ See Sifri *Standby Letters* 100.

⁴⁹² See again Ch 2 para 2.2.4.3 above.

⁴⁹³ See JMLSG (2020) *Sectoral Guidance* 157; APG (2012) *Trade-Based Money Laundering Report* 68. See again Ch 2 para 2.3.4 above.

⁴⁹⁴ See Cassara *Next Frontier* 14; JMLSG (2020) *Sectoral Guidance* 158.

⁴⁹⁵ See again Ch 2 para 2.2.4.3 and para 2.2.4.4 above.

3.3.5.4.7 Payment Arrangement as a Vulnerability for TBML

Payment is a necessary ingredient in the money-laundering process because it deals with the core aspect of money for which criminals are interested.⁴⁹⁶ Some types of standby letter of credits may allow TBML-related payments to be made without detection. For example, the direct pay,⁴⁹⁷ commercial,⁴⁹⁸ and financial standby letter of credit⁴⁹⁹ may all be ready-made vehicles for TBML payments since they deal with money payments. A direct pay standby letter of credit can be abused by making a bank participate in illegal transactions created only for the purpose of ensuring that money is regularly paid to a particular recipient under the guise of a loan repayment.⁵⁰⁰ Thus, the direct pay is a good way to repatriate criminal proceeds between two participating criminal groups disguised as legitimate business partners.⁵⁰¹

3.3.5.4.8 Collusion by Organised Crime Groups in TBML

Organised crime groups may also use the financial standby letter of credit for the sole purpose of demanding upon it after a 'failed' loan repayment exercise, which may be non-existent in the first place.⁵⁰² The rationale for using such complex structures is to produce 'clean money' from a process that is generally regarded as legitimate by law enforcement authorities. It is easy to explain and justify ill-gotten funds when asked by law enforcement authorities particularly where seemingly legitimate participants and processes are involved.⁵⁰³ This is easy to undertake particularly where the parties involved in the financial standby letter of credit are colluding. Collusion would make both ends of the transaction seem legitimate by producing evidence corroborating each other even though such evidence will either be contrived or outright false.

⁴⁹⁶ See again Ch 2 para 2.2 et seq.

⁴⁹⁷ See para 3.3.5.2.6 above.

⁴⁹⁸ See para 3.3.5.2.4 above.

⁴⁹⁹ See para 3.3.5.2.5 above.

⁵⁰⁰ See again para 3.3.5.2.6 above.

⁵⁰¹ See again Ch 2 para 2.2.4.4 above.

⁵⁰² See Sifri *Standby Letters* 100. See also Baker *Capitalism* 43; and Hataley (2020) *JMLC* 1 at 6 et seq.

⁵⁰³ See again Ch 2 para 2.2 et seq above.

3.3.5.5 Conclusion

The standby letter of credit is a payment instrument in default situations, which is good for global commerce.⁵⁰⁴ It is useful in situations where the other party fails to perform as per agreement. However, its operations may be under threat due to the emergence of the risk of TBML.⁵⁰⁵ The nature, operation and governance of the standby letter of credit may have weak points for TBML.⁵⁰⁶

The ISP98 rules are designed to facilitate the smooth flow of commercial activities rather than to combat TBML.⁵⁰⁷ In complying with the requirements under the ISP in settling payments, banks may find it difficult comply with AML obligations against TBML due to restrictions under the rules.⁵⁰⁸ Additionally, in trying to pay on compliant claims, banks may find themselves unwittingly paying claims that are fraudulent and/or involving TBML.⁵⁰⁹ Some of the provisions of the ISP absolve banks of responsibility when they pay on compliant claims but that are based on fraudulent documents.⁵¹⁰ Such provisions may encourage banks to be less concerned about consequences that may befall them if they facilitate TBML through fraudulent claims unknowingly.⁵¹¹

Sometimes a standby letter of credit may be issued as 'transferable' whereby a beneficiary may be allowed to transfer its drawing rights to a third party.⁵¹² A transferable standby letter of credit may pose TBML vulnerabilities to banks because it makes the transaction more complex and difficult to examine for money laundering.⁵¹³ Besides being issued as 'transferable', a standby letter of credit may be used to facilitate TBML through fictitious transactions.⁵¹⁴ The layering and integration processes of money laundering may be realised through the standby letter of credit. A

⁵⁰⁴ See para 3.3.5.1 above.

⁵⁰⁵ See para 3.3.5.4 et seq above.

⁵⁰⁶ See para 3.3.5.4 et seq above.

⁵⁰⁷ See para 3.3.5.4.2 above.

⁵⁰⁸ See again para 3.3.5.4.2 above.

⁵⁰⁹ See para 3.3.5.4.4 above.

⁵¹⁰ See again para 3.3.5.4.4 above.

⁵¹¹ See again para 3.3.5.4.4 above.

⁵¹² See para 3.3.5.4.5 above.

⁵¹³ See again para 3.3.5.4.5 above.

⁵¹⁴ See para 3.3.5.4.6 above.

standby letter of credit may be called upon only for the purpose of ‘cleaning’ and transmitting illegal funds between colluding parties.⁵¹⁵

Certain types of the standby letter of credit may also be more prone to TBML than others.⁵¹⁶ The direct pay, commercial and financial standby letter of credit may provide a ready-made conduit for TBML due to their operational vulnerabilities.⁵¹⁷ Having reviewed the selected trade-finance instruments and their associated risk of TBML, it is pertinent to briefly discuss how a TBML defence framework in the banking sector may be designed and deployed.⁵¹⁸ The following paragraphs are an attempt to explore a possible defence framework that banks can rely on in combatting TBML.

3.4 GENERAL DEFENCE FRAMEWORK AGAINST TBML

3.4.1 General

This section gives an overview of the possible or ideal defence framework against TBML as gleaned from various sources.⁵¹⁹ Combatting TBML in the banking sector requires that banks adopt an appropriate defence framework that captures the nuances of TBML.⁵²⁰ Thus, this section commences by giving an overview of the factors that may be necessary in designing a defence framework for TBML in the banking sector.⁵²¹ It then proceeds to discuss how the risk of TBML may be assessed in the banking system. After an assessment of the risk, it is necessary to detect TBML activities. The section concludes by reviewing the aspect of TBML detection and what needs to be factored in the process.

3.4.2 Designing an Appropriate Response to TBML for Financial Institutions

3.4.2.1 General

A well-designed defence framework against TBML in trade finance is necessary.⁵²² TBML has features that cut across trade and finance.⁵²³ This creates difficulties when

⁵¹⁵ See para 3.3.5.4.8 above.

⁵¹⁶ See para 3.3.5.4.7 above.

⁵¹⁷ See again para 3.3.5.4.7 above.

⁵¹⁸ See para 3.4 below.

⁵¹⁹ See para 3.4.2 et seq below.

⁵²⁰ See para 3.4.2.2 below.

⁵²¹ See para 3.4.2.2 below.

⁵²² See Chhina (2016) 19 *JMLC* 158 at 161 et seq; Naheem *Exploring TBML* 134 et seq.

⁵²³ See again Ch 2 para 2.3 et seq above. See also para 3.3 et seq above.

designing an appropriate model of defence for banks to use against TBML. Generally, traditional AML programmes used by banks are designed for cash transactions without an element of trade in mind.⁵²⁴ The FATF has issued best practices guidance to combat TBML in trade finance but it has issued no specific recommendation for the problem.⁵²⁵

Two approaches have been proposed to deal with TBML. One is to incorporate the TBML element in the current AML programmes.⁵²⁶ The second is to come up with a completely new design of the law and the models dealing with the challenge of TBML.⁵²⁷ This study argues that in the absence of a specific law against TBML, or recommendation from the FATF itself, it is better for South Africa to find ways of dealing with TBML using current AML regimes.⁵²⁸ In any jurisdiction, including South Africa, banks are essential in detecting money-laundering activity.⁵²⁹ They remain a significant stakeholder and are still at the forefront of detecting money-laundering activities in general.⁵³⁰ The classical description of the money-laundering process fits perfectly well in the way TBML operates.⁵³¹

However, TBML may not follow all the three stages of money laundering in a clearly defined manner.⁵³² Two factors are worth noting in this regard. First, by moving tainted money through value in goods there may be no placing of cash into the banking system

⁵²⁴ See Schott *Reference Guide to Anti-Money Laundering* VI-1 et seq. See also Naheem *Exploring TBML* 129. See also Ch 5 para 5.3.4; Ch 6 para 6.3.4; Ch 7 para 7.3.4; and Ch 8 para 8.3.4 below.

⁵²⁵ See FATF (2008) *Best Practices on TBML* passim; Hoffmann (2013) 48 *Tex Int'l L J* 326 at 330 et seq. See also Ch 4 para 4.3.2 et seq above; Ch 9 para 9.16 below; and Ch 10 para 10.2.18 below.

⁵²⁶ See Naheem *Exploring TBML* 135 et seq; McSkimming (2010) 15 *Deakin L Rev* 37 at 63. This what has been largely followed by jurisdictions considered in this study, including South Africa, see Ch 5 para 5.3.4; Ch 6 para 6.3.4; Ch 7 para 7.3.4; and Ch 8 para 8.3.4 below.

⁵²⁷ See Hoffmann (2013) 48 *Tex Int'l L J* 326 at 330 et seq. Since TBML is just a variation of money laundering in general, most jurisdictions have not seen the wisdom of passing completely new AML laws specific to TBML since it could be addressed adequately using current laws, see Ch para 2.2 et seq above; Ch 5 para 5.3.4; Ch 6 para 6.3.4; Ch 7 para 7.3.4; and Ch 8 para 8.3.4 below.

⁵²⁸ See Ch 5 para 5.3.4 below. See also Ch 6 para 6.3.4; Ch 7 para 7.3.4; Ch 8 para 8.3.4 below; Ch 9 para 9.16 below; and Ch 10 para 10.2.18 below.

⁵²⁹ See Van Jaarsveld *Money Laundering* 178 et seq; Levi & Reuter (2006) 34 *Crime and Justice* 289 at 290 et seq; and De Koker (2004) 4 *TSAR* 715 at 715 et seq. See also Ch 5 para 5.3.4 below.

⁵³⁰ See Van Jaarsveld *Money Laundering* 178 et seq; Naheem *Exploring TBML* 127.

⁵³¹ See Ch 2 para 2.2 et seq and para 2.3 et seq above.

⁵³² See Ch 2 para 2.2.4 et seq above. See also Cassara *Next Frontier* 14; JMLSG (2020) *Sectoral Guidance* 158.

in the traditional way.⁵³³ Instead, trade-finance instruments may be used or the cash may have been converted into goods before even contemplating placing it with a bank.⁵³⁴ Secondly, in TBML transactions the layering and integrating of money being laundered are ongoing processes through a series of trade transactions that are either real or fictitious.⁵³⁵ Such transactions may occur with an international dimension to them cutting across different countries, trade zones and correspondent banking relationships.⁵³⁶

3.4.2.2 Considerations in Designing the Framework against TBML

One of the biggest challenges for banks dealing with TBML is that tainted money can be deposited in a bank using legitimate front businesses.⁵³⁷ In order to understand how TBML affects the operations of banks, it is necessary to appreciate how trade finance facilitates legitimate trade transactions.⁵³⁸ For the major part of their activities, banks provide trade finance by using standard trade documents that leave vulnerable areas for TBML to occur.⁵³⁹ The term ‘TBML’ has become a widely used one.⁵⁴⁰ As defined by the FATF, TBML “covers multiple areas outside the scope of trade finance”⁵⁴¹ for which the current study does not cover.⁵⁴² Thus, TBML is a distinctive form of money laundering different from smuggling or cash-based forms of laundering using the financial system.⁵⁴³ Under this type of money laundering, criminals employ different methods to launder money through value transfer.⁵⁴⁴ This makes it difficult for banks to effectively detect and report suspicious transactions related to this crime. Banks deal with documents, not goods, services, or performances to which the documents

⁵³³ See Naheem *Exploring TBML* 134-135. See again Ch 2 para 2.3 et seq above.

⁵³⁴ On the possible abuse of trade-finance instruments through TBML, see para 3.3 et seq above.

⁵³⁵ See Cassara *Next Frontier* 14; JMLSG (2020) *Sectoral Guidance* 158. See again Ch 2 para 2.3 et seq above.

⁵³⁶ See Naheem *Exploring TBML* 127. See again Ch 2 para 2.3 et seq above.

⁵³⁷ See Naheem *Exploring TBML* 103. See also Ch 2 para 2.5.3.5 above.

⁵³⁸ See para 3.2 above.

⁵³⁹ See Naheem *Exploring TBML* 104. See para 3.3 et seq above.

⁵⁴⁰ See again Ch 2 para 2.3 et seq above.

⁵⁴¹ See the Wolfsberg Group, ICC and BAFT (2017) *Trade-Finance Principles* 8. See also FATF (2006) *TBML Report* passim and Ch 2 para 2.4 et seq above, for other sectors that can be impacted upon by TBML outside trade-finance instruments or in combination with them.

⁵⁴² See again para 3.3 above. See also Ch 2 para 2.3 et seq above and Ch 1 para 1.8 above.

⁵⁴³ See Naheem *Exploring TBML* 134-135; Cassara *Next Frontier* 3 et seq. See again Ch 2 para 2.3 et seq above.

⁵⁴⁴ See again Ch 2 para 2.3.4 et seq above.

may be connected.⁵⁴⁵ In other words, banks do not deal with the physical goods in the same way merchants do and do not have the expertise to do so. It is this overriding principle that defines and limits the level of scrutiny banks can bring to the identification of unusual activities involving trade-finance transactions.⁵⁴⁶

Before designing and implementing a comprehensive framework against TBML for the trade-finance sector, there is a need to understand how TBML affects banking operations.⁵⁴⁷ Financial institutions should develop their own understanding of TBML as it applies to their work.⁵⁴⁸ This aspect is central to the concept of the RBA as recommended by the FATF.⁵⁴⁹ For example, the tracking of illegally obtained money placed in a bank in contemplation of TBML operations is difficult because such money would have “potentially been integrated into the system before it is placed in a bank.”⁵⁵⁰ Thus, there is a need to design an appropriate AML framework that captures the non-traditional aspects of money laundering exhibited by TBML.

3.4.2.3 Adopting Financial-Sector AML Framework for TBML

In the absence of specific guidance at the international level regarding TBML, it has been suggested that policy makers adapt and apply AML strategies specific to the financial sector to TBML.⁵⁵¹ This suggested approach, however, raises a further significant question of whether the AML measures designed for the financial sector are suitable for TBML. In attempting to address the first question, McSkimming argues that the current AML measures applicable in the financial sector are inadequate in addressing TBML.⁵⁵² This view finds support in Liao and Acharya who contend that the available measures such as the KYC procedures would not be sufficient to counter TBML.⁵⁵³ They attribute the insufficiency to the fact that TBML is still a new threat against which less attention has been paid to date.⁵⁵⁴ Although these views have some

⁵⁴⁵ See again para 3.3 et seq above.

⁵⁴⁶ See the Wolfsberg Group, ICC and BAFT (2017) *Trade-Finance Principles* 9; Chhina (2014) 29 *JIBLR* 665 at 668.

⁵⁴⁷ See again para 3.2 and para 3.3 above.

⁵⁴⁸ See Naheem *Exploring TBML* 117. See also Chhina (2016) 19 *JMLC* 158 at 160 et seq.

⁵⁴⁹ See Recommendation 1 of the FATF (2012) *Standards*. See also para 3.4.4.3 below.

⁵⁵⁰ See Naheem *Exploring TBML* 128.

⁵⁵¹ See Chhina (2014) 29 *JIBLR* 665 at 668. See also Hoffmann (2013) 48 *Tex Int'l L J* 326 at 343; McSkimming (2010) 15 *Deakin L Rev* 37 at 39-40.

⁵⁵² See McSkimming (2010) 15 *Deakin L Rev* 37 at 39

⁵⁵³ See Liao & Acharya (2011) 14 *JMLC* 79 at 85.

⁵⁵⁴ *Ibid.*

merits, they are not entirely correct. The conventional AML framework does not adequately account for the trade component of TBML. However, in the trade-finance sector, the traditional AML frameworks can be adapted to directly address the trade component of TBML.⁵⁵⁵

3.4.2.4 Modification of the General AML Framework for TBML

In the absence of a well-structured framework against TBML, current AML frameworks for money laundering may be adapted for TBML.⁵⁵⁶ Since most countries, including South Africa, do not separately monitor and keep records on TBML, an ideal AML framework should be a modification of the one for money laundering in general.⁵⁵⁷ Liao and Acharya note that one way of addressing the problem of TBML is to adopt and adapt the general approach of financial institutions in cash-based money laundering.⁵⁵⁸ The majority of TBML activities occur outside financial institutions.⁵⁵⁹ Therefore, such activities are not detectable through methods that are solely developed to monitor money laundering within the financial institutions.⁵⁶⁰ To effectively detect TBML in the financial sector, there is a need for a robust system of information sharing with other players in the international trade chain.⁵⁶¹

3.5 CONCLUSION

Trade finance has been regarded as a secure form of payment in international trade.⁵⁶² However, with stringent money-laundering controls being put in place, organised crime groups have shifted their focus to less regulated sectors such as international trade.⁵⁶³ TBML has emerged as a threat for both financial institutions and players in the international trade.⁵⁶⁴ The key risk of TBML in trade-finance instruments is that these

⁵⁵⁵ See para 3.2 above. See also Ch 5 para 5.3.4; Ch 6 para 6.3.4; Ch 7 para 7.3.4; and Ch 8 para 8.3.4 below.

⁵⁵⁶ See Ch 5 para 5.3.4; Ch 6 para 6.3.4; Ch 7 para 7.3.4; and Ch 8 para 8.3.4 below.

⁵⁵⁷ See Sullivan & Smith (2012) *Australian Institute of Criminology* 4. See also APG (2012) *Trade-Based Money Laundering Report* 23.

⁵⁵⁸ Liao & Acharya (2011)14 *JMLC* 79 at 89.

⁵⁵⁹ See again Ch 2 para 2.3 et seq above.

⁵⁶⁰ See Liao & Acharya (2011)14 *JMLC* 79 at 86. See also McSkimming (2010) 15 *Deakin L Rev* 37 at 50.

⁵⁶¹ See Liao & Acharya (2011)14 *JMLC* 79 at 86. See also Ch 9 para 9.14 below and Ch 10 para 10.2.14 below.

⁵⁶² See para 3.1 above.

⁵⁶³ See again para 3.1 above. See also para 3.2.2 above.

⁵⁶⁴ See again para 3.2.2 above.

instruments may be abused to justify the movement of illegal funds from one point to another.⁵⁶⁵

Financial institutions play a significant role in facilitating international trade through trade finance.⁵⁶⁶ In the process of facilitating payments in international trade, financial institutions risk being entangled in TBML. Organised crime groups find the use of trade-finance instruments as a convenient way to launder illegal funds through TBML.⁵⁶⁷ In exercising their payment role, financial institutions are central to money-laundering control in that they can put preventive safeguards against TBML through AML defence frameworks.⁵⁶⁸

This chapter has reviewed selected trade-finance instruments and their associated risks of TBML.⁵⁶⁹ The chapter has attempted to show that depending on the structure or operation of each instrument, there is a possibility of abuse through TBML.⁵⁷⁰ The use of trade-finance instruments for TBML purposes seems to be mainly motivated by the attraction of legitimacy afforded by the instruments. The entire trade-finance transaction may be structured to facilitate a non-existent transaction. Fraudulent documents and shell companies may also be employed in such TBML schemes.⁵⁷¹ In a typical trade-finance operation, bank officials rarely check for the abuse of the instruments for TBML purposes.⁵⁷² In any case, the rules governing these instruments seem to restrict the remit of financial institutions in trying to detect TBML.⁵⁷³ Depending on the need of the money launderer, trade-finance instruments may be used at any stage of the TBML process from placement, layering to integration of illegal funds.⁵⁷⁴

TBML in trade-finance instruments can be intercepted within financial institutions in the same way traditional money laundering can be combatted.⁵⁷⁵ There is a need for financial institutions to be alive to the threat of TBML through developing preventive

⁵⁶⁵ See para 3.3 above.

⁵⁶⁶ See para 3.2.3 above.

⁵⁶⁷ See again para 3.3 above.

⁵⁶⁸ See again para 3.2.3 above. See also para 3.4.1 above.

⁵⁶⁹ See again para 3.3 et seq above.

⁵⁷⁰ See again para 3.3 et seq above.

⁵⁷¹ See Ch 2 para 2.4.9 above.

⁵⁷² See again para 3.2.3 above. See also para 3.3 et seq above.

⁵⁷³ See para 3.3.2 et seq above.

⁵⁷⁴ See again para 3.3 et seq above. See also Ch 2 para 2.2.4 above.

⁵⁷⁵ See para 3.4 et seq above.

measures for the challenge.⁵⁷⁶ A properly designed defence framework against TBML is necessary to prevent financial institutions from being used in money-laundering operations by organised crime-groups.⁵⁷⁷ Current AML defence frameworks are generally designed for traditional money laundering.⁵⁷⁸ This generally ignores emerging forms of money laundering such as TBML. To worsen matters, there is also no specific recommendation from the FATF designed for financial institutions to use in TBML situations.⁵⁷⁹ Thus, each jurisdiction seems to employ its national laws and models to try to combat TBML within financial institutions.⁵⁸⁰ There is a need, therefore, for a model AML defence framework for financial institutions, which incorporates the element of TBML.⁵⁸¹ Such a defence framework should be anchored on the general AML framework for traditional money laundering coupled with some modifications meant for TBML.⁵⁸² The documentary nature of the trade-finance processes means that a framework against TBML should aim to stop the illegal process through a strong documentary-review process and other supporting measures such as technology-enabled solutions.⁵⁸³

Close cooperation between and/or among domestic and international players against TBML is necessary to minimise the rate at which the problem affects institutions across the globe.⁵⁸⁴ A global response to the challenge of TBML in trade-finance transactions will also likely set the tone for domestic jurisdictions to respond in the like manner.⁵⁸⁵ The next chapter, therefore, is a discussion of that global response to TBML.

⁵⁷⁶ See Ch 5 para 5.3.4; Ch 6 para 6.3.4; Ch 7 para 7.3.4; and Ch 8 para 8.3.4 below.

⁵⁷⁷ See again para 3.4 et seq above.

⁵⁷⁸ See Ch 5 para 5.3.4; Ch 6 para 6.3.4; Ch 7 para 7.3.4; and Ch 8 para 8.3.4 below.

⁵⁷⁹ See Ch 4 para 4.3.2 et seq below. See also Ch 9 para 9.16 below.

⁵⁸⁰ See Ch 5 para 5.3.4; Ch 6 para 6.3.4; Ch 7 para 7.3.4; and Ch 8 para 8.3.4 below.

⁵⁸¹ See para 3.4.2 above. See also Ch 5 para 5.3.4; Ch 6 para 6.3.4; Ch 7 para 7.3.4; and Ch 8 para 8.3.4 below.

⁵⁸² See para 3.4.2.2 above. See also Ch 5 para 5.3.4; Ch 6 para 6.3.4; Ch 7 para 7.3.4; and Ch 8 para 8.3.4 below.

⁵⁸³ See again para 3.4.2 above. See also Ch 5 para 5.3.4; Ch 6 para 6.3.4; Ch 7 para 7.3.4; and Ch 8 para 8.3.4 below.

⁵⁸⁴ See Ch 4 below generally.

⁵⁸⁵ See Ch 4 below generally.

CHAPTER 4: INTERNATIONAL INITIATIVES AND ORGANISATIONAL RESPONSES TO TBML IN TRADE-FINANCE INSTRUMENTS

4.1 GENERAL

“If crime crosses borders, so must law enforcement. If the rule of law is undermined not only in one country, but in many, then those who defend it cannot limit themselves to purely national means”.¹

These are the words of the then United Nations (UN) Secretary General Kofi Anan in the foreword to the UN Convention against Transnational Organised Crime.² The words cannot be truer than in the fight against TBML. Organised crime groups have wasted no time in embracing technology and the phenomenon of globalisation in the underworld business of money laundering.³ The international nature of TBML calls for international initiatives and organisational responses.⁴

In the previous chapter, I examined how TBML affects the operation of trade-finance instruments.⁵ I further examined each selected trade-finance instrument and discussed the possible risk of TBML for each instrument.⁶ This chapter discusses the role of international organisations relevant to the fight against TBML in trade-finance.⁷ It explores their roles, and efforts against money laundering from an international perspective.⁸ The chapter also discusses the role of international organisations in terms of policy formulation and publication of relevant best practice guidelines that have helped in understanding the jurisprudence of TBML.⁹

¹ Foreword to the *UN Convention against Transnational Organised Crime* by the then UN Secretary General Kofi A Annan at iii.

² See the *UN Convention against Transnational Organised Crime* iii.

³ See Van Jaarsveld (2004) 16 *SA Merc L J* 685 at 685-686. For a general discussion of the jurisprudence of money laundering and TBML, see also Ch 2 para 2.2.1 et seq above.

⁴ See para 4.2 below. See Ch 2 para 2.3.1 et seq above.

⁵ See Ch 3 para 3.2 et seq above.

⁶ See Ch 3 para 3.3 et seq above.

⁷ See para 4.2 et seq below.

⁸ See para 4.3 and para 4.4 et seq below.

⁹ See para 4.3 and para 4.4 et seq below.

4.2 THE NEED FOR A GLOBAL RESPONSE TO TBML IN TRADE-FINANCE INSTRUMENTS

Money laundering is a global problem.¹⁰ Similarly, TBML is much a challenge for South Africa as it is for the global environment.¹¹ The world economy and world-capital markets are now globalised with the consequence that money laundering has become trans-boundary in nature.¹² Although TBML can be addressed at a domestic level through appropriate national AML policies, an effective solution to this challenge may also be found at the global platform.¹³ Since the money-laundering problem has become global, there is a need for a unified approach by countries to combat it at that level as well.¹⁴

Three factors may account for the increased global reach of money laundering and TBML. First, money laundering seems to flourish more in the international zone due to its complex and international character.¹⁵ Secondly, the interconnectedness of economies and the free flow of money using digital means have created new opportunities for money laundering to thrive.¹⁶ Thirdly, the disparity between national AML regimes across the world present loopholes for money laundering to thrive. Professional money launderers capitalise on those jurisdictions with weaker AML regimes to ‘clean’ their ill-gotten funds.¹⁷ TBML, in particular, thrives by crippling or exploiting the international trade where different customs laws operate with minimal or no co-operation.¹⁸

In response to the global money-laundering challenge, the international community has acted on numerous fronts.¹⁹ Such efforts as cross-border AML co-operation may

¹⁰ See Sullivan *AML in Nutshell* 137; Madinger *Money Laundering* 69. See again Ch 2 para 2.2.1 et seq above.

¹¹ See again Ch 2 para 2.3.1 et seq above. See also Ch 5 below, generally.

¹² See para 4.2 below; Alldridge *Money Laundering Law* 91. See again Ch 2 2.2.1 et seq above.

¹³ See Alldridge *Money Laundering Law* 91. See also para 4.3 et seq and para 4.4 et seq below.

¹⁴ See Madinger *Money Laundering* 69; Sullivan *AML in Nutshell* 138; and Hamman *AML Legislation* 33. See also para 4.3 et seq below.

¹⁵ See Van Jaarsveld *Money Laundering* 238. See also Ch 2 para 2.2.1 et seq above.

¹⁶ See Van Jaarsveld (2004) 16 *SA Merc L J* 685 at 685-686. See again Ch 2 para 2.3.1 et seq and Ch 3 para 3.3 et seq above.

¹⁷ See Van Jaarsveld *Money Laundering* 238. See also Ch 2 para 2.4.3 et seq above.

¹⁸ See again Ch 2 para 2.3.1 et seq above. See also para 4.4.3 below.

¹⁹ See para 4.3 and 4.4 et seq below. See also Schott *Reference Guide to Anti-Money Laundering* 39 para III-I.

be necessary to prevent organised crime groups from running successful money-laundering operations.²⁰ A global AML effort may also help shape consensus and nurture the spirit of co-operation among stakeholders from an international point of view.²¹ The modern world of banking is now a globalised venture affected by money-laundering activities from other jurisdictions hence the need for an international effort against the problem.²² International standard-setting bodies in the global fight against money laundering such as the UN and the FATF have the power to sanction non-co-operative member states.²³ Such sanctions may act as coercive instruments to achieve co-operation among stakeholders in the global fight against money laundering.²⁴

4.3 INTERNATIONAL STANDARD-SETTING BODIES AGAINST TBML

The battle against money laundering involves a few worldwide standard-setting organisations. The most notable of which are the UN²⁵ and the FATF²⁶ whose efforts have influenced and shaped the general global response to the challenge of money laundering. The role and general policy formulations of these bodies are discussed in turn.

4.3.1 The United Nations (UN)

4.3.1.1 General

The UN is the first international organisation to undertake significant steps to combat money laundering on a global basis.²⁷ Three reasons explain why the UN has an important status in the global fight against money laundering. First, it has the broadest range of membership ever since it was created in October 1945.²⁸ Secondly, the UN operates an active programme dedicated to combatting money laundering, namely, the Global Programme against Money Laundering (GPML), which is part of the UNODC.²⁹ Thirdly, the UN has the ability to adopt international conventions that have

²⁰ See Schott *Reference Guide to Anti-Money Laundering* 39 para III-I.

²¹ See para 4.3 et seq and para 4.4 et seq below.

²² See again Ch 2 para 2.4.3 et seq above.

²³ See para 4.3 et seq below.

²⁴ See para 4.3.2 below.

²⁵ See para 4.3.1 below.

²⁶ See para 4.3.2 below.

²⁷ See Schott *Reference Guide to Anti-Money Laundering* 40 para III-2; Alldridge *Money Laundering Law* 93-95.

²⁸ See Schott *Reference Guide to Anti-Money Laundering* 40 para III-2.

²⁹ See para 4.3.1.4 below. See also www.unodc.org [Accessed on 17 May 2022].

binding effect on a member state once that state signs, ratify and implement the convention as per its legal system.³⁰ The UN has, therefore, passed several important Conventions, two of which are relevant to the control of money laundering. I briefly discuss them below.³¹

4.3.1.2 The UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

The UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (Vienna Convention) came into force on 11 November 1990.³² It requires that members who are signatory to it criminalise money laundering and make it an extraditable offence.³³ It should be noted that the Vienna Convention does not employ the phrase ‘money laundering’ but defines the concept and calls upon signatory members to criminalise the activity.³⁴ In addition, a signatory member of the Vienna Convention is not allowed by the treaty to invoke bank secrecy in its bid to refuse to offer mutual legal assistance.³⁵ A signatory member that fails to enact domestic legislation to criminalise money laundering is regarded under the Vienna Convention as non-compliant.³⁶ By signing the Vienna convention, a signatory member has pledged in theory to investigate money laundering.³⁷

As regards South Africa, it became a part to the Vienna Convention on 14 December 1998.³⁸ It has, therefore, criminalised money laundering in three³⁹ separate provisions of the POCA in line with the requirements of the Vienna Convention.⁴⁰ South Africa

³⁰ See Schott *Reference Guide to Anti-Money Laundering* 40 para III-2.

³¹ See para 4.3.1.2 and para 4.3.1.2 below.

³² Schott *Reference Guide to Anti-Money Laundering* 40-41 para III-2.

³³ See Madinger *Money Laundering* 70.

³⁴ See Schott *Reference Guide to Anti-Money Laundering* 40-41 para III-2.

³⁵ See Alldridge *Money Laundering Law* 94; Van Jaarsveld *Money Laundering* 241; and Hamman *AML Legislation* 35. See also Article 7 of the Vienna Convention.

³⁶ See Alldridge *Money Laundering Law* 94.

³⁷ See Madinger *Money Laundering* 70.

³⁸ See ‘Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances’ <https://treaties.un.org> [Accessed on 16 August 2022]. See also Hamman *AML Legislation* 34-35; FATF & ESAAMLG (2021) *Anti-Money Laundering and Counter-Terrorist Financing Measures: South Africa Mutual Evaluation Report* (hereinafter ‘FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report*’) 220. For a discussion of the South African AML regime in relation to TBML in trade-finance instruments, see Ch 5 para 5.2 et seq below.

³⁹ See ss 4, 5 and 6 of the POCA.

⁴⁰ See FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 161. See also Ch 5 para 5.3.2 below.

adopts an ‘all-crimes’ approach by covering a wide range of predicate offences that may result in money laundering.⁴¹

A key component of the international effort in the combatting of money laundering is the Vienna Convention.⁴² Article 3 of the Convention provides a comprehensive definition of money laundering which forms the basis of most signatory member legislations, including South Africa.⁴³ However, its focus is largely on combatting illicit drug trade and its related money-laundering activities.⁴⁴ Article 7 of the Vienna Convention provides for assistance and mutual co-operation in resolving money-laundering related issues by signatory members.⁴⁵ However, the Vienna Convention does not provide for an enforcement mechanism although it requires that member governments who are signatory to it, change their laws to be in line with the convention.⁴⁶

4.3.1.3 The UN Convention against Transnational Organised Crime

The UN Convention against Transnational Organised Crime of 2000 (Palermo Convention) is another instrument that deals with AML issues. It became operative on September 29, 2003, subsequent to being ratified by 82 nations and signed by 147 countries.⁴⁷ South Africa ratified the Palermo Convention on 20 February 2004 and by doing so, the country agreed to be bound by the AML provisions of the treaty.⁴⁸ The Palermo Convention is significant in two ways. First, its AML provisions largely adopt the approach of the FATF in its 40 Recommendations on money laundering.⁴⁹

⁴¹ See FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 161. See also Ch 5 para 5.3.2.4 below.

⁴² See Alldridge *Money Laundering Law* 94.

⁴³ See Article 3 of the Vienna Convention. See also Hamman *AML Legislation* 35-36; Hopton *Money Laundering Guide* 7. See also Ch 5 para 5.3.2 below.

⁴⁴ See Alldridge *Money Laundering Law* 94; Hopton *Money Laundering Guide* 7; and Schott *Reference Guide to Anti-Money Laundering* 40-41 para III-2. See also Article 3 of the Vienna Convention.

⁴⁵ See Article 7 of the Vienna Convention.

⁴⁶ See Madinger *Money Laundering* 70.

⁴⁷ The Convention was adopted by the General Assembly through Resolution 55/25 of 15 November 2000, see www.unodc.org [Accessed 15 May 2022]. See also Hopton *Money Laundering Guide* 7. See also Schott *Reference Guide to Anti-Money Laundering* 42 para III-4.

⁴⁸ See FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 161; Hamman *AML Legislation* 39-40.

⁴⁹ See Schott *Reference Guide to Anti-Money Laundering* 42 para III-4. See also para 4.3.2.2 below.

Secondly, it is the first legally binding UN instrument that criminalises organised crime.⁵⁰

The Palermo Convention requires signatories to enact laws that criminalise participation in organised crimes, including money laundering.⁵¹ It expands the international effort against international organised crime.⁵² The convention calls upon regulatory regimes to deter money laundering through preventive measures such as customer identification, record keeping and filing of suspicious transaction reports.⁵³ South Africa largely complies with this requirement through the FICA of 2001, which provides for such money-laundering preventive measures.⁵⁴ The treaty also enables information sharing and cooperation between AML institutions at domestic and international level.⁵⁵ It also encourages signatory members to consider establishing a financial intelligence unit (FIU) in order to gather, examine, and distribute data on matters pertaining to money laundering.⁵⁶ Through the FICA of 2001, South Africa complies with this requirement by establishing the FIC.⁵⁷

4.3.1.4 The UN Global Programme against Money Laundering (GPML)

Through the Vienna Convention, the UN established GPML in 1997.⁵⁸ The UNODC's Anti-Money Laundering Unit is the department tasked with carrying out the GPML.⁵⁹ Among other objectives, the UNODC's Anti-Money Laundering Unit has four objectives that it seeks to achieve through the GPML.

⁵⁰ See Article 1 of the Palermo Convention; Van Jaarsveld *Money Laundering* 243; Hamman *AML Legislation* 37; and Hopton *Money Laundering Guide* 7.

⁵¹ See Van Jaarsveld *Money Laundering* 243; Hamman *AML Legislation* 37; and Hopton *Money Laundering Guide* 8.

⁵² See Van Jaarsveld *Money Laundering* 243-244; Hopton *Money Laundering Guide* 7-8.

⁵³ See Article 7 (1) (a) of the Palermo Convention. See also Van Jaarsveld *Money Laundering* 244-45; Hamman *AML Legislation* 39; and Schott *Reference Guide to Anti-Money Laundering* 10 para III-3.

⁵⁴ See Ch 5 para 5.3.4 below.

⁵⁵ See Van Jaarsveld *Money Laundering* 243-244; Hopton *Money Laundering Guide* 7-8. See also para 4.3.1.4.1 below.

⁵⁶ See Article 7(1) (b) of the Palermo Convention. See also para 4.4.4 below.

⁵⁷ See Ch 5 para 5.4.2 below.

⁵⁸ See Rick McDonell 'UN Anti-Money Laundering Initiatives' in: Wouter H Muller, Christian H Kalin & John G Goldsworth (eds) *Anti-Money Laundering: International Law and Practice* (2007) (hereinafter McDonell 'UN Anti-Money Laundering Initiatives') 51; Hopton *Money Laundering Guide* 12.

⁵⁹ See McDonell 'UN Anti-Money Laundering Initiatives' 51. Alldridge *Money Laundering Law* 95.

First, it seeks to assist all member states to achieve the UN General Assembly Special Session's objective of having AML legislation in place.⁶⁰ Secondly, the AML Unit aims to provide member states with the tools they need to execute national AML laws in conjunction with the GPML.⁶¹ Thirdly, through the GPML, the UNODC aims to improve member states' ability to conduct effective AML financial investigations and prosecutions.⁶² Fourthly, the UN seeks to support participating nations in identifying, seizing, and taking control of unlawful money-laundering proceeds.⁶³

In addition, the UNODC has carried out several global AML initiatives through the GPML to enhance the combatting of money laundering. Since 1995, the GPML has launched a mentors' programme through which the UNODC seconds AML experts to various global regions to help strengthen national AML frameworks.⁶⁴ Through the GPML, the UNODC has also focused on strengthening FIUs in member state jurisdictions.⁶⁵ Despite all its efforts, the GPML has not yet directly addressed TBML, especially in the trade-finance context.⁶⁶

4.3.1.5 The UN International Money-Laundering Information Network (IMoLIN)

The IMoLIN is a centralised one-stop AML resource for research, which was created in 1998 by the UN in partnership with international organisations involved in the combatting of money laundering.⁶⁷ The UNODC's AML Unit is responsible for administering and maintaining the IMoLIN on behalf of the 10 partner regional AML organisations.⁶⁸

The IMoLIN also administers and maintains the AML International Database (AMLID).⁶⁹ The AMLID is a service with a password protection, which catalogues world

⁶⁰ See McDonell 'UN Anti-Money Laundering Initiatives' 51.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ See McDonell 'UN Anti-Money Laundering Initiatives' 52. Alldridge *Money Laundering Law* 95.

⁶⁵ See McDonell 'UN Anti-Money Laundering Initiatives' 52. Alldridge *Money Laundering Law* 95.

⁶⁶ See Azinge-Egbiri (2023) 15 *AJLS* 38 at 48.

⁶⁷ See Alldridge *Money Laundering Law* 95; McDonell 'UN Anti-Money Laundering Initiatives' 53.

⁶⁸ The ten partner organisations are, the APG, the Caribbean Financial Action Task Force (CFATF), Commonwealth Secretariat, the Council of Europe–MONEYVAL, the ESAAMLG, the EuroAsian Group (EAG), the FATF, Financial Action Task Force on Money Laundering in South America (GAFISUD), Interpol, and the Organisation of American States (OAS/CICAD), see McDonell 'UN Anti-Money Laundering Initiatives' 53.

⁶⁹ See McDonell 'UN Anti-Money Laundering Initiatives' 54.

AML laws in a format that is easily searchable.⁷⁰ Through the AMLID, the UN maintains a resourceful online library for national AML legislation.⁷¹ The database is regularly updated with new AML laws and regulations to catch up with developments in different member countries. The AMLID also represents legal analyses of various AML regimes of UN member states.⁷²

4.3.1.6 The UN Contribution to the Control of TBML in Trade-Finance Instruments

The UN has no single convention directed at TBML as a form of money laundering.⁷³ This may be understandable given the broad role played by the UN against money laundering, which has never been directed at any form of money laundering previously. However, it can still be argued that the Vienna and Palermo Conventions may equally apply to the problem of TBML.⁷⁴ The Conventions set an AML tone that is broad enough to accommodate even TBML. For example, illicit drug trafficking may be a predicate offence for TBML while TBML may be a transnational organised crime as contemplated under the Conventions.⁷⁵ The provisions of the Palermo Convention regarding CDD and filing of suspicious transaction reports, for example, are equally useful in the combatting of TBML.⁷⁶

The UN may also use its influence through the GPML to put TBML on the global AML agenda.⁷⁷ The IMoLIN and AMLID programmes may also prove to be useful in promoting research and information sharing on TBML issues due to their expanded global reach.⁷⁸ Thus, although the UN has not made any specific statements directed at TBML, its global influence through conventions, processes and resources may be useful if directed towards the problem.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ See para 4.3.1.2 and para 4.3.1.3 above.

⁷⁴ See again para 4.3.1.2 and para 4.3.1.3 above.

⁷⁵ See again para 4.3.1.2 and para 4.3.1.3 above. See also Ch 2 para 2.3 et seq.

⁷⁶ See para 4.4.1.4 and 4.4.6.2.2 below. See also Ch 3 para 3.4 et seq.

⁷⁷ See para 4.3.1.4 above.

⁷⁸ See para 4.3.1.4.1 above.

4.3.1.7 Conclusion

The UN is a major player in the worldwide campaign against money laundering.⁷⁹ Its two major treaties — the Vienna and the Palermo Convention — have made important contributions in the sensitisation of money laundering as a global issue.⁸⁰ The UN, however, has not made any specific pronouncements regarding TBML and neither has it published any treaty directed at TBML control.⁸¹ Its conventions nevertheless, contain key provisions that are relevant in the combatting of TBML.⁸² The requirements relating to the criminalisation of money laundering, the need to mutually co-operate in combatting crime and AML preventive measures recommended in the Conventions.⁸³ Through its GPML, the UN may play a significant role against TBML.⁸⁴ Its IMoLIN and AMLID resources may be perfect starting points to collate and disseminate information on TBML to member states.⁸⁵ This may increase awareness on TBML at a global level and at a faster rate given the eminent position occupied by the UN in global affairs.

4.3.2 The Financial Action Task Force

4.3.2.1 General

The FATF is a major international organisation dedicated to dealing with the challenge of money laundering.⁸⁶ A group of seven most industrialised countries at the time, commonly referred to as ‘Group Seven’ (G7), formed the organisation in 1989.⁸⁷ The body performs three major functions with regards to money laundering. First, it keeps track of how well members are putting AML measures into practice.⁸⁸ Secondly, it reviews and reports on money-laundering trends, techniques and counter-measures

⁷⁹ See para 4.3.1 above.

⁸⁰ See para 4.3.1.2 and para 4.3.1.3 above.

⁸¹ See para 4.3.1.4 above.

⁸² See again para 4.3.1.4 above.

⁸³ See again para 4.3.1.4 above. See also the Vienna and Palermo Conventions, generally.

⁸⁴ See again para 4.3.1.4 above.

⁸⁵ See para 4.3.1.5 above.

⁸⁶ See Alldridge *Money Laundering Law* 104.

⁸⁷ See Hopton *Money Laundering Guide* 17; Madinger *Money Laundering* 71. At the inception of the taskforce at the G7 Summit in Paris, the G7 nations were the US, Canada, Britain, Germany, France, Italy and Japan.

⁸⁸ See Schott *Reference Guide to Anti-Money Laundering* 47 para III-9. See also para 4.3.2.3 below.

that members may adopt.⁸⁹ Thirdly, the FATF promotes the adoption and implementation of its AML standards by all its member countries.⁹⁰

It is worth noting that the FATF was initially created as an *ad hoc* group of governments with a single central focus on the problem of money laundering on a limited mandate.⁹¹ However, from 2020 it is now operating with an open-ended mandate.⁹² Currently, the FATF has 39 members who are central to the global efforts in fighting money laundering and terrorist financing.⁹³ Significant to this study, South Africa is also a member of the FATF and was admitted into the FATF's membership in June 2003.⁹⁴ Regionally it belongs to the ESAAMLG, which is a FATF-style regional body.⁹⁵

The FATF has local chapters as associate members also known as FATF-Style Regional Bodies, which largely abide by its recommendations.⁹⁶ These associate members are regional in nature and they may also include some specific regional issues in their policies.⁹⁷ Examples of such local chapters include the CFATF, the APG,⁹⁸ and the ESAAMLG.⁹⁹ Some international organisations, for example, the UN, the Egmont Group, Interpol and the IMF, are also members of the FATF and have observer status.¹⁰⁰

The FATF has issued several reports pertaining to the combatting of money laundering in which it advocates and recommends international co-operation.¹⁰¹ The taskforce examines money laundering at an international level and recommends remedies to member states for adoption.¹⁰² The focus of the FATF has also been directed towards

⁸⁹ See Van Jaarsveld *Money Laundering* 223; Hamman *AML Legislation* 67; and Schott *Reference Guide to Anti-Money Laundering* 47 para III-9.

⁹⁰ See Schott *Reference Guide to Anti-Money Laundering* 47 para III-9; Hamman *AML Legislation* 67. See also para 4.3.2.2 below.

⁹¹ See Alldridge *Money Laundering Law* 104. See also Hamman *AML Legislation* 67-68.

⁹² See 'FATF Ministerial Declaration and Mandate' on www.fatf-gafi.org/fag [Accessed on 22 October 2021].

⁹³ See www.fatf-gafi.org/fag [Accessed on 22 October 2021].

⁹⁴ See Van Jaarsveld *Money Laundering* 223; Hopton *Money Laundering Guide* 18.

⁹⁵ See para 4.3.3 below.

⁹⁶ See Hopton *Money Laundering Guide* 19; Alldridge *Money Laundering Law* 105. See also para 4.3.3 and 4.3.4 below.

⁹⁷ See Sullivan *AML in Nutshell* 139. See also para 4.3.3 and 4.3.4 below.

⁹⁸ See para 4.3.4 below.

⁹⁹ See para 4.3.3 below.

¹⁰⁰ See Sullivan *AML in Nutshell* 139. See also <https://www.fatf-gafi.org> [Accessed on 17 May 2022].

¹⁰¹ See Madinger *Money Laundering* 71. See also para 4.3.2.4 et seq below.

¹⁰² See Hopton *Money Laundering Guide* 17; Madinger *Money Laundering* 71.

terrorist financing.¹⁰³ However, this study does not cover the aspect of terrorist financing.¹⁰⁴

4.3.2.2 The FATF Standards

The FATF strives to have a worldwide network against money laundering. The body promulgates standards on how member states should combat money laundering.¹⁰⁵ The *FATF Standards* come in the form of Recommendations, which place much emphasis on the control of money laundering through financial institutions.¹⁰⁶ Most AML obligations for banks such as customer identification, record keeping and suspicious transaction reporting are part of what the FATF's Recommendations provide for.¹⁰⁷ Thus, the Recommendations form the basis for most national AML regimes, including that of South Africa.¹⁰⁸ The POCA and FICA in South Africa are largely modelled along the specifications in the FATF Recommendations.¹⁰⁹ It should be noted that the FATF's Recommendations have no legal force and are not binding on member states.¹¹⁰ However, failure to comply with the Recommendations may result in sanctions being imposed on a non-compliant member country.¹¹¹ In this regard, the FATF can urge member states and financial institutions around the world not to deal with businesses from a designated non-compliant country.¹¹² The FATF may also name and shame a non-complaint member country through publication of a 'black-list' of non-cooperative countries.¹¹³ The name and shame sanction has been deemed successful in that it can instantly cause business standstill in a non-compliant country and the member may immediately take corrective measures.¹¹⁴

¹⁰³ See Madinger *Money Laundering* 71.

¹⁰⁴ See Ch 1 para 1.8 above. See also Ch 3 para 3.3 et seq above.

¹⁰⁵ See Van Jaarsveld *Money Laundering* 223-227.

¹⁰⁶ Ibid. Hamman *AML Legislation* 67.

¹⁰⁷ See Van Jaarsveld *Money Laundering* 227; Alldridge *Money Laundering Law* 105.

¹⁰⁸ See Van Jaarsveld *Money Laundering* 223-227.

¹⁰⁹ See De Koker 'Money Laundering in South Africa' 109. See also Ch 5 para 5.2 et seq below.

¹¹⁰ See Sullivan *AML in Nutshell*; Alldridge *Money Laundering Law* 105; and Hamman *AML Legislation* 67.

¹¹¹ See Hopton *Money Laundering Guide* 20-21; Alldridge *Money Laundering Law* 105.

¹¹² See Alldridge *Money Laundering Law* 105.

¹¹³ See Hopton *Money Laundering Guide* 20-21; Alldridge *Money Laundering Law* 105.

¹¹⁴ See Alldridge *Money Laundering Law* 106.

To help with the implementation of its *Standards* and Recommendations, the FATF researches and publishes white papers on money laundering.¹¹⁵ It should be noted that the FATF has no single Recommendation dedicated to the tackling of TBML.¹¹⁶ However, the organisation has researched and published a few white papers directed at explaining the nature of TBML and how to combat it.¹¹⁷

4.3.2.3 The FATF Country Mutual Evaluations

The FATF also carries out mutual evaluations of member countries to assess the strength of their AML regimes.¹¹⁸ The aim of conducting the evaluation is to identify jurisdictions with strategic AML deficiencies.¹¹⁹ Where a country is found to be deficient in terms of its AML regime, it is placed on the high-risk and non-co-operative jurisdictions also known as the name and shame list or grey list.¹²⁰ South Africa has had its mutual evaluation exercise conducted by the FATF and ESAAMLG first in 2009 and second, in 2021.¹²¹ The outcome of the evaluations predominantly conclude that South Africa has a relatively strong AML regime.¹²² The FATF, however, points out AML deficiencies in areas such as the application of the RBA and the identification of beneficial ownership information most of which have since been catered for in legislation.¹²³ The evaluations are silent on the issue of TBML.¹²⁴

¹¹⁵ See Sullivan *AML in Nutshell* 139. See also para 4.3.2.4 et seq below.

¹¹⁶ See Delston & Walls (2009) 41 *Case W Res Int'l L* 85 at 116-118. See also the FATF (2012) *Standards* generally.

¹¹⁷ See para 4.3.2.4 et seq below.

¹¹⁸ See Sullivan *AML in Nutshell* 139; Alldridge *Money Laundering Law* 105.

¹¹⁹ See Van Jaarsveld *Money Laundering* 223-224.

¹²⁰ See Sullivan *AML in Nutshell* 139; and para 4.3.2.2 above. As of February 2023, South Africa is among the countries regarded by the FATF as having deficiencies in its AML framework, see Ch 5 para 5.2 below.

¹²¹ See FATF & ESAAMLG (2009) *South Africa Mutual Evaluation Report* and FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* generally.

¹²² See FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 6. See also Ch 5 para 5.2 et seq below.

¹²³ See FATF & ESAAMLG (2009) *South Africa Mutual Evaluation Report* 28; FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 4; and the FICA Amendment Act 1 of 2017. However, in February 2023 the FATF placed South Africa under the grey list due to some deficiencies in its AML regime. Although the South African government has since taken corrective measures, the greylisting is expected to last until 2025, See Ch 5 para 5.2 below.

¹²⁴ See FATF & ESAAMLG (2009) *South Africa Mutual Evaluation Report* and FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* passim.

4.3.2.4 The Contribution of the FATF to the Control of TBML in Trade-Finance Instruments

The FATF has made various policy pronouncements against TBML in the form of typologies¹²⁵ reports, best-practices guidance, risk indicators and trends on TBML.¹²⁶ These are briefly explored below.

4.3.2.4.1 The 2006 FATF Typologies Report on TBML

The FATF's 2006 TBML report is a groundbreaking piece of work that puts the issue of TBML on the international platform.¹²⁷ The report presents the FATF's first depiction of TBML through the organisation's own understanding.¹²⁸ It is the outcome of a study carried out by a project team under the typologies initiative of the FATF.¹²⁹ Among other nations and organisations, South Africa also participated in the FATF's project team that produced the TBML report of 2006.¹³⁰

The FATF used a detailed questionnaire to come up with the report in order to establish current practices about TBML in different countries.¹³¹ The report has a number of significant findings, five of which can be mentioned here. First, it notes that TBML is becoming a significant channel for criminal enterprise.¹³² In this regard, the report came up with one of the most cited definitions of TBML.¹³³ Secondly, the study finds that TBML practices can differ in complexity and that information sharing between and/or among national authorities may help stem the challenge of TBML.¹³⁴ Thirdly, the FATF categorises TBML methods as basic and complex.¹³⁵ By doing this,

¹²⁵ In relation to the regulation of money laundering, the term 'typology' or 'typologies' refer to the study of different techniques, trends or methods or their variations, employed in money laundering, see <https://www.imf.org/external/np/leg/amlcft/eng/aml1.htm#typologies> [Accessed on 17 August 2022]; Hopton *Money Laundering Guide* 22-23. See also FATF& Egmont Group (2020) *TBML Trends & Developments Report* 58-62; and APG (2012) *Trade-Based Money Laundering Report* 8 on the use of this term in the context of TBML control.

¹²⁶ See para 4.3.2.4.1 et seq below.

¹²⁷ See Ch 2 para 2.3 et seq above.

¹²⁸ See FATF (2006) *TBML Report* 1. See again Ch 2 para 2.3 et seq above.

¹²⁹ See FATF (2006) *TBML Report* 1.

¹³⁰ See note 1 of the FATF (2006) *TBML Report* 1 for a list other countries which participated.

¹³¹ See FATF (2006) *TBML Report* at 20 et seq.

¹³² Idem at 25.

¹³³ See Ch 2 para 2.3.2.2 above.

¹³⁴ See FATF (2006) *TBML Report* 25.

¹³⁵ See Idem at 3-7. See also Ch 2 para 2.3.4 and para 2.3.5 above.

the organisation brings more clarity on the operations of TBML through case studies.¹³⁶ Fourthly, the FATF lists a number of red flags that could be of help in the examining of bank transactions for possible existence of TBML.¹³⁷ Although the existence of a red flag alone may not be indicative of TBML, it can help initiate the process of investigating whether TBML exists.¹³⁸ Fifthly, the FATF is concerned with customs agency practices, law enforcement authorities, FIUs, tax authorities, and banking supervisors.¹³⁹ The FATF also provides recommendations to these stakeholders on how they may resolve the challenge of TBML.¹⁴⁰

Besides these key findings, the report ends with a reflective section titled “issues for consideration”.¹⁴¹ Under this heading, the FATF recommends possible courses of action to control and mitigate TBML. These actions include building awareness, strengthening measures to identify TBML and increasing international co-operation.¹⁴²

In the main, the FATF’s 2006 report on TBML is a major piece of work that galvanised the global attention towards TBML.¹⁴³ Almost every scholarly research that deals with TBML refers to the report as a starting point.¹⁴⁴ As an internationally significant institution in the fight against money laundering, the FATF’s attention towards TBML helped heighten awareness of this problem.

4.3.2.4.2 The 2008 FATF Best Practice Guidance on TBML

The FATF’s *Best Practices Guidance on TBML* (Best Practices Paper) is a follow-up to the 2006 report.¹⁴⁵ It was published on 10 June 2008.¹⁴⁶ The aim of the *Best Practices Paper* is to improve the manner in which competent authorities such as FIUs and tax authorities collect and use trade data to identify TBML.¹⁴⁷ It encourages the

¹³⁶ See FATF (2006) *TBML Report* 9 et seq. See again Ch 2 para 2.3.4 and para 2.3.5 above.

¹³⁷ See FATF (2006) *TBML Report* 24. See also Ch 3 para 3.4 et seq above and para 4.3.2.4.4 below.

¹³⁸ See FATF (2006) *TBML Report* 24 et seq. See also para 4.3.2.4.4 below.

¹³⁹ See FATF (2006) *TBML Report* 21.

¹⁴⁰ See *Idem* at 20-28. See also para 4.3.2.4.2 below.

¹⁴¹ See FATF (2006) *TBML Report* 26.

¹⁴² *Ibid.*

¹⁴³ See Ch 2 para 2.3 et seq above.

¹⁴⁴ See again Ch 2 para 2.3 et seq above.

¹⁴⁵ See FATF (2008) *Best Practices on TBML* generally.

¹⁴⁶ See *Idem* at 1.

¹⁴⁷ *Ibid.*

RBA in the investigation of TBML.¹⁴⁸ Among other issues, the *Best Practices Paper* provides technical definitions of terms such as ‘trade data’, ‘trade authorities’, ‘trade finance’ and ‘trade’.¹⁴⁹ The inclusion of technical definitions is a major improvement on the 2006 report on TBML in which the FATF did not attempt to define any of these terms.¹⁵⁰ A provision of working definitions delineates parameters to be used in understanding the scope of TBML.

The major highlights of the 2008 *Best Practices Paper* are, first, the provision of guidance on measures to be taken by competent authorities when combatting TBML.¹⁵¹ Secondly, the proposition of TBML training that is specific for each sector.¹⁵² Thirdly, the emphasis on the important role played by financial institutions in the detecting of TBML.¹⁵³ More significantly, the FATF stresses and recommends six best practices that may be adopted when combatting TBML.

First, the FATF recommends capacity building and the raising of awareness on TBML issues.¹⁵⁴ In the paper, the FATF recommends that capacity building for staff in the banking sector should focus on such issues as a financial institution’s policies, procedures and processes when dealing with trade-finance transactions.¹⁵⁵

Secondly, the FATF emphasises that information sharing is central in the fight against TBML.¹⁵⁶ In this regard, the FATF urges its member nations to share TBML sanitised case studies, red-flag indicators, and techniques to banks and other relevant competent authorities.¹⁵⁷ Due to the relatively little attention paid to TBML at policy level, the FATF recommends that member countries increase research in this area.¹⁵⁸ Further studies could be in the form of periodic joint meetings of relevant national authorities involved in money-laundering control, joint investigations or collaboration with other foreign authorities.¹⁵⁹ To enhance these efforts there is a need for knowledge

¹⁴⁸ See FATF (2008) *Best Practices on TBML* 1. See also para 4.4.5.3.1 below.

¹⁴⁹ See FATF (2008) *Best Practices on TBML* 1-2.

¹⁵⁰ See para 4.3.2.4.1 above.

¹⁵¹ See FATF (2008) *Best Practices on TBML* 3.

¹⁵² Ibid.

¹⁵³ See FATF (2008) *Best Practices on TBML* 7-9. See also Ch 3 para 3.2 above.

¹⁵⁴ See FATF (2008) *Best Practices on TBML* 2.

¹⁵⁵ Idem at 4.

¹⁵⁶ See para 4.4.4 et seq below.

¹⁵⁷ See FATF (2008) *Best Practices on TBML* 5.

¹⁵⁸ Ibid.

¹⁵⁹ See FATF (2008) *Best Practices on TBML* 5. See also 4.4 below.

sharing at international level through the works of relevant international and regional organisations like the Egmont Group,¹⁶⁰ World Customs Organisation,¹⁶¹ and the FATF-Style Regional Bodies.¹⁶²

Thirdly, the FATF recommends to its members that they should establish domestic mechanisms to connect and coordinate efforts of various AML authorities in the combatting of TBML.¹⁶³ Pursuant to this goal, the FATF encourages competent authorities to form partnerships in order to effectively share information related to the investigation of TBML.¹⁶⁴ Most jurisdictions, including South Africa have since actioned this recommendation.¹⁶⁵

Fourthly, the FATF encourages member countries to collect and exchange trade data in TBML investigations, in a manner that is consistent with the member jurisdiction's laws on privacy and data protection.¹⁶⁶

Fifthly, the FATF emphasises on the importance of the principle of international co-operation.¹⁶⁷ Under this principle, the FATF encourages co-operation between and/or among member countries through mutual legal support in investigating and prosecuting cases of TBML.¹⁶⁸ Member states may also co-operate through signing of memoranda of understanding to share information related to TBML.¹⁶⁹ Where the sharing of trade data is restricted by domestic laws, the FATF encourages member countries to share sanitised trade data.¹⁷⁰

Sixthly, the FATF encourages the fighting of TBML without hindering legitimate trading activities.¹⁷¹ In doing this, the FATF recommends that TBML regulatory requirements should not put reporting entities under financial or administrative strain.¹⁷² In addition to this, there is a need to ensure that commercially sensitive information is not misused

¹⁶⁰ See para 4.4.4 et seq below.

¹⁶¹ See para 4.4.3 et seq below.

¹⁶² See FATF (2008) *Best Practices on TBML* 5. See also para 4.3.3 below and para 4.3.4 below.

¹⁶³ See FATF (2008) *Best Practices on TBML* 5-6.

¹⁶⁴ See *Idem* at 5. See also para 4.4.4 below.

¹⁶⁵ See Ch 5 para 5.4.4 below.

¹⁶⁶ See FATF (2008) *Best Practices on TBML* 6.

¹⁶⁷ *Idem* at 7.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

for purposes other than the control of TBML.¹⁷³ The FATF further recommends that an RBA should be applied to ensure that TBML red-flag indicators are consistently employed in investigations.¹⁷⁴

Principally, the *Best Practices Paper* should be seen as an incremental contribution to the 2006 TBML report.¹⁷⁵ Its recommendations are not law and, therefore, they are not binding on members of the FATF.¹⁷⁶ However, as the guidelines indicate, they are just best practices, whose influence, when applied, may change the nature of current applicable laws in the area of TBML control.

4.3.2.4.3 The 2020 FATF & Egmont Group Report on TBML Trends and Developments

The FATF describes the 2020 *Report on TBML Trends and Developments* as a ‘companion piece’ to its earlier reports of 2006,¹⁷⁷ 2008,¹⁷⁸ and that of 2012 from the APG.¹⁷⁹ Thus, the report compliments the insights and findings generated in the earlier FATF’s reports.¹⁸⁰ It is a collaboration of the FATF and the Egmont Group in which the latter group also added its input and insights in the study.¹⁸¹ The report emphasises that TBML remains a significant form of money laundering.¹⁸² An addition to the report is the concept of trade-based terrorist financing, which is not the preoccupation of this study.¹⁸³

The report reflects on the progress made so far in the fight against TBML since the APG’s 2012 report on TBML typologies.¹⁸⁴ However, it proposes additional initiatives and strategies to detect and disrupt TBML in its processes.¹⁸⁵ Such initiatives and

¹⁷³ Ibid.

¹⁷⁴ See FATF (2008) *Best Practices on TBML* 7. See para 4.4.5.3.1 below.

¹⁷⁵ See again para 4.3.2.4.1 above.

¹⁷⁶ See para 4.3.2.2 above.

¹⁷⁷ See again para 4.3.2.4.1 above.

¹⁷⁸ See para 4.3.2.4.2 above.

¹⁷⁹ FATF & Egmont Group (2020) *TBML Trends & Developments Report* 3. See para 4.3.4.2 below.

¹⁸⁰ FATF & Egmont Group (2020) *TBML Trends & Developments Report* 3.

¹⁸¹ See also para 4.4.4 below.

¹⁸² See FATF & Egmont Group (2020) *TBML Trends & Developments Report* 3.

¹⁸³ Ibid. See also Ch 1 para 1.8 above.

¹⁸⁴ See FATF & Egmont Group (2020) *TBML Trends & Developments Report* 3. See also para 4.3.4.2 below.

¹⁸⁵ See FATF & Egmont Group (2020) *TBML Trends & Developments Report* generally.

strategies include the use of advanced information technology and risk-assessment systems and more meaningful co-operation between the public and private sectors.¹⁸⁶

The target audience for the report is extensive and includes financial institutions, DNFBPs and competent authorities responsible for identifying, investigating and prosecuting the offence of TBML.¹⁸⁷ The report presents a number of key findings and reiterates the complexity of trade involving interconnected global supply chains.¹⁸⁸ The FATF & Egmont Group emphasise that these supply chains may be exploited by organised crime groups and professional money launderers to facilitate the laundering of proceeds of crime.¹⁸⁹ The report further notes the continued exploitation of TBML techniques reported by the FATF in 2006.¹⁹⁰ The report also takes stock of current risks of TBML and the development of new methods that may be exploited through TBML.¹⁹¹ The FATF & Egmont Group also note with concern, in the report, the continued use of third-party intermediaries in TBML especially in the financial settlement process.¹⁹²

Furthermore, the report points out that there are still significant challenges in identifying and combatting TBML.¹⁹³ The issues raised by the FATF in 2006 and those raised by the APG in 2012 still remain unresolved.¹⁹⁴ For example, the level of co-operation at both domestic and international level necessary to combat TBML is still very low.¹⁹⁵ Domestic coordination is regarded under the FATF *Standards* as one of the fundamental pillars of an effective AML regime.¹⁹⁶ The FATF, therefore, recommends that in order to collaborate and share information, policy makers and other appropriate authorities, including the FIUs, should set up channels to facilitate

¹⁸⁶ Idem at 3.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ See FATF & Egmont Group (2020) *TBML Trends & Developments Report* 4. See again 4.3.2.4.1 above. See also Ch 2 para 2.3.4 and para 2.3.5 above.

¹⁹¹ See FATF & Egmont Group (2020) *TBML Trends & Developments Report* 4.

¹⁹² Ibid. See also Ch 3 para 3.3 et seq above.

¹⁹³ See FATF & Egmont Group (2020) *TBML Trends & Developments Report* 4-5.

¹⁹⁴ Idem at 4. See also para 4.3.4.2 below.

¹⁹⁵ See FAT & Egmont Group (2020) *TBML Trends & Developments Report* 4. See para 4.4.4.3 below.

¹⁹⁶ See Recommendation 2 of the FATF (2012) *Standards*.

cooperation and the exchange of information at a domestic level in order to effectively combat TBML.¹⁹⁷

4.3.2.4.4 The 2021 FATF-Risk Indicators for TBML

Following its TBML trends and developments report of 2020,¹⁹⁸ the FATF & Egmont Group's latest publication is the *2021 Risk Indicators Report for TBML*.¹⁹⁹ The risk indicators for TBML are developed from a sample of data received by the FATF & Egmont Group in the course of a TBML research project.²⁰⁰ The purpose of the risk indicators for TBML is to improve the ability of public and private institutions in the identification of suspicious activity that may indicate the occurrence of TBML in transactions.²⁰¹ A risk indicator shows or suggest the probability of the occurrence of unusual or suspicious activity.²⁰² It should be noted that where there is just one risk indicator in relation to a customer or single transaction, this might not justify suspicion of TBML.²⁰³ However, such risk indicator may prompt further investigation and transaction monitoring where appropriate.²⁰⁴

The list of risk indicators the FATF & Egmont Group produced in the report are not exhaustive and they may not all apply to TBML.²⁰⁵ In addition, the FATF & Egmont Group encourage members to first acquaint themselves with the earlier reports on TBML before using the risk indicators in order to get a grounding on the nature of the problem.²⁰⁶ Furthermore, the *2021 Risk Indicators Report for TBML* cover four categories of risk, namely, first, structural risk indicators,²⁰⁷ second, trade activity risk indicators,²⁰⁸ third, trade document and commodity risk indicators,²⁰⁹ and fourth,

¹⁹⁷ See FATF & Egmont Group (2020) *TBML Trends & Developments Report* 39.

¹⁹⁸ See 4.3.2.4.3 above.

¹⁹⁹ See FATF & Egmont Group (2021) *TBML: Risk Indicators Report* generally.

²⁰⁰ *Idem* at 1.

²⁰¹ *Ibid.*

²⁰² *Idem* at 2.

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ FATF & Egmont Group (2021) *TBML: Risk Indicators Report* 1.

²⁰⁶ *Ibid.* See also 4.3.2.4.1 and para 4.3.2.4.2 above.

²⁰⁷ See FATF & Egmont Group (2021) *TBML: Risk Indicators Report* 3.

²⁰⁸ *Idem* at 4.

²⁰⁹ *Idem* at 5.

account and transaction activity risk indicators.²¹⁰ In the main, the report seems to provide good guidance on how to investigate and detect TBML in trade finance.²¹¹

4.3.2.4.5 Other Significant and Relevant FATF Reports against TBML in Trade-Finance Instruments

Besides the reports already discussed in the foregoing, the FATF has also published other works relevant to the issue of TBML. These works include, the FATF's *Guidance on the Risk-Based Approach: The Banking Sector*,²¹² (*Risk-Based Approach Guidance*), *Guidance on Transparency and Beneficial Ownership*,²¹³ (*Guidance on Beneficial Ownership*) and *Guidance on Correspondent Banking Services*.²¹⁴ The *Guidance on the Risk-Based Approach* outlines principles involved when applying the RBA to AML operations.²¹⁵ The guidance also seeks to assist member states, competent authorities and financial institutions in designing and implementing an RBA to AML.²¹⁶

The *Guidance on Transparency and Beneficial Ownership* seeks to prevent the improper use of business entities to launder money.²¹⁷ The guidance may also be applied in combatting tax evasion and corruption.²¹⁸ The *Guidance on Correspondent Banking Services* seeks to address the problem of de-risking in correspondent banking relationships by clarifying the application of the FATF *Standards* in such situations.²¹⁹ The guidance also intends to support the development of a shared understanding of what constitutes the RBA for banks involved in correspondent banking activities.²²⁰ It further seeks to clarify the interplay between FATF *Standards* on international

²¹⁰ Idem at 6.

²¹¹ See also Ch 3 para 3.3 et seq above.

²¹² See FATF (2014) *RBA Guidance* passim.

²¹³ See FATF (2014) *Guidance on Beneficial Ownership* passim.

²¹⁴ See FATF (2016) *Guidance on Correspondent Banking Services* (hereinafter 'FATF (2016) *Guidance on Correspondent Banking*') passim.

²¹⁵ See FATF (2014) *RBA Guidance* 4.

²¹⁶ Ibid.

²¹⁷ See FATF (2014) *Guidance on Beneficial Ownership* 4.

²¹⁸ Ibid.

²¹⁹ See FATF (2016) *Guidance on Correspondent Banking* 6.

²²⁰ Ibid. See also FATF (2014) *RBA Guidance* passim.

correspondent banking and CDD.²²¹ Although these three guidance reports do not refer to TBML in specific terms, their principles may equally important to TBML.

4.3.2.5 Conclusion

The FATF is one of the most significant international standard-setting bodies in money-laundering issues.²²² The organisation is vital in the combatting of TBML. Through its *AML Standards*, the FATF has helped shape the international framework against money laundering.²²³ Besides the *AML Standards*, the FATF carries out mutual assessments of member countries to strengthen their national AML frameworks.²²⁴ Although, the FATF has contributed immensely in shaping the global AML agenda, the organisation has not passed a single Recommendation aimed at combatting TBML in the mould of its 40 Recommendations. However, it has made various policy pronouncements through research guides, best practices and reports on TBML, which are likely to set the tone in the fight against the problem.²²⁵ Through, its regional bodies, the FATF has also helped member countries to deal with geographic specific money-laundering challenges.²²⁶ South Africa belongs to the ESAAMLG, which has not also made a single known policy paper on TBML.²²⁷

4.3.3 The Eastern Southern Africa Anti-Money Laundering Group (ESAAMLG)

4.3.3.1 General

The ESAAMLG is a 21-member regional body that subscribes to global standards in the fight against money laundering and terrorism financing.²²⁸ The body was established in 1999 and South Africa is one of its member countries.²²⁹ Other

²²¹ See FATF (2016) *Guidance on Correspondent Banking* 6. See also Recommendations 13; and 10 of the FATF (2012) *Standards*.

²²² See para 4.3.2.1 above.

²²³ See para 4.3.2.2 above.

²²⁴ See para 4.3.2.3 above.

²²⁵ See para 4.3.2.4 et seq above.

²²⁶ See para 4.3.3 and para 4.3.4 below.

²²⁷ See para 4.3.3 below.

²²⁸ The members of the ESAAMLG include South Africa, Zimbabwe, Botswana, Lesotho, Kenya, the Seychelles, Malawi, Mauritius, Mozambique, Namibia Swaziland, Tanzania, Uganda, and Zambia, see www.esaamlg.org [Accessed on 13 May 2024].

²²⁹ See www.esaamlg.org [Accessed on 18 August 2022].

international bodies significant in the combatting of money laundering have observer status in the ESAAMLG.²³⁰

4.3.3.2 The Role the ESAAMLG

The ESAAMLG has four objectives that it seeks to achieve as part of its mandate. First, it seeks to adopt and implement the recommendations of the FATF.²³¹ Secondly, the body aspires to apply AML measures against all serious crimes in the region.²³² Although this objective does not refer to TBML, it may be included as being a form of serious organised crime. Thirdly, ESAAMLG intends to combat the financing of terrorism. Fourthly, the regional body seeks to achieve the implementation of measures in AML multilateral agreements and initiatives to prevent money laundering.²³³

The group operates through two main organs, namely, the Council of Ministers and the Task Force.²³⁴ The Council of Ministers is the main decision-making organ of the ESAAMLG and is made up of at least one ministerial representative from each member country.²³⁵ The Task Force is responsible for all the AML technical matters of the ESAAMLG and is made up of senior government officials from the organisation's jurisdictions responsible for AML/CFT matters.²³⁶ South Africa is represented in the ESAAMLG by the Ministry of Finance and National Treasury — which is the ministry responsible for AML policy measures — and the FIC.²³⁷

The ESAAMLG has carried out mutual assessments of its member countries in collaboration with the FATF to evaluate the strength of their AML regimes.²³⁸ South Africa has had its assessment carried out first in 2009 and again in 2021.²³⁹ The ESAAMLG has also carried out a study of money-laundering trends and methods

²³⁰ Ibid. These organisations are the AUSTRAC, Commonwealth Secretariat, the FATF, IMF, SADC, UK, USA, UNODC, World Bank and the WCO.

²³¹ See www.esaamlg.org [Accessed on 18 August 2022].

²³² Ibid.

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ Ibid.

²³⁷ See FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 24.

²³⁸ See www.esaamlg.org [Accessed on 18 August 2022].

²³⁹ See FATF & ESAAMLG (2009) *South Africa Mutual Evaluation Report* and FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* generally.

prevalent in the region.²⁴⁰ The body, however, has not made any pronouncements about TBML despite researches from some scholars,²⁴¹ and organisations pointing to the possible existence of the problem in the region.²⁴²

4.3.3.3 The Contribution of the ESAAMLG to the Control of TBML in Trade-Finance Instruments

The ESAAMLG has made efforts in the fighting of money laundering in general through typologies research and publications.²⁴³ However, its major shortcoming has been the absence of input directed at TBML despite research from other organisations to the effect that TBML is a challenge not only in the developed world but in the developing economies as well.²⁴⁴ The trend from other FATF-Style Regional Bodies such as the APG,²⁴⁵ and the CFATF,²⁴⁶ is that of carrying out research on TBML in their jurisdictions. Findings from such research would then be used to alert members on the extent of the TBML problem in the context of the specific region.²⁴⁷

4.3.3.4 Conclusion

The ESAAMLG is a FATF-Style Regional Body responsible for regional AML issues in its sphere of jurisdiction.²⁴⁸ It researches on money-laundering trends and developments affecting the Eastern and Southern Africa region. The ESAAMLG also carries out mutual evaluations in member countries to establish the extent of compliance with FATF *Standards and Recommendations*.²⁴⁹ The body uses its findings to sensitise its members about current threats of money laundering and how to strengthen their AML regimes. South Africa is a member of the ESAAMLG and is influenced through the Treasury, by policy positions taken by the regional body on

²⁴⁰ See www.esaamlg.org [Accessed on 18 August 2022].

²⁴¹ See Kamba 'Cross-Border Trade-Based Money Laundering in Southern Africa' generally.

²⁴² See Ch 2 para 2.3 et seq above. See also GFI (2018) *South Africa: Potential Revenue Losses Report* passim.

²⁴³ See www.esaamlg.org [Accessed on 18 August 2022].

²⁴⁴ See para 4.3.3.2 above.

²⁴⁵ See para 4.3.4.2 below.

²⁴⁶ The term 'TBML' was first expressed as such by the CFATF in its 2000 to 2001 Annual Report while conducting a money-laundering typology exercise in the region's free trade zones.

²⁴⁷ See para 4.3.4.2 below.

²⁴⁸ See para 4.3.3.1 above.

²⁴⁹ See again para 4.3.3.2 above.

money-laundering issues.²⁵⁰ However, the ESAAAMLG has not undertaken any research on TBML for the benefit of its members despite reportage from other organisations about the potential threat of the problem in the region.²⁵¹ The absence of any research or guidance paper on TBML from the ESAAMLG has left the region in the ‘dark’ regarding its status on the problem.

4.3.4 The Asia-Pacific Group (APG)

4.3.4.1 General

The APG is part of a global network of similar organisations referred to as FATF-Style Regional Bodies.²⁵² The group was established in 1995 by the government of Australia as a regional FATF-Asia Secretariat.²⁵³ The Secretariat later worked with other countries in the Asia-Pacific region to mobilise commitment to fight money laundering.²⁵⁴ The outcome of such mobilisation was the formal grouping called the APG, which was officially created in February 1997.²⁵⁵

The APG is an independent regional AML body established by 13 original members through unanimous consent.²⁵⁶ However, the organisation’s membership has since increased to more than 35, including Singapore, which is part of this study.²⁵⁷ The APG has five primary functions that it carries out, namely, mutual evaluations, technical assistance and training, typologies research, global engagement, and private-sector engagement.²⁵⁸

4.3.4.2 The Contribution of the APG to the Control of TBML in Trade-Finance Instruments

In 2006, the FATF released its seminal TBML report and the APG did a follow up research on this report in 2012.²⁵⁹ The APG’s report on TBML aims to update and

²⁵⁰ See again para 4.3.3.2 above.

²⁵¹ See para 4.3.4.2 above.

²⁵² See www.apgml.org [Accessed on 7 April 2022]. See also para 4.3.2 and para 4.3.3 above.

²⁵³ See www.apgml.org [Accessed on 7 April 2022].

²⁵⁴ Ibid.

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ See www.apgml.org [Accessed on 7 April 2022]. See also Ch 8 below general.

²⁵⁸ See www.apgml.org [Accessed on 7 April 2022].

²⁵⁹ See APG (2012) *Trade-Based Money Laundering Report* generally. See again para 4.3.2.4.1 above.

extend the FATF's study.²⁶⁰ The report identifies current methods and techniques used in TBML schemes.²⁶¹ It also seeks to establish reasons for the seeming existence of a few cases of TBML being investigated or prosecuted since the FATF's report of 2006.²⁶²

The APG's TBML report also reveals three key findings. First, the report establishes that the majority of jurisdictions lack awareness and training about TBML.²⁶³ Secondly, it notes that the majority of governments do not distinguish between TBML and other types of money laundering.²⁶⁴ Thirdly, the report indicates that there is a lack of reliable statistics pointing to the size of TBML for most jurisdictions.²⁶⁵ The APG attributes the lack of statistics due to the absence of standardisation when collecting data about TBML.²⁶⁶

In addition to these findings, the APG's most significant contribution against TBML is the profiling of TBML sanitised case studies.²⁶⁷ These have helped in raising awareness of the nature of TBML and the various forms it can assume.²⁶⁸

4.3.4.3 Conclusion

The APG is an Asia Pacific FATF-Style Regional Body that deals with money-laundering issues in that part of the world.²⁶⁹ Although, the body represents the Asia-Pacific region, it has been singled out due to its direct contribution to the issue of TBML.²⁷⁰ In addition, Singapore, which falls under the APG jurisdiction, is also part of this study.²⁷¹ The APG published a follow up paper on TBML typologies following the FATF contributions on the subject.²⁷² The APG typologies report helped shed more

²⁶⁰ See APG (2012) *Trade-Based Money Laundering Report* 4. See again para 4.3.2.4.1 and para 4.3.2.4.2 above.

²⁶¹ See APG (2012) *Trade-Based Money Laundering Report* 5. See again Ch 2 para 2.3.4 and para 2.3.5 above.

²⁶² See APG (2012) *Trade-Based Money Laundering Report* 5.

²⁶³ Ibid. See also Ch 2 para 2.3.3 et seq above.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

²⁶⁶ See APG (2012) *Trade-Based Money Laundering Report* 5-6.

²⁶⁷ Idem at 52-54.

²⁶⁸ See APG (2012) *Trade-Based Money Laundering Report* 52-54. See also Ch 2 para 2.4 et seq above.

²⁶⁹ See para 4.3.4.1 above.

²⁷⁰ See APG (2012) *Trade-Based Money Laundering Report* generally.

²⁷¹ See Ch 1 para 1.6.3.3 above. See also Ch 8 below.

²⁷² See para 4.3.4.2 above.

light on the FATF findings on the issue of TBML by providing more sanitised case studies of the problem.²⁷³ The APG findings regarding the absence of specialised training on TBML issues and lack of proper statistics on the size of the problem are of significance as well.²⁷⁴ Such findings may help jolt stakeholders into action in trying to establish whether they are affected by TBML and the extent of such affection.

4.4 SOME INDUSTRY ASSOCIATIONS AND BODIES RELEVANT TO TBML CONTROL

Industry associations and bodies are voluntary industry groups that research and publish general guidance papers on the issue of money laundering to sensitise their members.²⁷⁵ Although their policy positions may not be binding on members or constitute standards that may be followed widely, these bodies help in influencing the way their members deal with the challenge of money laundering.²⁷⁶ Thus, industry associations and bodies are equally relevant to the fight against TBML as they are against money laundering in general. The relevance of these bodies to TBML control will be explored below.

4.4.1 The Basel Committee on Banking Supervision

4.4.1.1 General

The Basel Committee on Banking Supervision (Basel Committee) is a major international organisation that deals with the supervision of banks.²⁷⁷ The Committee was established in 1974 through 10 central bank governors.²⁷⁸ The committee is a subgroup of the Bank for International Settlements (BIS).²⁷⁹ The Basel Committee is currently comprised of 45 members from 28 jurisdictions that consist of central banks and other authorities with the responsibility of supervising banks and banking

²⁷³ See again para 4.3.4.2 above.

²⁷⁴ See again para 4.3.4.2 above.

²⁷⁵ See para 4.4.1 et seq below.

²⁷⁶ See para 4.4.1 below. See also para 4.3 above.

²⁷⁷ See Alldridge *Money Laundering Law* 106. See also www.bis.org/bcbs/ [Accessed on 18 May 2022].

²⁷⁸ See Hopton *Money Laundering Guide* 8. See www.bis.org/bcbs/ [Accessed on 18 May 2022].

²⁷⁹ See Hopton *Money Laundering Guide* 8; Sullivan *AML in Nutshell* 140.

business.²⁸⁰ The Basel committee expanded its membership in 2009 and 2014.²⁸¹ South Africa joined the Basel Committee on 10 June 2009.²⁸²

The task of the Basel Committee is to develop non-binding norms and principles for the supervision of banks.²⁸³ To achieve its mandate it relies on its members' commitments to implement and apply the norms and principles in their respective jurisdictions as per the body's guidelines.²⁸⁴ Members are also reviewed by the Basel Committee to assess and ensure that they are consistently following the organisation's standards.²⁸⁵

It is worth noting that the Basel Committee is one of the few organisations to initiate efforts aimed at tackling money laundering at the international level.²⁸⁶ However, similar to the FATF, the Basel Committee does not possess any legislative authority and its guidelines are not legally binding on members.²⁸⁷ Although this is the case, the body formulates standards and guidelines on a broad range of issues regarding the supervision of banks.²⁸⁸ To that end, the Basel Committee leaves it to appropriate national authorities to adopt these standards and guidelines to meet their national needs. The organisation has issued four supervisory standards and guidelines that deal with the money-laundering problem.²⁸⁹

4.4.1.2 Statement of Principles

In 1988, the Basel Committee issued the *Statement on Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering* (Statement of Principles).²⁹⁰ The *Statement of Principles* outlines the fundamental rules and practices that banks must implement in order to prevent money laundering through the banking system

²⁸⁰ See BIS 'Basel Committee Membership' www.bis.org/bcbs/ [Accessed 18 May 2022].

²⁸¹ Ibid.

²⁸² See BIS 'Basel Committee broadens its Membership' www.bis.org/bcbs/ [Accessed on 18 May 2022].

²⁸³ See Van Jaarsveld *Money Laundering* 213; Hamman *AML Legislation* 78-79.

²⁸⁴ See <https://bis.org/bcbs/charter.htm> [Accessed on 18 August 2022].

²⁸⁵ Ibid.

²⁸⁶ See Van Jaarsveld *Money Laundering* 213. See also para 4.3.1 and para 4.3.2 above.

²⁸⁷ See Hopton *Money Laundering Guide* 9; Sullivan *AML in Nutshell* 140. See also para 4.3.2 above.

²⁸⁸ See para 4.4.1.3 et seq below.

²⁸⁹ See Schott *Reference Guide to Anti-Money Laundering* 51 para III-13. See also para 4.4.1.3 et seq below.

²⁹⁰ See Hamman *AML Legislation* 78; Hopton *Money Laundering Guide* 8; and Van Jaarsveld *Money Laundering* 213.

both domestically and internationally.²⁹¹ Through the *Statement of Principles*, the Basel Committee emphasised the integrity of banks' management in preventing their institutions from being used as conduits for money laundering.²⁹²

4.4.1.3 Basel Core Principles

In 1997, the Basel Committee issued the *Core Principles for Effective Banking Supervision* (The Core Principles).²⁹³ There are 25 *Core Principles* of which *Core Principle* 15 addresses the aspect of money laundering.²⁹⁴ The *Core Principle* provides that bank supervisors must ensure that banks have adequate policies, practices and procedures in place, including the KYC rules, to prevent the financial system from being abused by criminal elements.²⁹⁵ To date, the Basel Committee's KYC policy and procedures form the bedrock of an effective AML institutional framework for almost every jurisdiction, including South Africa.²⁹⁶ At the heart of a KYC policy are five elements, namely, customer-acceptance policy, record keeping, staff training, client identification, and reporting of questionable transactions.²⁹⁷

4.4.1.4 Customer Due Diligence (CDD)

In 2001, the Basel Committee issued a detailed paper on the KYC principles titled *Customer Due Diligence for Banks* (CDD Paper).²⁹⁸ The *CDD Paper* was issued to cure deficiencies emanating from the KYC procedures at the international level.²⁹⁹ The KYC standards in the *CDD Paper* builds upon and improves the *Statement of Principles* and *Core Principle 15 for Effective Banking Supervision*.³⁰⁰ Furthermore, the Basel Committee encourages, in the *CDD Paper*, the acceptance and application of

²⁹¹ See Hamman *AML Legislation* 79; Schott *Reference Guide to Anti-Money Laundering* 52 para III-14; and Van Jaarsveld *Money Laundering* 213.

²⁹² See Alldridge *Money Laundering Law* 106.

²⁹³ See Van Jaarsveld *Money Laundering* 219; Hamman *AML Legislation* 80.

²⁹⁴ See Core Principle 15 of the *Basel Core Principles for Effective Banking Supervision*.

²⁹⁵ See Hamman *AML Legislation* 80-81; Van Jaarsveld *Money Laundering* 219. See also para 4.4.1.3 above.

²⁹⁶ See Schott *Reference Guide to Anti-Money Laundering* 53 para III-15.

²⁹⁷ See Van Jaarsveld *Money Laundering* 232-236. See also Ch 3 para 3.4 et seq above and para 4.4.5.2 below. For a discussion of the KYC framework under the South African AML regime in relation to the control of TBML in trade-finance instruments, see Ch 5 para 5.3.4 et seq below.

²⁹⁸ See Hopton *Money Laundering Guide* 9; Hamman *AML Legislation* 81. See also para 4.4.1.3 above.

²⁹⁹ See Van Jaarsveld *Money Laundering* 232-236; Schott *Reference Guide to Anti-Money Laundering* 54 para III-16.

³⁰⁰ See para 4.4.1.3 above.

the FATF's banking-related recommendations.³⁰¹ By adopting this stance, the Basel Committee intended the CDD process in banks to be in harmony with what the FATF recommends.³⁰²

4.4.1.5 General Guide to Account Opening and Customer Identification

The Basel Committee issued the *General Guide to Account Opening and Customer Identification* (General Guide) in 2003.³⁰³ The purpose of the *General Guide* is to assist banks in identifying customers accurately.³⁰⁴ It should be noted that the *General Guide*'s content closely resembles the FATF *Recommendations* in most cases.³⁰⁵ The *General Guide*, for example, provides for the verification of both customers and transactions.³⁰⁶

4.4.1.6 The Contribution of the Basel Committee to the Control of TBML in Trade-Finance Instruments

The Basel Committee has not made any statement specifically addressed to the challenge of TBML.³⁰⁷ Although such a statement has not been made, the Basel Committee has arguably made significant contributions to the control of money laundering in general.³⁰⁸ Such contributions may equally apply to TBML with some variations to suit the peculiarities of the problem. For example, the Basel Committee's *General Guide*, and *CDD Paper* principles are equally relevant to the issue of TBML as they are to money laundering in general.³⁰⁹ The *Core Principles for Effective Banking Supervision* requiring banks to have adequate AML policies and procedures are still relevant to the combatting of TBML within banks as they were for money laundering in general at their inception.³¹⁰

³⁰¹ See also para 4.3.2.2 above.

³⁰² Schott *Reference Guide to Anti-Money Laundering* 54 para III-16. See again para 4.3.2.2 above.

³⁰³ See Van Jaarsveld *Money Laundering* 221; Hamman *AML Legislation* 82.

³⁰⁴ Ibid.

³⁰⁵ See Van Jaarsveld *Money Laundering* 221. See again para 4.3.2.2 above.

³⁰⁶ See Hamman *AML Legislation* 82. See also para 4.4.1.3 and para 4.4.1.4 above.

³⁰⁷ See para 4.4.1.2 et seq above.

³⁰⁸ See again para 4.4.1.2 et seq above.

³⁰⁹ See para 4.4.1.3 and para 4.4.1.4 above.

³¹⁰ See para 4.4.1.2 above.

4.4.1.7 Conclusion

The Basel Committee is an international organisation that deals with bank supervision through issuance of non-binding guidelines.³¹¹ Since the regulatory activity of dealing with money laundering is now the province of other organisations not necessarily in the banking sector, the significance of the Basel Committee has diminished in this respect.³¹² The Basel Committee has not made a single policy statement directed at the challenge of TBML in banks.³¹³ Its silence on the matter may be due to lack of expertise on the subject. However, the Basel Committee's principles still play a significant role in shaping AML policy. The issue of CDD and account opening guidance may still play a significant role in the manner in which banks carry out customer onboarding for trade-finance transactions.³¹⁴ Such guidance may help stem the challenge of TBML in the banking sector.

4.4.2 The International Chamber of Commerce (ICC)

4.4.2.1 General

The ICC is an international non-governmental business organisation that represents business enterprises from across the world.³¹⁵ Its objective is to promote international trade, services and investment while at the same time eliminating challenges and distortions within international commerce.³¹⁶ To achieve its objectives the ICC employs two main methods, namely, out political advocacy and direct lobbying at governments and international organisations.³¹⁷

4.4.2.2 The Origins and Structure of the ICC

The ICC was formed in 1919 at the International Trade Conference, in the Atlantic City of New Jersey from 20-24 October.³¹⁸ Its members, who consists thousands of

³¹¹ See again para 4.4.1.2 above.

³¹² See para 4.3.1 and para 4.3.2 above.

³¹³ See para 4.4.1.6 above.

³¹⁴ See again para 4.4.1.3 and para 4.4.1.4 above.

³¹⁵ See Manganaro (2011) 14 *Int'l Trade & Bus L Rev* 273 at 280.

³¹⁶ See Tomashot *Selling Peace* 2; Kelly-Louw *Demand Guarantees* 95; and Manganaro (2011) 14 *Int'l Trade & Bus L Rev* 273 at 280.

³¹⁷ See Dominic Kelly 'The International Chamber of Commerce' (2005) 10 *New Political Economy* 259-271 at 259.

³¹⁸ See Tomashot *Selling Peace* 2; Kelly (2005) 10 *New Political Economy* 259 at 260.

companies and associations, span over 130 countries.³¹⁹ Due to its global reach and huge composition of membership from almost all business sectors, the ICC wields considerable influence.³²⁰ The stature of the organisation in international commerce has become so significant that it can lobby the UN, the World Trade Organisation, the EU and other international organisations on behalf of the international business community.³²¹ As an indicator of its significance in global affairs, the ICC even has a consultative status within the UN.³²²

In terms of composition, the ICC has a wide network of more than 90 national committees and has access to thousands of companies who strengthen its numerous member positions on many specific issues.³²³ In South Africa, the ICC national committee is called the South African Chamber of Commerce and Industry (SACCI). Besides SACCI, the Johannesburg Chamber of Commerce and Industry is also an active member of the ICC.³²⁴

4.4.2.3 The Operations of the ICC

The ICC operates through 13 special commissions based in Paris, France, which deal with various issues affecting international commerce and trade.³²⁵ One of the ICC's major roles is the harmonisation of international trade practices through the creation of uniform rules and trade terms that are incorporated into contracts.³²⁶ A few of the ICC standard guidelines such as the UCP rules have become a significant part of the international commercial law.³²⁷ The ICC rules are voluntary and do not have the force of law, but they constitute long-standing custom in international trade.³²⁸ The ICC also provides essential services that aid in the smooth operation of international trade.³²⁹ The most notable of such services are arbitration services through the international

³¹⁹ See Goode (1995) 39 *St Louis U L J* 725 at 725; Kelly-Louw *Demand Guarantees* 95.

³²⁰ See Kelly (2005) 10 *New Political Economy* 259 at 260.

³²¹ See Hugo (2017) 1 *TSAR* 1 at 3; Kelly-Louw *Demand Guarantees* 95.

³²² See Kelly-Louw *Demand Guarantees* 95.

³²³ See Hugo (2017) 1 *TSAR* 1 at 4. See also www.icc-ccs.org [Accessed on 10 May 2022].

³²⁴ See Hugo (2017) 1 *TSAR* 1 at 4.

³²⁵ See Goode (1995) 39 *St Louis U L J* 725 at 725; Hugo (2017) 1 *TSAR* 1 at 4; and Kelly-Louw *Demand Guarantees* 95.

³²⁶ See Goode (1995) 39 *St Louis U L J* 725 at 725; Kelly-Louw *Demand Guarantees* 95.

³²⁷ See Van Niekerk & Schulze *International Trade* para 3.4.2; Kelly-Louw *Demand Guarantees* 95.

³²⁸ See Van Niekerk & Schulze *International Trade* para 3.4.4; Manganaro (2011) 14 *Int'l Trade & Bus L Rev* 273 at 280.

³²⁹ See Tomashot *Selling Peace* 2.

Court of Arbitration and Commercial crime investigations through the Commercial Crime Services.³³⁰

The pervasive nature of organised crime has also affected the ICC's operations in international commerce. To counter organised crime in its operations, the ICC runs the Commercial Crimes Services.³³¹

4.4.2.4 The ICC Commercial Crime Services

The ICC Commercial Crimes Services is the anti-crime division of the ICC.³³² It is based in the UK and its role is to fight all forms of commercial crime.³³³ The Commercial-Crimes Services division is comprised of three bureaux that operate independently, namely, the International Maritime Bureau,³³⁴ the Financial Investigation Bureau³³⁵ and the Counterfeiting Intelligence Bureau.³³⁶ The members of the Commercial Crimes Services are drawn mainly from the legal profession, the law enforcement arm, and companies in international business, intellectual property and information technology.³³⁷ Besides the three specialised bureaux, the Commercial Crimes Services also operate FraudNet, a global network of law firms that specialises in dealing with business crime, including TBML.³³⁸

4.4.2.4.1 International Maritime Bureau (IMB)

The IMB was established in 1981 to act as a central point in the combatting of all forms of maritime crime and malpractice.³³⁹ Thus, the main task of the IMB is to protect the

³³⁰ See Kelly-Louw *Demand Guarantees* 95; Tomashot *Selling Peace* 2.

³³¹ See para 4.4.2.2 below.

³³² See Yanan Zhang 'Documentary Letter of Credit Fraud under Criminal Law Regime in England and China' (2014) 21 *Journal of Financial Crime* 433-446 at 442; Francois Vincke 'Putting in Place Integrity Programmes to Fight Economic Crime, ICC's Role' (2007) 5 *Int'l Bus L J* 681-712 at 697.

³³³ See Vincke (2007) 5 *Int'l Bus L J* 681 at 697. See <https://www.icc-ccs.org> [Accessed on 10 May 2022].

³³⁴ See Vincke (2007) 5 *Int'l Bus L J* 681 at 698. See also para 4.4.2.2.1 below.

³³⁵ See Vincke (2007) 5 *Int'l Bus L J* 681 at 698. See also para 4.4.2.2.2 below.

³³⁶ See Vincke (2007) 5 *Int'l Bus L J* 681 at 698. See para 4.4.2.2.3 below. See also <https://www.icc-ccs.org> [Accessed on 10 May 2022].

³³⁷ See Vincke (2007) 5 *Int'l Bus L J* 681 at 697 <https://www.icc-ccs.org> [Accessed on 10 May 2022].

³³⁸ Zhang (2014) 21 *Journal of Financial Crime* 433 at 442; <https://www.icc-ccs.org> [Accessed on 10 May 2022].

³³⁹ See Vincke (2007) 5 *Int'l Bus L J* 681 at 698. See also Fouché H 'Policing Maritime Piracy in Southern Africa' (2006) 3 *Acta Criminologica* 180-194 at 181; Jacques Meyer & Ian de Vries 'The Role of Interpol in Combatting Maritime Piracy' (2014) 1 *Acta Criminologica* 108 -120 at 108.

integrity of international trade through preventing fraud and other forms of business malpractices.³⁴⁰ The division relies on industry expertise and experience from its numerous networks to identify and investigate fraud, discover new criminal methods and trends and highlight other threats to trade such as TBML.³⁴¹ The IMB also authenticates documents used in trade finance.³⁴² The bureau runs diversified services from fraud investigations, the suppression of piracy to tracking of ships on the shipping lanes.³⁴³ The bureau is, therefore, the world's primary independent crime-fighting body with the mandate to protect the integrity of international trade.³⁴⁴

4.4.2.4.2 Financial Investigation Bureau (FIB)

The FIB is another bureau within the ICC's Commercial Crimes division. It is formerly known as the Commercial Crime Bureau.³⁴⁵ The FIB's role is steeped in the AML field where it provides KYC guidelines to commercial banks, the financial services sector and investors.³⁴⁶ The FIB membership include international banks, national financial intelligence units, law enforcement agencies and national regulatory and oversight authorities.³⁴⁷ Based on the information on its website, the FIB offers a range of services that include financial-instrument and document analysis, due diligence, research and analysis, and international financial crime and fraud investigations.³⁴⁸ The FIB portal online can be used to conduct due diligence and KYC checks against companies.³⁴⁹ The bureau has an extensive database dating back to over 25 years against which AML checks and due diligence may be conducted.³⁵⁰

³⁴⁰ See John Mo 'Options to Combat Maritime Piracy in Southeast Asia' (2002) 33 *Ocean Development & International Law* 343-358 at 343; Vincke (2007) 5 *Int'l Bus L J* 681 at 698.

³⁴¹ See also <https://www.icc-ccs.org> [Accessed on 18 August 2022]. See also Vincke (2007) 5 *Int'l Bus L J* 681 at 698.

³⁴² See Zhang (2014) 21 *Journal of Financial Crime* 433 at 442; Hamed Alavi 'Mitigating the Risk of Fraud in Documentary Letters of Credit' (2016) 6 *Ta/Tech Journal of European Studies* 139-156 at 146.

³⁴³ See Vincke (2007) 5 *Int'l Bus L J* 681 at 698.

³⁴⁴ See <https://www.icc-ccs.org> [Accessed on 18 August 2022]. See also Vincke (2007) 5 *Int'l Bus L J* 681 at 698.

³⁴⁵ See Vincke (2007) 5 *Int'l Bus L J* 681 at 698. See also <https://www.icc-ccs.org> [Accessed on 18 August 2022].

³⁴⁶ *Ibid.*

³⁴⁷ *Ibid.*

³⁴⁸ *Ibid.*

³⁴⁹ *Ibid.*

³⁵⁰ *Ibid.*

4.4.2.4.3 Counterfeiting Intelligence Bureau (CIB)

The CIB was created in 1985 as a specialised branch within the ICC's Commercial Crimes Services division.³⁵¹ It is a non-profit membership organisation with worldwide members drawn from multinational companies, trade associations, law firms, technology inventors and investigative agencies.³⁵² Its mission is to combat counterfeiting of products and documents, protecting the integrity of intellectual property and preventing the abuse of copyright.³⁵³ Counterfeiting is one of the fastest growing economic crimes in the world with devastating economic consequences for countries in the investment and public health and safety sectors.³⁵⁴ The bureau has a team of internet investigators to combat counterfeiting.³⁵⁵ The CIB also keeps the International Hologram Image Register meant to safeguard hologram copyright among other crime-fighting functions.³⁵⁶

4.4.2.5 *The Contribution of the ICC to the Control of TBML in Trade-Finance Instruments*

The ICC through its Banking Commission has participated in a joint effort with the Wolfsberg Group to draft the *Trade-Finance Principles* since 2014.³⁵⁷ From 2011, the Wolfsberg Group has had some meetings with the ICC to lobby for the acceptance of its principles by the ICC members.³⁵⁸ The Wolfsberg Group intended to raise and standardise the level of practice within the trade-finance industry for financial-crime compliance.³⁵⁹ Both the ICC and the Wolfsberg Group discovered during deliberations that, if the ICC issued a guidance paper on TBML control, banks were likely to follow

³⁵¹ Vincke (2007) 5 *Int'l Bus L J* 681 at 698.

³⁵² See <https://www.icc-ccs.org> [Accessed on 18 August 2022].

³⁵³ See Vincke (2007) 5 *Int'l Bus L J* 681 at 698. See also <https://www.icc-ccs.org> [Accessed on 18 August 2022].

³⁵⁴ See <https://www.icc-ccs.org> [Accessed on 10 May 2022]. See also Humphrey PB Moshi 'Trade-Based Money Laundering' in: Charles Goredema (ed) *The Invisible Threat: Money Laundering in Eastern and Southern Africa* (2010) 67-78; RJ Moshoeshoe, GM Enslin & DR Katerere 'An Exploratory Assessment of the Legislative Framework for Combatting Counterfeit Medicines in South Africa' (2022) 15 *Journal of Pharmaceutical Policy and Practice* 1-16.

³⁵⁵ See Vincke (2007) 5 *Int'l Bus L J* 681 at 698. See also <https://www.icc-ccs.org> [Accessed on 10 May 2022].

³⁵⁶ See <https://www.icc-ccs.org> [Accessed on 18 August 2022].

³⁵⁷ See also para 4.4.5.3.2 below.

³⁵⁸ See the Wolfsberg Group, ICC & BAFT (2019 Amendment) *Trade-Finance Principles* 5. See also para 4.4.5.3.2 below.

³⁵⁹ See the Wolfsberg Group, ICC & BAFT (2019 Amendment) *Trade-Finance Principles* 5.

such guidance due to the eminent position occupied by the ICC in the international business community.³⁶⁰ The ICC, therefore, jointly participated in the production of the *Trade-Finance Principles* in 2017 together with the Wolfsberg Group and the BAFT.³⁶¹ The principles have since been amended once — in 2019 — to take into account developments in the trade-finance sector and in the organised-crime world.³⁶²

Besides participating in the issuing of trade-finance principles, the ICC, through its Commercial Crimes Services, has the capacity and branches that may be useful in the combatting of TBML in trade-finance instruments.³⁶³ In this regard, the IMB and the FIB may be useful branches for such AML functions as sanctions screening, investigations, vessel checking, and document authentication for purposes of countering TBML.³⁶⁴ As already noted, TBML often relies on fraudulent documents and transactions designed to move value in illegal funds.³⁶⁵ Such fraudulent schemes may be tackled through the ICC's FraudNet programme, the FIB and the CIB, which seem to be divisions equipped for fraudulent activities in international commerce.³⁶⁶

4.4.2.6 Conclusion

The ICC is an international organisation that represents business interests in global commerce.³⁶⁷ The organisation is particularly active in the promulgation of rules that regulate the operations of financial institutions in trade finance.³⁶⁸ The body also deals with various forms of financial crime, including TBML through trade-finance transactions.³⁶⁹ The ICC contributed in the issuance of trade-finance principles against TBML together with the Wolfsberg Group and the BAFT.³⁷⁰ Its participation in the issuance of the trade-finance principles has been viewed by industry practitioners as a significant contribution in the fight against TBML.³⁷¹ Due to its significance in international commerce, the ICC's presence and input in the combatting of TBML add

³⁶⁰ Ibid. See also para 4.4.5.3.2 below.

³⁶¹ See para 4.4.6 et seq below. See also para 4.4.5 et seq below.

³⁶² See the Wolfsberg Group, ICC & BAFT (2019 Amendment) *Trade-Finance Principles* 4-5.

³⁶³ See para 4.4.2.4 above.

³⁶⁴ See para 4.4.2.4.1 and para 4.4.2.4.2 above.

³⁶⁵ See again Ch 2 para 2.3.4 and para 2.3.5 above.

³⁶⁶ See again para 4.4.2.4.2 and para 4.4.2.4.3 above.

³⁶⁷ See 4.4.2.1 above.

³⁶⁸ See again para 4.4.2.2 above.

³⁶⁹ See again para 4.4.2.5 above.

³⁷⁰ See again para 4.4.2.5 above.

³⁷¹ See again para 4.4.2.5 above.

more weight to the efforts already being made by other organisations like the Wolfsberg Group and BAFT.³⁷²

4.4.3 The World Customs Organisation (WCO)

4.4.3.1 General

The WCO is an independent inter-governmental organisation established in 1952 as the Customs Co-operation Council.³⁷³ Its objective is to increase customs administrations' efficacy and efficiency.³⁷⁴ The WCO is based in Brussels, Belgium.³⁷⁵ As of 7 February 2024, the WCO represents 186 customs administrations around the world that collectively process roughly 98 per cent of world trade.³⁷⁶ South Africa is a member of the WCO through the SARS and it joined the organisation on 24 March 1964.³⁷⁷

The WCO is the only international body with competence in customs issues and which represents the international customs community.³⁷⁸ The WCO also helps in the designing of measures aimed at harmonisation and simplification of customs administration.³⁷⁹ The organisation achieves this objective through the Harmonised Commodity Description and Coding System for product classification and the Kyoto Convention on the Simplification and Harmonisation of Customs Procedures.³⁸⁰

³⁷² See para 4.4.5 et seq and para 4.4.6 et seq below.

³⁷³ See Michael Keen 'The Future of Fiscal Frontiers and the Modernization of Customs Administration' in: Michael Keen (ed) *Changing Customs: Challenges and Strategies for the Reform of Customs Administration* (2003) (hereinafter Keen 'The Future of Fiscal Frontiers') 18; WCO-Egmont Group *Customs-FIU Co-operation Handbook: Sanitised Public Version* (2020) (hereinafter 'WCO-Egmont Group *Customs-FIU Co-operation Handbook*') 9.

³⁷⁴ See Keen 'The Future of Fiscal Frontiers' 18. See also www.wcoomd.org [Accessed on 18 August 2022]. For a detailed history of the WCO, see Carsten Weerth 'The World Customs Organisation — A History of 65 Years of Growth and its Legal Milestones' (2017) 7 *Customs Scientific Journal* 17-24.

³⁷⁵ See Keen 'The Future of Fiscal Frontiers' 18; WCO-Egmont Group *Customs-FIU Co-operation Handbook* 9.

³⁷⁶ In 2023 the members were 185 but with the addition of Palau on 2 February 2024, they are now 186, See www.wcoomd.org [Accessed on 8 May 2024].

³⁷⁷ See www.wcoomd.org [Accessed on 18 August 2022].

³⁷⁸ See www.wcoomd.org [Accessed on 18 August 2022]. See also WCO-Egmont Group *Customs-FIU Co-operation Handbook* 9; Weerth '(2017) 7 *Customs Scientific Journal* 17-24.

³⁷⁹ See Keen 'The Future of Fiscal Frontiers' 18; Carsten Weerth 'The Structure and Function of the World Customs Organisation' (2009) 4 *Global Trade and Customs Journal* 131-154 at 131.

³⁸⁰ See Keen 'The Future of Fiscal Frontiers' 18.

However, besides its customs harmonisation role, the WCO also has a part to play against the combatting of money laundering.³⁸¹

4.4.3.2 The Role of the WCO in Combatting Money Laundering

The Declaration of the WCO on Transnational Organised Crime in Budapest on 18 June 1997 notes the strategic significance of customs authorities in preventing money laundering.³⁸² The Customs Co-operation Council recognises that criminal proceeds are sometimes moved from one jurisdiction to another, and this gives law enforcement agencies and customs administration a chance to intercept and confiscate those proceeds.³⁸³

The WCO has had various AML initiatives meant to raise awareness and capacitate its members about money laundering in general. In 2001, it issued a comprehensive AML recommendation entitled the *Recommendation of the Customs Co-operation Council*.³⁸⁴ This Recommendation emphasises the need to develop and strengthen the role of customs administration in combatting money laundering.³⁸⁵ It was revised in 2005 to include inputs and insights from the FATF *Standards* and it widened the scope of and reaffirmed the role customs administration play in the fight against money laundering.³⁸⁶ The Customs Co-operation Council noted that the WCO needed to play a leading role in the development of practical measures to tackle money laundering and recover the proceeds of crime.³⁸⁷ In 2018, the WCO created its AML/CTF Programme to complement its AML efforts around the world.³⁸⁸ Utilising already existing expertise in its customs operations, the WCO strives to enhance its members' ability to combat money laundering through awareness campaigns and information

³⁸¹ See para 4.4.3.2 below.

³⁸² See WCO-Egmont Group *Customs-FIU Co-operation Handbook* 9. See also WCO (2005) *Recommendation of the Customs Co-operation Council on the Need to Strengthen the Role of Customs Administration in Tackling Money Laundering and in Recovering the Proceeds of Crime* (hereinafter 'WCO (2005) *Recommendation of the Customs Co-operation Council*') 1.

³⁸³ See WCO-Egmont Group *Customs-FIU Co-operation Handbook* 9. See also WCO (2005) *Recommendation of the Customs Co-operation Council* 1.

³⁸⁴ See www.wcoomd.org [Accessed on 7 April 2022]. See also WCO-Egmont Group *Customs-FIU Co-operation Handbook* 9.

³⁸⁵ See www.wcoomd.org [Accessed on 7 April 2022].

³⁸⁶ Ibid. See also WCO-Egmont Group *Customs-FIU Co-operation Handbook* 9.

³⁸⁷ See WCO-Egmont Group *Customs-FIU Co-operation Handbook* 9.

³⁸⁸ See www.wcoomd.org [Accessed on 7 April 2022]. See also WCO-Egmont Group *Customs-FIU Co-operation Handbook* 8.

sharing.³⁸⁹ It is this broader AML function of the WCO that may possibly be applied against the problem of TBML in trade-finance.³⁹⁰

4.4.3.3 The Contribution of the WCO to the Control of TBML in Trade-Finance Instruments

Customs authorities are crucial in the fight against TBML.³⁹¹ They are the primary-enforcement agencies in the international trade area, with a mandate to deal with crimes that may threaten trade, including TBML.³⁹² Tapping on their expertise in the administration of international trade, customs authorities have the potential and strategic positioning to identify and investigate TBML.³⁹³ In this regard, the APG notes that the WCO initiative to expand the idea of globally networked customs in order to enhance information exchange, particularly in the fight against TBML, is strategically valuable.³⁹⁴ Through its AML/CTF Programme, the WCO also conducts regional and national capacity building workshops on a regular basis for WCO members.³⁹⁵

In addition, The WCO also carries out operations to counter TBML.³⁹⁶ These include establishing mechanisms to track reports of imports and exports between nations in order to combat TBML.³⁹⁷ There is a need, therefore, between governments to share import and export information with the aim of detecting anomalies in trade data that may indicate TBML.³⁹⁸ It is worth noting that, the exchange of trade information among customs is consistent with the FATF's *Recommendation* on international co-operation.³⁹⁹ To accomplish the smooth sharing of information between customs authorities, jurisdictions may consider concluding customs mutual-assistance agreements.⁴⁰⁰

³⁸⁹ See www.wcoomd.org [Accessed on 7 April 2022].

³⁹⁰ See para 4.4.3.3 below.

³⁹¹ See para 4.4.3.2 above.

³⁹² See WCO-Egmont Group *Customs-FIU Co-operation Handbook* 9; FATF & Egmont Group (2020) *TBML Trends & Developments Report* 54.

³⁹³ See FATF & Egmont Group (2020) *TBML Trends & Developments Report* 54.

³⁹⁴ See APG (2012) *Trade-Based Money Laundering Report* 76.

³⁹⁵ See www.wcoomd.org [Accessed on 7 April 2022].

³⁹⁶ See WCO-Egmont Group *Customs-FIU Co-operation Handbook* 9.

³⁹⁷ See FATF (2006) *TBML Report* 21.

³⁹⁸ Ibid.

³⁹⁹ See FATF (2006) *TBML Report* 21. See also para 4.3.2.4 above and para 4.4.4 below.

⁴⁰⁰ See WCO-Egmont Group *Customs-FIU Co-operation Handbook* 20; FATF (2006) *TBML Report* 21.

The WCO has also collaborated with other organisations in the fight against TBML such as the Egmont Group through the production of the *Customs-FIU Co-operation Handbook* in 2020.⁴⁰¹ The handbook is intended to provide a practical and current AML guidance for FIUs and customs authorities when combatting money laundering in the customs operations.⁴⁰² The WCO-Egmont Group handbook has also been strategically constructed to address customs-based money laundering such as TBML using a three-step intervention strategy of identification, interdiction and investigation.⁴⁰³ Besides outlining the role of the WCO and the Egmont Group, the handbook also explores AML challenges usually encountered in various forms of money laundering, including TBML through trade-finance instruments.⁴⁰⁴ The WCO together with the Egmont Group also provide recommendations on how to tackle TBML in the context of customs administration.⁴⁰⁵ Such recommendations include formal collaboration and information sharing between the FIUs and customs authorities as well as the training of staff on TBML.⁴⁰⁶

4.4.3.4 Conclusion

The WCO is a world customs body with speciality in customs issues.⁴⁰⁷ Due to the pervasive nature of TBML affecting even customs operations, the WCO has also become relevant in money-laundering issues.⁴⁰⁸ The FATF has established that customs authorities under the WCO are relevant participants in the fight against TBML.⁴⁰⁹ The WCO itself, although not a special AML body in the mould of the FATF, has made various policy positions to demonstrate its willingness and role against money laundering.⁴¹⁰ The organisation has participated in developing manuals and handbooks that guide its members in the fight against TBML. One such participation, led to the development of the *Customs-FIU Handbook* together with the Egmont Group.⁴¹¹ Thus, the WCO contributed immensely in developing and advocating for the

⁴⁰¹ See WCO-Egmont Group *Customs-FIU Co-operation Handbook* passim.

⁴⁰² Idem at 5.

⁴⁰³ Ibid.

⁴⁰⁴ Idem at 4-22.

⁴⁰⁵ Idem at 20-21.

⁴⁰⁶ Ibid.

⁴⁰⁷ See para 4.4.3.1 above.

⁴⁰⁸ See para 4.4.3.3 above.

⁴⁰⁹ See para 4.3.2 and para 4.3.4 above.

⁴¹⁰ See para 4.4.3.2 and para 4.4.3.3 above.

⁴¹¹ See again para 4.4.3.3 above. See also para 4.4.4 et seq below.

idea of information sharing among stakeholders, which is necessary if TBML is to be dealt with successfully.⁴¹²

4.4.4 The Egmont Group

4.4.4.1 General

The Egmont Group is an association or grouping of FIUs from across the globe.⁴¹³ It is a product of a meeting held in June 1995 at the Egmont-Arenberg Palace in Brussels between government agencies and international organisations.⁴¹⁴ The FIC of South Africa is a member of the Egmont Group having joined the organisation on 1 July 2003.⁴¹⁵ The aim of the Egmont Group, is to make available, a forum for FIUs to get support and improve their respective national AML programmes.⁴¹⁶ The support includes the expanding of exchange of financial intelligence information, improving the capacity and expertise of FIUs personnel and increasing the sharing of expertise among member FIUs.⁴¹⁷

The Egmont Group has strong ties with the FATF in which organisation it has observer status granted in February 2002.⁴¹⁸ In line with what the Egmont Group encourages, the FATF recommends that member countries establish FIUs to prevent and co-operate in the fight against money laundering.⁴¹⁹ The Egmont Group operates through five working groups, namely, the legal working group, the outreach-working group, the trading working group, the operational working group and the IT working group.⁴²⁰ Two critical contributions of the Egmont Group make it a significant body in the global fight

⁴¹² See again para 4.4.3.3 above.

⁴¹³ See Madinger *Money Laundering* 72; Schott *Reference Guide to Anti-Money Laundering* 57 para III-19.

⁴¹⁴ See Wouter H Muller 'The Egmont Group' in: Wouter H Muller, Christian H Kalin & John G Goldsworth (eds) *Anti-Money Laundering: International Law and Practice* (2007) (hereinafter Muller 'The Egmont Group') 86; Schott *Reference Guide to Anti-Money Laundering* 57 para III-19; Hopton *Money Laundering Guide* 14; Sullivan *AML in Nutshell* 142; and Hamman *AML Legislation* 82.

⁴¹⁵ See <https://www.egmontgroup.org/members> [Accessed 18 August 2022]. For more regarding the FIC and its contributions against TBML in the selected trade-finance instruments, see Ch 5 para 5.4.2 below.

⁴¹⁶ See Muller 'The Egmont Group' 89; Schott *Reference Guide to Anti-Money Laundering* 57 para III-19; Hopton *Money Laundering Guide* 14; Sullivan *AML in Nutshell* 142; and Hamman *AML Legislation* 82.

⁴¹⁷ See Muller 'The Egmont Group' 89; Hopton *Money Laundering Guide* 14.

⁴¹⁸ See Van Jaarsveld *Money Laundering* 250; Hamman *AML Legislation* 84.

⁴¹⁹ See Recommendation 2 of the FATF (2012) *Standards*; Madinger *Money Laundering* 72.

⁴²⁰ See Muller 'The Egmont Group' 89-90.

against money laundering. These are the concept of FIUs,⁴²¹ and the principles for information exchange.⁴²²

4.4.4.2 The Egmont Group Concept of FIUs

FIUs are central national organisations tasked with collecting, examining, and distributing financial data to authorities relevant in the combatting of money laundering.⁴²³ Of importance is that they serve as the focal points for domestic AML programmes responsible for the exchange of information between financial institutions and law enforcement authorities.⁴²⁴ In South Africa, the FIC plays this role.⁴²⁵

As noted earlier, one of the significant contributions of the Egmont Group is the creation of the FIU model for use by national governments. It should be noted that before the Egmont Group's initiative, the FIU models differed significantly across jurisdictions.⁴²⁶ Due to this, establishing international cooperation against money laundering was extremely challenging.⁴²⁷ Thus, the Egmont Group filled that gap by creating uniformity in the way FIUs operate.⁴²⁸

4.4.4.3 The Egmont Principles for Information Exchange

Besides the concept of FIUs, the Egmont Group also improved the exchange of information in the combatting of money laundering in a significant way. In this regard, the group's role in promoting the exchange of information through FIUs in the combatting of money laundering is now universally recognised.⁴²⁹ This is evident when one observes that almost every country's FIU is a member of the Egmont Group and subscribes to its principles. Due to the transnational nature of organised crime, the Egmont Group finds it prudent to communicate and share intelligence in a cross-border context.⁴³⁰ This is a significant step in the efforts of combatting money

⁴²¹ See para 4.4.4.2 below.

⁴²² See para 4.4.4.3 below.

⁴²³ See Hopton *Money Laundering Guide* 15; Madinger *Money Laundering* 72.

⁴²⁴ See Schott *Reference Guide to Anti-Money Laundering* 57 para III-19. See also para 4.4.4.3 below.

⁴²⁵ See Ch 5 para 5.4.2 for the discussion of the FIC and its role under the South African AML regime.

⁴²⁶ See Hamman *AML Legislation* 83.

⁴²⁷ Ibid.

⁴²⁸ Idem at 83. See also para 4.4.4.3 below.

⁴²⁹ See Hamman *AML Legislation* 84. See also para 4.4.4.2 above.

⁴³⁰ See Sullivan *AML in Nutshell* 143; Van Jaarsveld *Money Laundering* 250.

laundering because member countries across the world do not have automatic law enforcement authority to act in another jurisdiction.⁴³¹

As already noted, central to the work of the Egmont Group is the exchange of information to aid in the combatting of money laundering.⁴³² In this regard, the organisation has adopted two documents, namely, the *Principles for Information Exchange* and the *Best Practices for Exchange of Information*.⁴³³ These two documents enhance the exchange of information and provide guidelines for best practices to be applied in the exchange of information between FIUs.⁴³⁴ Once a country becomes a member of the Egmont Group it must commit to abide by the Egmont Group's *Principles for Information Exchange* between FIUs.⁴³⁵ Failure to do so may lead to the suspension or even expulsion of the non-compliant member from the Egmont Group.⁴³⁶

The Egmont Group's *Principles for Information Exchange* provide, in part, that FIUs must freely exchange information with other FIUs based on the principle of reciprocity or mutual agreements.⁴³⁷ To avoid misuse of information, the Egmont Group member FIUs have agreed that information shared between FIUs should only be used for the specific purpose for which the information was requested.⁴³⁸ In addition, the Egmont Group has also made rules for confidentiality regarding information exchange, which are followed by almost every FIU that becomes a member.⁴³⁹

4.4.4.4 The Contribution of the Egmont Group to the Control of TBML in Trade-Finance Instruments

It is worth noting that the Egmont Group has contributed significantly to the global fight against money laundering in general. In this regard, the group has championed the

⁴³¹ See Sullivan *AML in Nutshell* 143; Van Jaarsveld *Money Laundering* 250.

⁴³² See Muller 'The Egmont Group' 90.

⁴³³ Ibid.

⁴³⁴ Ibid.

⁴³⁵ See Schott *Reference Guide to Anti-Money Laundering* 58 para III-20.

⁴³⁶ For example, in 2018 the Egmont Group suspended the Nigerian Financial Intelligence Unit and threatened to expel it due to the FIU's lack of adequate operational independence, see 'Nigeria: In the Face of Expulsion from the Egmont Group-Mondaq' <https://www.mondaq.com> [Accessed on 18 August 2022].

⁴³⁷ See Muller 'The Egmont Group' 90; Sullivan *AML in Nutshell* 143.

⁴³⁸ See Muller 'The Egmont Group' 90.

⁴³⁹ See Schott *Reference Guide to Anti-Money Laundering* 58 para III-20; Van Jaarsveld *Money Laundering* 251.

concept of FIUs, which are central components to most jurisdictions' AML frameworks, including in South Africa.⁴⁴⁰ The Egmont Group has also helped popularise the idea of information exchange among stakeholders through FIUs in order to combat money laundering effectively.⁴⁴¹

Apart from its broad support to the fight against money laundering, the Egmont Group has also collaborated with various organisations in efforts to combat TBML.⁴⁴² The group has co-published a follow up report on TBML trends with the FATF in 2020.⁴⁴³ It has also contributed in the production of the *Customs-FIU Cooperation Handbook* in 2020 together with the WCO to guide customs authorities and FIUs in the combatting of TBML.⁴⁴⁴ In 2021, the Egmont Group also contributed in the production of risk indicators for TBML together with the FATF.⁴⁴⁵ The risk indicators are a valuable contribution to the efforts aimed at controlling TBML in the banking sector.⁴⁴⁶

4.4.4.5 Conclusion

The Egmont Group remains one of the most significant stakeholders in the fight against TBML.⁴⁴⁷ Its contributions have been ongoing and have the potential to change the future course of events in so far as TBML control is concerned. The ability of the Egmont Group to collaborate with other significant institutions in the fight against TBML, like the FATF, and the WCO, has the likely effect of increasing information sharing about money laundering.⁴⁴⁸ The Egmont Group's idea of FIUs has proved to be central in national money-laundering control in almost every country around the world, including in South Africa.⁴⁴⁹

⁴⁴⁰ See para 4.4.4.2 above.

⁴⁴¹ See para 4.4.4.3 above.

⁴⁴² See para 4.4.3.3 and para 4.3.2.3 above.

⁴⁴³ See para 4.3.2.4.3 above.

⁴⁴⁴ See para 4.4.3.3 above.

⁴⁴⁵ See para 4.3.2.4.4 above.

⁴⁴⁶ See again para 4.3.2.4.4 above. See also para 4.4.6.2.1 below.

⁴⁴⁷ See para 4.4.4.4 above.

⁴⁴⁸ See again para 4.4.4.4 above.

⁴⁴⁹ See Ch 5 para 5.4.2 below.

4.4.5 The Wolfsberg Group

4.4.5.1 General

The Wolfsberg Group⁴⁵⁰ is an association of 12 global banks that represents global private-banking issues.⁴⁵¹ The organisation is not just a grouping of private banks but one with interest in money-laundering control. It is one of the most significant institutions that has been involved in the development of AML standards over time.⁴⁵²

The aim of the Wolfsberg Group is to develop frameworks and guidelines for the management and control of financial-crime risks especially around the issues of KYC, AML, and Counter Terrorist Financing.⁴⁵³ The organisation has gone beyond the role of just setting standards to the role of creating a forum where regulators and industry players can meet and deliberate over AML issues annually called the Wolfsberg Forum.⁴⁵⁴ Despite its standard setting role, the Wolfsberg Group has no legal or legislative authority over member countries and international banks who subscribe to it.⁴⁵⁵

The Wolfsberg Group has a record of accomplishment of either initiating, participating, or collaborating with other significant AML regulatory institutions such as the FATF.⁴⁵⁶ For instance, the standards on CDD did not develop much beyond their original focus until 2000 when the Wolfsberg Group published its *Wolfsberg AML Principles for Private Banking*.⁴⁵⁷ The Wolfsberg Group is also the first international body to publish a comprehensive set of recommendations on correspondent banking due diligence

⁴⁵⁰ The following multinational banks make up the group: Barclays, Citigroup, Bank of America, Goldman Sachs, Standard Chartered, MUFG, Deutsche Bank, Banco Santander, Société Générale, JPMorgan Chase, HSBC, and UBS, see <https://www.wolfsberg-principles.com> [Accessed on 9 May 2024].

⁴⁵¹ See Van Jaarsveld *Money Laundering* 248; Schott *Reference Guide to Anti-Money Laundering* 64 para IV-4.

⁴⁵² See para 4.4.5.2 et seq below.

⁴⁵³ See <https://www.wolfsberg-principles.com> [Accessed on 18 May 2022].

⁴⁵⁴ See Mark Pieth 'The Wolfsberg Process' in: Wouter H Muller, Christian H Kalin & John G Goldsworth (eds) *Anti-Money Laundering: International Law and Practice* (2007) (hereinafter Pieth 'The Wolfsberg Process') 97.

⁴⁵⁵ See Sullivan *AML in Nutshell* 142.

⁴⁵⁶ See para 4.4.5.3.1 below.

⁴⁵⁷ See Gemma Aiolfi & Hans-Peter Bauer 'The Wolfsberg Group' in: Mark Pieth (ed) *Collective Action: Innovative Strategies to Prevent Corruption* (2012) (hereinafter Aiolfi & Bauer 'The Wolfsberg Group') 3. See also para 4.4.5.2.1 below and the principles available at <https://www.wolfsberg-principles.com> [Accessed on 18 August 2022].

and monitoring in 2002.⁴⁵⁸ The RBA, which is an integral part of the FATF 40 Recommendations, is an outcome of the collaboration between the Wolfsberg Group and the FATF.⁴⁵⁹ Since the publication of the *Global AML Guidelines for Private Banking*⁴⁶⁰ in October 2000, the Wolfsberg Group is generally regarded as an authority in AML issues at the global level.⁴⁶¹

4.4.5.2 The Wolfsberg Group AML Principles

The Wolfsberg Group has published a set of principles, the most notable of which and relevant to this study are the *AML Principles for Private Banking*,⁴⁶² *AML Principles for Correspondence Banking*,⁴⁶³ and the *Trade-Finance Principles*.⁴⁶⁴ The Wolfsberg Group AML principles are a key component in the global effort against money laundering.⁴⁶⁵ These principles are briefly described below.

4.4.5.2.1 AML Principles for Private Banking 2002

These principles represent the Wolfsberg Group's opinion regarding appropriate AML guidelines that private banking institutions should adopt when dealing with high net worth individuals.⁴⁶⁶ The principles, therefore, deal with such issues as customer identification, which includes identifying the ultimate beneficial owner for bank accounts and enhanced due diligence on suspicious transactions.⁴⁶⁷

4.4.5.2.2 AML Principles for Correspondent Banking 2014

In a network of global banking where banks in various jurisdictions depend on others, the AML principles for correspondent banks have proved to be most valuable. These

⁴⁵⁸ See Aiolfi & Bauer 'The Wolfsberg Group' 3. The principles are available at <https://www.wolfsberg-principles.com> [Accessed on 18 August 2022].

⁴⁵⁹ See *Guidance on the Risk-Based Approach* of 2006 at <https://www.wolfsberg-principles.com> [Accessed on 18 August 2022]. See also para 4.4.5.3.1 below.

⁴⁶⁰ These guidelines have since been revised twice in May 2002 and in June 2012, see <https://www.wolfsberg-principles.com> [Accessed on 18 August 2022]. See also para 4.4.5.2.1 below.

⁴⁶¹ See Pieth 'The Wolfsberg Process' 95.

⁴⁶² See para 4.4.5.2.1 below.

⁴⁶³ See para 4.4.5.2.2 below.

⁴⁶⁴ See para 4.4.5.3.2 below.

⁴⁶⁵ Van Jaarsveld *Money Laundering* 248.

⁴⁶⁶ See Pieth 'The Wolfsberg Process' 98; Schott *Reference Guide to Anti-Money Laundering* 64 para IV-4.

⁴⁶⁷ See *Schott Reference Guide to Anti-Money Laundering* 66 para IV-6.

principles regulate how correspondent banking relationships are established and maintained.⁴⁶⁸ The principles prohibit international banks from conducting banking business with shell banks. The Wolfsberg Group recommends an RBA in the establishment of correspondent banking relationships to ascertain the appropriate level of risks banks can accept for each new correspondent banking client.⁴⁶⁹

4.4.5.3 The Contribution of the Wolfsberg Group to the Control of TBML in Trade-Finance Instruments

Besides its contribution to the general AML discourse, the Wolfsberg Group has made direct and indirect contributions against TBML in trade finance. In this regard, the organisation has published a few guidance papers that may be relevant to the combatting of TBML. I briefly discuss these below.

4.4.5.3.1 Guidance on the Risk-Based Approach (RBA) on Money Laundering 2006

The Wolfsberg Group champions the adoption of the RBA by national and international regulatory agencies in the fight against money laundering.⁴⁷⁰ In its 2006 paper titled *A Risk-Based Approach for Money-Laundering Risks*, the group advocated for a flexible approach in identifying money-laundering risks or services risk.⁴⁷¹ The RBA differs significantly from the traditional rules-based approach, which deals with money-laundering risks using predefined criteria.⁴⁷² With the Wolfsberg Group's RBA, each financial institution develops its own compliance systems depending on the variables of the money-laundering risk affecting it. Thus, the RBA allows a financial institution to allocate resources as per the available information about risky customers or transactions.⁴⁷³

It is submitted that the flexibility under the RBA may be a more suitable tool to combat TBML and its variations.⁴⁷⁴ To attain this, a financial institution may distribute resources and effort required to fight TBML depending on how the bank perceives it as a threat.

⁴⁶⁸ See Pieth 'The Wolfsberg Process' 99.

⁴⁶⁹ See Schott *Reference Guide to Anti-Money Laundering* 66 para IV-6. See also para 4.4.5.3.1 below.

⁴⁷⁰ See Pieth 'The Wolfsberg Process' 97.

⁴⁷¹ Ibid. See also para 4.4.6.2.1 below.

⁴⁷² See Pieth 'The Wolfsberg Process' 97. See also para 4.4.6.2.1 below.

⁴⁷³ See Pieth 'The Wolfsberg Process' 97. See also para 4.4.6.2.1 below.

⁴⁷⁴ See Ch 3 para 3.4.2.2 above.

As a demonstration of the acceptance of the RBA concept, most jurisdictions, including South Africa, have incorporated the RBA in their national legislations.⁴⁷⁵ This has made the deployment of the approach specific and relevant to each jurisdiction.

4.4.5.3.2 Guidance on Money-Laundering Risks in Trade Finance 2011 and 2019

The Wolfsberg Group has also been instrumental in refocusing the agenda of TBML in trade finance by providing trade-finance expertise, which is limited within the ranks of other AML bodies such as the FATF.⁴⁷⁶ In this regard, the group pioneered in the designing of *Trade-Finance Principles* to guide banks in the combatting of TBML.⁴⁷⁷ The principles were initially released in 2011 and they have since been updated twice in 2017 and 2019.⁴⁷⁸ The updated versions of the *Trade-Finance Principles* were drafted in collaboration with the ICC and the BAFT to widen the scope of stakeholders that may benefit from them.⁴⁷⁹ These set of principles are an ongoing effort by the Wolfsberg Group and its partners in defining AML standards for TBML in trade-finance transactions.⁴⁸⁰

Of significance is that the *Trade-Finance Principles* address how TBML may exploit trade finance and how financial institutions may control the problem.⁴⁸¹ The principles, therefore, review TBML risks that may be encountered in trade-finance instruments such as documentary credits, documentary collections, demand guarantees, and standby letters of credit.⁴⁸² I have alluded to the insights and guidance under these principles elsewhere under the relevant chapters.⁴⁸³ For each of trade-finance instrument the principles provide AML guidance about CDD, transaction and documentary review as well as monitoring of transactions for suspicious features.⁴⁸⁴

⁴⁷⁵ See Ch 5 para 5.3.4.4 below.

⁴⁷⁶ See Aiolfi & Bauer 'The Wolfsberg Group' 9. See also para 4.3.2.4 above.

⁴⁷⁷ See the Wolfsberg Group, ICC and BAFT (2019 Amendment) *Trade-Finance Principles* generally. This is the latest report in its collaborative effort with the ICC and BAFT. See also para 4.4.2.5 above and para 4.4.6.2 below.

⁴⁷⁸ See again para 4.4.2.5 above. See also para 4.4.6.2 below.

⁴⁷⁹ See again para 4.4.2.5 above. See also para 4.4.6.2 below.

⁴⁸⁰ See the Wolfsberg Group, ICC and BAFT (2019 Amendment) *Trade-Finance Principles* 1. See again para 4.4.2.5 above.

⁴⁸¹ See also Ch 3 para 3.3 et seq above.

⁴⁸² See the Wolfsberg Group, ICC and BAFT (2019 Amendment) *Trade-Finance Principles* 2; Ch 3 para 3.3 et seq above. See also Ch 5 para 5.3.4 et seq and Ch 9 para 9.2 et seq below.

⁴⁸³ See again Ch 3 para 3.3 et seq above.

⁴⁸⁴ See the Wolfsberg Group, ICC and BAFT (2019 Amendment) *Trade-Finance Principles* 9. See again Ch 3 para 3.3 et seq above.

4.4.5.4 Conclusion

The Wolfsberg Group is an organisation of private banks that has taken it upon itself to combat money laundering.⁴⁸⁵ The group has largely contributed towards the global fight against TBML, especially in the context of trade finance.⁴⁸⁶ It has done this through publication of AML principles for private and correspondent banking.⁴⁸⁷ The Wolfsberg Group has also been advocating for banks to adopt the RBA in money-laundering risk assessments.⁴⁸⁸ The RBA may be central to a flexible assessment of TBML risks relative to a bank's risk profile. The Wolfsberg Group has also been one of the major contributors to the fight against TBML through its flagship Wolfsberg Group *Trade-Finance Principles*.⁴⁸⁹ Through collaboration with the BAFT and the ICC, the Wolfsberg Group developed the Trade-Finance Principles even further for a wider global audience.⁴⁹⁰ The principles guide financial institutions in their trade-finance transactions to effectively deal with the potential challenge of TBML.

4.4.6 Bankers Association for Finance and Trade (BAFT)

4.4.6.1 General

BAFT was founded in 1921 as the Bankers Association for Foreign Trade.⁴⁹¹ At its formation, it brought together ten departments of international banks based in Midwest in the US to collaborate on common issues and concerns raised by their international trade-finance customers.⁴⁹² In 2001, the Bankers Association for Foreign Trade merged with the International Financial Services Association and later on rebranded to become the BAFT in 2014.⁴⁹³

The aim of BAFT is to work on defining the best-market practices in trade finance and financial-crime control.⁴⁹⁴ As a worldwide trade-finance association, BAFT facilitates

⁴⁸⁵ See para 4.4.5.1 above.

⁴⁸⁶ See para 4.4.5.2 et seq above.

⁴⁸⁷ See para 4.4.5.2.1 and para 4.4.5.2.2 above.

⁴⁸⁸ See para 4.4.5.3.1 above.

⁴⁸⁹ See para 4.4.5.3.2 above.

⁴⁹⁰ See para 4.4.2.5 above and para 4.4.6.2.3 below.

⁴⁹¹ See www.baft.org [Accessed on 6 May 2022].

⁴⁹² Ibid.

⁴⁹³ It should be noted, however, that there was no change of the acronym 'BAFT' serve for the composition of the organisation and change of name, see www.baft.org [Accessed on 18 August 2022].

⁴⁹⁴ Ibid.

financial solutions among financial institutions, service providers and the regulatory community.⁴⁹⁵ The solutions aim to encourage sound financial practices within the trade-finance industry.⁴⁹⁶ The organisation focuses on various issues, including the shaping of policy, influencing legislation, establishing industry best practices, and the provision of education and training to its members.⁴⁹⁷

4.4.6.2 The Contribution of BAFT to the Control of TBML in Trade-Finance Instruments

BAFT promotes thought leadership and best practices within the banking and trade industries.⁴⁹⁸ In one of its most notable contributions towards the control of TBML, the organisation has worked with the ICC and the Wolfsberg Group to develop the *Trade-Finance Principles*.⁴⁹⁹ These principles provide guidance to financial institutions in the combatting of TBML in trade finance.⁵⁰⁰

Besides collaborations with the ICC and the Wolfsberg Group, BAFT has also developed two notable guidance papers of its own, namely, *Guidance for Identifying Potentially Suspicious Activity in Letter of Credit and Documentary Collections*,⁵⁰¹ and *Combatting Trade-Based Money Laundering: Rethinking the Approach*.⁵⁰² These guidance papers are briefly explored below under their respective headings.

4.4.6.2.1 Guidance for Identifying Potentially Suspicious Activity

BAFT developed the *Guidance for Identifying Potentially Suspicious Activity in Letters of Credit and Documentary Collections* in 2015. The guidance was issued after BAFT observed that regulatory expectations for banks in the fight against TBML have increased.⁵⁰³ This is one of the reasons for undertaking the present study to come up with strategies on how to deal with TBML in the context of banking in South Africa.⁵⁰⁴ In addition, bank examiners have heightened what they expect concerning the screening of customers, filtering of sanctions, and the identification of suspicious

⁴⁹⁵ Ibid.

⁴⁹⁶ Ibid.

⁴⁹⁷ Ibid.

⁴⁹⁸ See BAFT (2021) *Annual Review Digest* 1.

⁴⁹⁹ See para 4.4.6.2.3 below. See also para 4.4.2.5 and para 4.4.5.3.2 above.

⁵⁰⁰ See para 4.4.6.2.3 below.

⁵⁰¹ See para 4.4.6.2.1 below.

⁵⁰² See para 4.4.6.2.2 below.

⁵⁰³ See BAFT (2015) *Annual Review* 6.

⁵⁰⁴ See Ch 1 para 1.5 above. See also Ch 3 para 3.3 et seq above and Ch 5 below generally.

activities in trade-finance transactions.⁵⁰⁵ The purpose of the guidance is to assist banks at a global level to develop their approach in the combatting of TBML in trade finance.⁵⁰⁶

This best practice guidance consolidates the red flags and other suggested practices that have been identified by the FATF, FCA, FinCEN, FFIEC, Basel Committee, Wolfsberg Group and others.⁵⁰⁷ The guidance comprises sixteen red flags and risk indicators that may help banks to identify potentially unusual activity of TBML.⁵⁰⁸ Such red flags and risk indicators range from a customer that departs significantly from its traditional pattern of trade, transaction parties that appear to be connected, customers that conduct business in high-risk jurisdictions to customers that transact in goods or by way of certain trade documents that potentially involve a higher risk of TBML.⁵⁰⁹ It should be noted that the BAFT guidance does not only present red flags for potential TBML in trade finance but also provide a suggested course of action for banks to take when confronted with such red flags.⁵¹⁰

The BAFT 2015 best practice publication serves as a guiding tool for trade-finance practitioners in their day-to-day operations.⁵¹¹ In designing and drafting the guidance paper, BAFT's Trade Best Practices AML/KYC Working Group considered different approaches used by banks of various sizes in different jurisdictions.⁵¹² This has enabled the guidance paper to be inclusive and a global reference point for banks when they formulate compliance policies for KYC and AML risks.⁵¹³ BAFT makes it clear that the guidance is only meant to raise awareness of what may appear to be a suspicious activity of TBML in trade-finance transactions.⁵¹⁴ Ultimately, each bank has to decide whether to adopt the guidance within the confines of the laws of its

⁵⁰⁵ See BAFT (2015) *Guidance on Suspicious Activity in Letters of Credit Report 1*.

⁵⁰⁶ Ibid.

⁵⁰⁷ See BAFT (2015) *Annual Review 6*. See also BAFT (2015) *Guidance on Suspicious Activity in Letters of Credit Report 8-12*. See also para 4.3.2.4.4 above.

⁵⁰⁸ See BAFT (2015) *Guidance on Suspicious Activity in Letters of Credit Report 3-12*. See again para 4.3.2.4.4 above.

⁵⁰⁹ See BAFT (2015) *Guidance on Suspicious Activity in Letters of Credit Report 3-12*. See again para 4.3.2.4.4 above and Ch 3 para 3.4 et seq above.

⁵¹⁰ See BAFT (2015) *Guidance on Suspicious Activity in Letters of Credit Report 3-7*.

⁵¹¹ See BAFT (2015) *Annual Review 6*.

⁵¹² Ibid.

⁵¹³ Idem at 9. See again Ch 3 para 3.4 et seq above.

⁵¹⁴ See BAFT (2015) *Guidance on Suspicious Activity in Letters of Credit Report 1*.

operational jurisdiction.⁵¹⁵ The guidance assists trade-finance and AML staff in the developing of the risk-based compliance solutions that can appropriately identify and escalate potentially suspicious activity.⁵¹⁶ In this regard, BAFT urges banks to apply an RBA to their compliance standards for TBML risks in trade finance.⁵¹⁷ This means that individual transactions or customers are processed based on the bank's risk assessment of the parties involved and the transaction type and size.⁵¹⁸

Of further significance in the guidance note is that BAFT proposes a defence framework for TBML that includes six elements, namely, CDD, sanctions screening, product-specific policies, targeted training, identification, and reporting of suspicious activity.⁵¹⁹ BAFT argues that these are elements of an ideal AML framework that may successfully withstand the threat of TBML.⁵²⁰

4.4.6.2.2 Guidance on Combatting TBML in Trade-Finance: Rethinking the Approach

The 2017 *Guidance on Combatting TBML: Rethinking the Approach* is a follow up on the 2015 *Guidance on Identifying Suspicious Activities in Trade Finance*.⁵²¹ Through the 2017 guidance, BAFT proposes a new approach in fighting TBML, which is an improvement upon its 2015 report.⁵²² BAFT recognises that while its 2015 guidance is helpful to financial institutions, TBML has been evolving and there is a need for clarification on how this form of money laundering operates and how to contain it.⁵²³ Thus, BAFT clarifies the role of banks in trade finance and how that role may be deployed in the combatting of TBML.⁵²⁴

BAFT emphasises in this 2017 guidance note that, organised crime groups that seek to launder illegal funds through trade finance are interested in the payment component

⁵¹⁵ Ibid.

⁵¹⁶ See BAFT (2015) *Annual Review* 6. See again Ch 3 para 3.4 et seq above.

⁵¹⁷ See BAFT (2015) *Guidance on Suspicious Activity in Letters of Credit Report* 1. See also para 4.4.5.3.1 above.

⁵¹⁸ See BAFT (2015) *Guidance on Suspicious Activity in Letters of Credit Report* 1. See again para 4.4.5.3.1 above.

⁵¹⁹ See BAFT (2015) *Guidance on Suspicious Activity in Letters of Credit Report* 2. See again Ch 3 para 3.4.2.2 above.

⁵²⁰ See BAFT (2015) *Guidance on Suspicious Activity in Letters of Credit Report* 2; Ch 3 para 3.4.2.2 above. For a discussion of these elements and others under the South African AML regime, see Ch 5 para 5.3.4 et seq below.

⁵²¹ See para 4.4.6.2.1 above.

⁵²² See BAFT (2017) *Combatting TBML Report* 1. See again para 4.4.6.2.1 above.

⁵²³ See BAFT (2017) *Combatting TBML Report* 1. See also Ch 2 para 2.3 et seq above.

⁵²⁴ See BAFT (2017) *Combatting TBML Report* 2. See also Ch 3 para 3.2 et seq above.

to facilitate the transfer of value to the other end.⁵²⁵ The organisation recognises that while banks are involved in preventing TBML, their capacity is limited, for example, due to lack of relevant information, which is often beyond the banking sector.⁵²⁶ Even in circumstances where banks are able to use red flags to identify TBML suspicious activity, this may not be conclusive.⁵²⁷ This is because an unusual activity in customer transactions may not necessarily point to criminal behaviour and may need further review on escalation.⁵²⁸ The type of suspicious activity reports that may be generated by banks may result in the raising of false alarm due to limited data on the underlying transactions that may reveal TBML.⁵²⁹ BAFT, therefore, believes that to successfully combat TBML, there is a need to go beyond banks.⁵³⁰

BAFT proposes four solutions under the *Guidance on Combatting TBML*.⁵³¹ First, it calls for targeted training, education and awareness about TBML to relevant stakeholders. The proposition for continuous training and education on TBML issues is seen by BAFT as a baseline requirement whose attainment may be constrained by low budgets and/or lack of expertise within smaller financial institutions.⁵³² However, the organisation maintains that training remains a key requirement for staff to be competent enough when examining transactions for possible TBML.⁵³³

Secondly, BAFT proposes the sharing of information as a central component in the fight against TBML.⁵³⁴ However, for information sharing to be effective there is a need to balance concerns on data privacy on the one hand, and the control of TBML on the other hand.⁵³⁵ Thus, BAFT proposes a public-private partnership to identify TBML trends that may be shared in a controlled setting by relevant stakeholders.⁵³⁶ Such a partnership may act as a point of convergence for law enforcement agencies, government authorities, and financial institutions where they can benefit from the same

⁵²⁵ See BAFT (2017) *Combatting TBML Report* 3. See again Ch 3 para 3.3 et seq above.

⁵²⁶ See BAFT (2017) *Combatting TBML Report* 5. See again Ch 3 para 3.2 et seq above.

⁵²⁷ See BAFT (2017) *Combatting TBML Report* 8.

⁵²⁸ Ibid.

⁵²⁹ Ibid.

⁵³⁰ See BAFT (2017) *Combatting TBML Report* 8. See also Delston & Walls (2009) 41 *Case W Res Int'l L* 85 at 85-118.

⁵³¹ See BAFT (2017) *Combatting TBML Report* 7.

⁵³² Idem at 8.

⁵³³ See also para 4.4.1.3 above.

⁵³⁴ See BAFT (2017) *Combatting TBML Report* 8. See also para 4.4.5.1 et seq above.

⁵³⁵ See BAFT (2017) *Combatting TBML Report* 8.

⁵³⁶ Idem at 9.

information relevant to the combatting of TBML.⁵³⁷ A case in point of such public-private partnership is the 2015 pilot project in England called the Joint Money Laundering Intelligence Taskforce (JMLIT).⁵³⁸ Most jurisdictions, including South Africa, have since created their own version of the JMLIT.⁵³⁹ BAFT believes that public-private partnerships enhance information sharing and are significant in the combatting of TBML.⁵⁴⁰

Thirdly, BAFT proposes the use of technology in fighting TBML.⁵⁴¹ Although rapid evolution of technology avails more tools to combat TBML, organised crime groups also seek the same technology to complicate their operations.⁵⁴² Nonetheless, BAFT believes that a proper deployment of appropriate technology such as data analytics may yield positive results in controlling TBML.⁵⁴³ Such technology is more suitable in the aggregation of data in real time across various sectors like trade, customs, and financial institutions.⁵⁴⁴ BAFT cites the use of data analytics in the US in Trade Transparency Units (TTUs), as an example of where technology has been appropriately deployed to significantly control TBML.⁵⁴⁵ In TTUs, a system called Data Analysis and Research for Trade Transparency (DARTT) is employed to investigate trade discrepancies such as trade misinvoicing which may indicate the presence of TBML.⁵⁴⁶

Fourthly, BAFT proposes the use of emerging technology in combatting TBML such as distributed ledger technology, artificial intelligence, and cognitive computing.⁵⁴⁷ While emerging technology may be useful to combat TBML, BAFT encourages financial institutions to adopt co-ordinated risk-based approaches in its use.⁵⁴⁸ More importantly, BAFT suggests that data pooling across stakeholder communities would

⁵³⁷ See BAFT (2017) *Combatting TBML Report* 8. See again para 4.4.5.1 et seq above.

⁵³⁸ See BAFT (2017) *Combatting TBML Report* 9. For a detailed discussion of JMLIT, see Ch 6 para 6.4.4 below.

⁵³⁹ See BAFT (2017) *Combatting TBML Report* 9. For the South African version of JMLIT, see Ch 5 para 5.4.4 below.

⁵⁴⁰ See BAFT (2017) *Combatting TBML Report* 9. See also para 4.4.3.3 above.

⁵⁴¹ See BAFT (2017) *Combatting TBML Report* 9.

⁵⁴² Idem at 8. See also Ch 2 para 2.3 et seq above.

⁵⁴³ See BAFT (2017) *Combatting TBML Report* 9.

⁵⁴⁴ Ibid.

⁵⁴⁵ Idem at 10.

⁵⁴⁶ See BAFT (2017) *Combatting TBML Report* 9; Cassara *Next Frontier* 158-161. For more on the use of DARTT in TTUs under the US AML regime, see Ch 7 para 7.4.12 below.

⁵⁴⁷ See BAFT (2017) *Combatting TBML Report* 10.

⁵⁴⁸ Ibid.

be more suitable and save costs for smaller financial institutions.⁵⁴⁹ In addition, the 2017 BAFT guidance comes with a set of recommendations that may be useful to stakeholders in the fight against TBML especially banks.⁵⁵⁰ The recommendations emphasise the importance of adopting solutions proposed by BAFT already discussed in the foregoing.

4.4.6.2.3 The Wolfsberg Group, ICC and BAFT Trade-Finance Principles 2019

The 2019 *Trade-Finance Principles for Combatting TBML in the Trade-Finance Sector* are a follow up to the 2017 publication of the same title and contents except that they are an update of the earlier version.⁵⁵¹ In that instalment, BAFT collaborated with the Wolfsberg Group and the ICC in coming up with the *Trade-Finance Principles*.⁵⁵² The principles were updated after the organisations involved noted that there were developments in the money-laundering field that needed to be taken into account.⁵⁵³

It should be noted that to broaden the global perspective of the trade-finance principles, BAFT became part of the Wolfsberg Group and the ICC.⁵⁵⁴ Before the joint publication of 2017, the Wolfsberg Group had been largely involved in the drafting of the trade-finance principles for TBML control alone.⁵⁵⁵ These trade-finance principles published by the Wolfsberg Group alone were viewed by bank industry practitioners as being more suitable for ‘large global banks’ at the exclusion of ‘small local banks’.⁵⁵⁶ To correct such perceptions, the Wolfsberg Group has had discussions with the ICC since 2011 to establish how the principles could effectively be disseminated to the ICC membership.⁵⁵⁷ A collaborative venture by the Wolfsberg Group involving the ICC and BAFT was viewed by industry practitioners as having a ‘global’ appeal that was fairly

⁵⁴⁹ Idem at 9.

⁵⁵⁰ Idem at 11-12.

⁵⁵¹ See the Wolfsberg Group, ICC & BAFT (2019 Amendment) *Trade-Finance Principles* 4. See also para 4.4.5.3.2 and para 4.4.2.5 above.

⁵⁵² See the Wolfsberg Group, ICC & BAFT (2019 Amendment) *Trade-Finance Principles* 4. See again para 4.4.5.3.2 and para 4.4.2.5 above.

⁵⁵³ See the Wolfsberg Group, ICC & BAFT (2019 Amendment) *Trade-Finance Principles* 4.

⁵⁵⁴ Idem at 5. See again para 4.4.5.3.2 and para 4.4.2.5 above.

⁵⁵⁵ See the Wolfsberg Group, ICC & BAFT (2019 Amendment) *Trade-Finance Principles* 5. See also para 4.4.5 above.

⁵⁵⁶ See the Wolfsberg Group, ICC & BAFT (2019 Amendment) *Trade-Finance Principles* 5.

⁵⁵⁷ Ibid.

representative of a larger grouping of stakeholders.⁵⁵⁸ In addition, a publication involving the ICC was also viewed by banks as of a serious nature and likely to be accepted by more banks as a guidance in their trade-finance transactions.⁵⁵⁹

By way of an overview, the 2019 *Trade-Finance Principles* provide guidance to financial institutions on how to deal with associated financial-crime risks, including the risk of TBML.⁵⁶⁰ The principles also explore the issue of controls that banks may use to combat TBML in general.⁵⁶¹ They also deal with the need for co-operation among relevant stakeholders in order to effectively deal with TBML.⁵⁶²

Bank controls under the principles are provided for under a separate appendix for each selected trade-finance instrument.⁵⁶³ The instruments specifically mentioned under each appendix are documentary credits, documentary collections, demand guarantees and the standby letter of credit.⁵⁶⁴ The specific guidance given for each instrument is significant for this study in that these instruments are similar to the ones being examined under the present research.⁵⁶⁵ In this regard, most of the insights given by BAFT in order to deal with potential TBML for each instrument have been incorporated under the relevant sections dealing with the instrument in this thesis.⁵⁶⁶ The controls for TBML suggested in the appendices of the guidance are intended to be reflective of standard industry practices.⁵⁶⁷ However, a bank may apply an RBA appropriate to its circumstances to depart from the suggested controls.⁵⁶⁸ The controls for TBML proposed in the principles fall into three categories, namely, due diligence, review and screening.⁵⁶⁹ I briefly explain each of these controls in turn.

⁵⁵⁸ See the Wolfsberg Group, ICC & BAFT (2019 Amendment) *Trade-Finance Principles* 5. See again para 4.4.5.3.2 and para 4.4.2.5 above.

⁵⁵⁹ See the Wolfsberg Group, ICC & BAFT (2019 Amendment) *Trade-Finance Principles* 5. See also para 4.4.2 et seq above.

⁵⁶⁰ See the Wolfsberg Group, ICC & BAFT (2019 Amendment) *Trade-Finance Principles* 33.

⁵⁶¹ Ibid. See also para 4.4.6.2.1 above.

⁵⁶² See the Wolfsberg Group, ICC & BAFT (2019 Amendment) *Trade-Finance Principles* 33. See also para 4.4.4 et seq above.

⁵⁶³ See the Wolfsberg Group, ICC & BAFT (2019 Amendment) *Trade-Finance Principles* 33. See also para 4.4.6.2.1 above.

⁵⁶⁴ See the Wolfsberg Group, ICC & BAFT (2019 Amendment) *Trade-Finance Principles* 33. See again Ch 3 para 3.3 et seq above.

⁵⁶⁵ See again Ch3 para 3.3 et seq above.

⁵⁶⁶ See again Ch3 para 3.3 et seq above.

⁵⁶⁷ See the Wolfsberg Group, ICC & BAFT (2019 Amendment) *Trade-Finance Principles* 33.

⁵⁶⁸ Ibid. See also para 4.4.5.3.1 above.

⁵⁶⁹ See the Wolfsberg Group, ICC & BAFT (2019 Amendment) *Trade-Finance Principles* 33.

(a) The Due-Diligence Control

The due-diligence control is the initial control a bank may use against TBML.⁵⁷⁰ This is a risk-based process to identify and know a customer or risk-based controls applied on parties who may not be customers to a bank.⁵⁷¹ Under this control, banks are encouraged under the principles to have risk-based policies and procedures that cover CDD, including on correspondent banks.⁵⁷² More importantly, the principles encourage that the due-diligence information should be made accessible to all bank staff that handle trade-finance customers and transactions.⁵⁷³ This recommendation is designed to help such employees comprehend the client profile and their anticipated behaviour, to be able to identify what would pass as a potentially suspicious activity.⁵⁷⁴

(b) The Review Control

The review control is the other control that banks may use against TBML.⁵⁷⁵ Review is defined under the trade-finance principles as any procedure, automatic or manual, to verify pertinent data that might be accessible under a transaction concerning persons involved, the documents they received, and their instructions.⁵⁷⁶ Thus, a reviewing activity is simply the process of ensuring that the documents and their contents are in compliance.⁵⁷⁷ Where possible, appropriate financial-crime risks, including the risk of TBML, should also be checked based on the contents of the documents, details of the transaction, and relevant information from the customer's profile.⁵⁷⁸

(c) Screening

⁵⁷⁰ Ibid.

⁵⁷¹ Ibid. For a discussion of the RBA and CDD processes in the controlling of TBML in trade finance under the South African AML regime, see Ch 5 para 5.3.4.4 and para 5.3.4.6 below, respectively. See the Wolfsberg Group, ICC & BAFT (2019 Amendment) *Trade-Finance Principles* 33.

⁵⁷² Ibid.

⁵⁷³ Ibid.

⁵⁷⁴ Ibid.

⁵⁷⁵ Ibid.

⁵⁷⁶ Ibid.

⁵⁷⁷ Ibid.

⁵⁷⁸ Ibid.

Screening is the other bank control that may be deployed against TBML under the trade-finance principles.⁵⁷⁹ Typically, screening is done automatically. Lists of names, organisations, nations, or individuals taken from various official sanction lists or blacklists are used to detect fraud, sanctions, or other transactions that may be affected by TBML.⁵⁸⁰

4.4.6.3 Conclusion

BAFT was established to resolve issues and concerns of its members in international-trade finance. Its aim is to promote best-market practices not only in trade finance but also in the field of money-laundering control.⁵⁸¹ The organisation has made substantial contributions towards the control of TBML in trade-finance transactions.⁵⁸² In one of its most notable contributions, BAFT has produced a 2015 guidance report on identifying suspicious TBML activity in documentary credits. The guidance consolidates sixteen red flags and risk indicators of potential TBML from other organisations for use by financial institutions.⁵⁸³ In improving upon the 2015 guidance, BAFT proposes a new approach in fighting TBML through an updated guidance of 2017. The body recognises that while its 2015 guidance is helpful to banks, TBML has been evolving and there is a need to propose new strategies to contain it.⁵⁸⁴

BAFT has also collaborated with the Wolfsberg Group and the ICC to produce the *Trade-Finance Principles for Combatting TBML* in trade finance.⁵⁸⁵ The principles are significant in that they address the challenge of TBML in the context of banking. Among other things, the trade-finance principles provide guidance to banks on how to deal with associated financial-crime risks, including the risk of TBML. Thus, the principles explore the issue of controls that banks may use to combat TBML in general. They also deal with the need for co-operation among relevant stakeholders in order to effectively deal with TBML.⁵⁸⁶

⁵⁷⁹ Idem at 34.

⁵⁸⁰ Ibid.

⁵⁸¹ See para 4.4.6.1 above.

⁵⁸² See para 4.4.6.2 et seq above.

⁵⁸³ See para 4.4.6.2.1 above.

⁵⁸⁴ See para 4.4.6.2.2 above.

⁵⁸⁵ See para 4.4.6.2.3 above.

⁵⁸⁶ See again para 4.4.6.2.3 above.

4.5 CONCLUSION

Several international organisations have been involved in the global fight against money laundering and TBML. These range from the UN, the FATF, the ESAAMLG, and the APG to the Wolfsberg Group and the BAFT.⁵⁸⁷ The organisations have had various thrusts in their contributions towards the control of money laundering.⁵⁸⁸ The UN has been largely instrumental in the creation of AML conventions that are binding on member states who sign the treaties.⁵⁸⁹ The FATF, which is one of the organisations active on the issue of money laundering, has been largely instrumental in the issuance of AML standards in the form of recommendations.⁵⁹⁰ Although the recommendations do not have the force of law, member states and jurisdictions that do not subscribe to them may find themselves isolated in the financial world through non-co-operation.⁵⁹¹ Despite its vast contributions in the global money-laundering fight, the FATF has not issued a single recommendation against TBML.⁵⁹² This has hindered progress in giving guidance on law reform for various member countries that normally get direction from the FATF. A specific recommendation on TBML would have shed more light on how stakeholders, including financial institutions could deal with the problem. The FATF, however, has confined itself to the issuing of reports and guidelines on the problem of TBML.⁵⁹³ These reports and guidelines have been helpful to various stakeholders in raising awareness about TBML and how to combat it.

Regional organisations similar to the FATF, such the APG, have also made significant contributions against TBML through follow up reports on those made by the FATF.⁵⁹⁴ The APG has helped raise awareness on the extent of TBML and its other methods not clearly articulated in the FATF reports.⁵⁹⁵ Many industry associations and bodies have also added their voices on the global fight against TBML. Such bodies include

⁵⁸⁷ See para 4.3 et seq and para 4.4 et seq above.

⁵⁸⁸ See again para 4.3 et seq and para 4.4 et seq above.

⁵⁸⁹ See para 4.3.1.2 and para 4.3.1.3 above.

⁵⁹⁰ See para 4.3.2.2 above.

⁵⁹¹ See again para 4.3.2.2 above.

⁵⁹² See para 4.3.2.4 et seq above.

⁵⁹³ See again para 4.3.2.4 et seq above.

⁵⁹⁴ See para 4.3.4.2 above.

⁵⁹⁵ See again para 4.3.4.2 above.

the Basel Committee, the ICC, WCO, the Egmont Group, the Wolfsberg Group, and BAFT.⁵⁹⁶

The Basel Committee has not issued any statement specifically directed at TBML. The organisation, however, has largely confined itself to the issuance of general AML guidelines that may find application to TBML.⁵⁹⁷ Although the ICC has been largely influential in the creation of international trade rules, it has also been actively involved in money-laundering issues of recent.⁵⁹⁸ The organisation has collaborated with the Wolfsberg Group and the BAFT in the creation of trade-finance principles, which are useful guidelines in the combatting of TBML.⁵⁹⁹ The WCO is a world customs body that has also added its voice in the fight against TBML. The organisation has collaborated with the Egmont Group to advocate for the sharing of information between customs authorities and the FIUs across the world.⁶⁰⁰ This is a significant AML effort in that information sharing is key to the successful combatting of TBML.⁶⁰¹

Other industry associations that have been significant in the combatting of TBML are the Egmont Group and the Wolfsberg Group.⁶⁰² The Egmont Group has been central to the issue of FIUs, which are key components to the gathering, analysing and sharing of AML information between and/or among stakeholders at the national level.⁶⁰³ Almost every jurisdiction, including South Africa, has already established a FIU that acts as the focal point in collecting and disseminating information to other AML stakeholders especially law enforcement agencies.⁶⁰⁴

The Wolfsberg Group, which is a grouping of private banks that has also made a significant contribution towards the fight of TBML through its flagship trade-finance principles.⁶⁰⁵ As already noted, TBML can be broad and may affect various sectors.⁶⁰⁶ The Wolfsberg Group has focused its efforts on how TBML may be controlled in the

⁵⁹⁶ See again para 4.4 et seq above.

⁵⁹⁷ See para 4.4.1.6 above.

⁵⁹⁸ See para 4.4.2 above.

⁵⁹⁹ See para 4.4.2.5 and 4.4.5.3 above.

⁶⁰⁰ See para 4.4.3.3 above.

⁶⁰¹ See para 4.4.4 above.

⁶⁰² See para 4.4.4 and para 4.4.5 above.

⁶⁰³ See para 4.4.4.2 above.

⁶⁰⁴ See again para 4.4.4.2 above. See also Ch 5 para 5.4.2 below.

⁶⁰⁵ See again para 4.4.5.3 above.

⁶⁰⁶ See Ch 2 para 3. 2 et seq and Ch 3 para 3.3 et seq above.

financial sector.⁶⁰⁷ Its trade-finance principles come with red flags on how to detect TBML besides the recommendations on courses of action to take.⁶⁰⁸ These principles have been updated regularly with the help of the collaborative effort from other bodies such as the ICC and the BAFT.⁶⁰⁹ The BAFT has added its voice in the fight against TBML by publishing works geared towards identifying suspicious transactions in trade-finance.⁶¹⁰ More importantly, the organisation has further recommended the use of technology and innovative platforms to combat TBML.

South Africa belongs to the global community of AML organisations. These organisations have different approaches and strategies they use in combatting TBML.⁶¹¹ Thus, the varied responses to TBML by international organisations offer a number of lessons for South African competent authorities to also formulate their own AML strategies against the problem. The TBML guidance reports of the FATF, for which South Africa is a member, present a good starting point for the country to replicate or adapt. One of the major recommendations from the FATF and the APG, for which South Africa may borrow, is the need to conduct research on TBML at the national level. This would not only determine the magnitude of the problem in the country but will also inform the kind of strategies that competent authorities such as the FIC may formulate against TBML in South Africa.

Additionally, the presence of South Africa as a member in various international organisations —that have already made some pronouncements on TBML— should enlighten the country to make its own assessment of the problem. The guidance reports and principles of the FATF and the BAFT on TBML could be replicated by the FIC and contextualised for South Africa.⁶¹² One of the dominant themes in the global fight against money laundering in general, and TBML in particular, is the need for co-operation between and /or among organisations.⁶¹³ Thus, information sharing between competent authorities is a critical component in the fight against TBML. The South African AML authorities may need to improve on information sharing through drawing lessons from the global AML response. The following chapter, therefore, examines the

⁶⁰⁷ See again para 4.4.5.3 and Ch 3 para 3.3 et seq above.

⁶⁰⁸ See again para 4.4.5.3 above.

⁶⁰⁹ See again para 4.4.5.3 and para 4.4.6.2.3 above.

⁶¹⁰ See para 4.4.6.2 above.

⁶¹¹ See para 4.3 and 4.4 et seq above.

⁶¹² See para 4.3.2 and 4.4.6 et seq above.

⁶¹³ See para 4.2 above.

South African AML regime in order to establish how it responds to the problem of TBML in trade-finance transactions.

CHAPTER 5: THE CONTROL OF TBML IN TRADE-FINANCE INSTRUMENTS UNDER SOUTH AFRICAN LAW

5.1 GENERAL

In the previous chapter, I focused on the international initiatives and organisational responses to the challenge of TBML in the context of trade finance.¹ The chapter examined the contribution of various international bodies against TBML in trade-finance instruments.²

This chapter discusses the South African AML regime and its shortcomings against the possible risk of TBML in the trade-finance sector.³ The chapter commences by giving an overview of the threat of TBML in South Africa.⁴ The overview is then followed by an analysis of the relevant South African AML laws, particularly, the POCA and the FICA to establish how they may be of use against the risk of TBML in trade-finance instruments.⁵ In this regard, the crime of money laundering is discussed. Of particular importance under this chapter's review is the discussion of the South African AML regime with a focus on the role of banks against TBML in trade-finance instruments.⁶ Banks process the trade-finance transactions whose processes may be abused through TBML.⁷ The rationale for the analysis will be to establish whether banks could effectively combat TBML in trade-finance instruments using the current legislative and institutional AML regime in South Africa.⁸ Furthermore, this chapter reviews the role of institutions relevant to the combatting of money laundering in South Africa.⁹ This is done to establish if the institutions have any role to play against the risk of TBML in trade-finance instruments and how they could be improved should they be found to be lacking in capacity. The overall goal of this chapter is to point out gaps and weaknesses, if any, in the South African AML regime, which may be cured through

¹ See Ch 4 above generally. See also Ch 3 para 3.3 et seq above.

² See again Ch 4 above passim. See also Ch 3 para 3.3 et seq above.

³ See again Ch 3 para 3.3 et seq above.

⁴ See para 5.2 below.

⁵ See para 5.3.2 below. See also Ch 3 para 3.3 et seq above.

⁶ See para 5.3.4 et seq below. See also Ch 3 above generally.

⁷ See para Ch 3 para 3.2 and 3.3 above.

⁸ See para 5.3.4 below.

⁹ See para 5.4 et seq below.

insights from other jurisdictions, selected in this study.¹⁰ Cumulatively, the chapter argues that, although the South African AML regime seems effective, its strength against TBML in trade-finance processes may need to be improved.

5.2 OVERVIEW OF THE THREAT OF TBML IN SOUTH AFRICA

With a contemporary banking system, South Africa serves as a regional financial centre.¹¹ This exposes it to the possibility of being used as a conduit for trade in illegal goods and money laundering.¹² The country is a transport gateway for continental trade with the rest of the world. This makes it vulnerable to the threat of proceeds of crime from other jurisdictions.¹³ It is worth noting that money laundering in South Africa is primarily motivated by the following offences: tax-related crimes, trade in illicit drugs, corruption and bribery.¹⁴ However, the IMF notes that there is little appreciation of money-laundering vulnerabilities posed by foreign predicate offences.¹⁵ These could therefore pose more challenges than the usually known predicate offences.

Furthermore, South Africa is also home to free-trade zones, which are generally prone to the risk of TBML.¹⁶ The presence of high-crime rates in South Africa also makes it a jurisdiction vulnerable to organised crime groups, which may seek to launder illegal funds through various means, including by way of TBML in trade-finance instruments.¹⁷

¹⁰ See Ch1 para 1.6.3 et seq. See also Ch 6; Ch 7; and Ch 8 passim.

¹¹ See Pieter K Smit 'South Africa' in: Wouter H Muller, Christian H Kalin & John G Goldsworth (eds) *Anti-Money Laundering: International Law and Practice* (2007) (hereinafter Smit 'South Africa') 781; Lawack 'The South African Banking System' 63; Schulze 'Banks and Banking Law' 2; and IMF (2022) *South Africa: Financial Sector Assessment Program — Financial System Stability Assessment Report* 11-12. As regards the discussion of the concept of 'banking business' in the context of South Africa, see Herbert Kawadza 'Rethinking the Definition of the "Business of Banking" in South Africa against the Backdrop of *Registrar of Banks v Net Income Solutions* [2013] ZAWCHC 92' (2015) 1 *Journal of Corporate and Commercial Law and Practice* 105-115.

¹² IMF (2021) *South Africa: Detailed Assessment Report on Anti-Money Laundering and Combatting the Financing of Terrorism* (hereinafter 'IMF (2021) South Africa: Assessment Report on AML') 25.

¹³ See FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 19.

¹⁴ See IMF (2021) *South Africa: Assessment Report on AML* 25.

¹⁵ *Idem* at 11.

¹⁶ See Ch 2 para 2.4.8 above.

¹⁷ See FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 19.

The GFI has conducted research in South Africa about trade misinvoicing, which is a form of TBML. It concluded that this type of malpractice is common in the country.¹⁸ However, there is no comprehensive study that has been carried out at national level to assess the extent of threats posed by TBML in trade-finance instruments in South Africa.¹⁹ One of the reasons for AML authorities in various countries, including in South Africa, to rarely report on TBML is due to lack of expertise on the subject.²⁰ For instance, the FIC only mentions TBML once in one of its studies of money-laundering techniques without further elaborating on it.²¹ This is not adequate considering the fact that South Africa is one of the stakeholders that participated in the researching, and publishing of the 2006 report on TBML together with the FATF.²² Besides inadequate reporting on the subject, most jurisdictions, including South Africa, do not classify TBML as a separate form of money laundering.²³ One can, therefore, argue that the FIC classifies TBML as part of money laundering in general. However, it could have been ideal to specifically mention TBML, as is the case in other jurisdictions under this study.

In its AML assessment of South Africa in 2021, the IMF found that South African competent authorities generally understand the money-laundering threats in the country.²⁴ However, such understanding is limited when it comes to complex methods of money laundering such as TBML in trade-finance instruments.²⁵ The FATF also found South Africa to be lacking in some areas such as the provision for the prevention of terrorism financing, adequate coverage in due-diligence processes for beneficial ownership, issues relating to the powers of the FIC and the effect of state capture on the financial sector.²⁶ These areas, among others, caused South Africa to be grey-

¹⁸ See GFI (2018) *South Africa: Potential Revenue Losses Report* iii. See also Ch 2 para 2.3.3 above.

¹⁹ See Ch 2 para 2.3.3 above.

²⁰ See APG (2012) *Trade-Based Money Laundering Report*. See again Ch 2 para 2.3.3 above.

²¹ See TBML www.fic.gov.za [Accessed on 23 September 2022].

²² See Ch 4 para 4.3.2.4.1 above.

²³ For an exception to this, see, generally, Ch 7 below; and s 6506 of the US AML Act of 2020 which specifically mentions TBML.

²⁴ IMF (2021) *South Africa: Assessment Report on AML* 11.

²⁵ *Idem* at 45.

²⁶ See See FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 3; IMF (2021) *South Africa: Assessment Report on AML* 11.

listed by the FATF in February 2023.²⁷ The grey listing may have an adverse effect on correspondent banking relationships that were already existing between South African financial institutions and those from other jurisdictions.²⁸ In partly addressing these issues, the South African legislature has passed the General Laws (Anti-Money Laundering and Combatting Terrorism Financing) Amendment Act.²⁹ The amendment provides for the issues raised by the FATF and is part of the plan to have the grey listing by the international AML body removed.³⁰ In a *Follow-Up and Technical Compliance Re-Rating Report* of November 2023, the FATF notes that South Africa has made significant progress in addressing the AML deficiencies discovered under the 2021 mutual evaluation.³¹ The South African government is expected by the FATF to comply with the grey-listing requirements by January 2025.³²

Outside the FATF concerns, which have since been addressed through legislation, South Africa has no formal national AML strategy on how to deal with the challenge of money laundering generally, let alone TBML in trade-finance instruments in particular.³³ The country has also not conducted a national money-laundering risk

²⁷ A FATF grey or black list is a list of countries which the organisation has assessed to have weak AML/CFT measures and is issued three times a year. Among the countries grey listed or put under increased monitoring for AML deficiencies by the FATF together with South Africa are Nigeria, Türkiye, the United Arab Emirates, Tanzania and Mozambique, see www.fatf-gafi.org [Accessed 27 March 2023]. See also International Compliance Association 'South Africa Edges Towards FATF Grey List' <https://www.int-comp.org/october>; Global Compliance News 'South Africa: Financial Action Task Force's Potential Grey Listing' <https://www.globalcompliancenews.com> [Accessed on 27 January 2023]; Louis de Koker 'FATF's Grey-Listing of South Africa: Navigating Myths and Truths about the Economic Impact' (2023) 1 *The Forensic Practitioner* 10-12 at 10; Annalise Kempen 'NOT Our Colour of Choice: Implications of the Grey-Listing on South Africa' (April 2023) *Servamus* 23-25 at 23; and Kevin West 'South Africa's Grey-Listing' (2023) 1 *The Forensic Practitioner* 14-15 at 14.

²⁸ See De Koker (2023) 1 *The Forensic Practitioner* 10 at 12; Kempen (April 2023) *Servamus* 23 at 25; and West (2023) 1 *The Forensic Practitioner* 14 at 14. As regards the economic risk and impact of the FATF greylisting on a country, see Louis de Koker, John Howell & Nicholas Morris 'Economic Consequences of Greylisting by the Financial Action Task Force' (2023) *Risks* 11: 81. <https://doi.org/10.3390/risks11050081> [Accessed on 4 February 2024].

²⁹ 22 of 2022. See also West (2023) 1 *The Forensic Practitioner* 14 at 15; Kempen (April 2023) *Servamus* 23 at 24.

³⁰ See De Koker (2023) 1 *The Forensic Practitioner* 10 at 12; West (2023) 1 *The Forensic Practitioner* 14 at 15; Kempen (April 2023) *Servamus* 23 at 24.

³¹ See FATF (2023), 'Anti-Money Laundering and Counter-Terrorist Financing Measures – South Africa, 2nd Enhanced Follow-up Report', FATF, Paris <https://www.fatf-gafi.org/content/fatf-gafi/en/publications/Mutualevaluations/south-africa-fur-2023.html> [Accessed on 12 February 2024].

³² See De Koker (2023) 1 *The Forensic Practitioner* 10 at 12; West (2023) 1 *The Forensic Practitioner* 14 at 14.

³³ See FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 24; IMF (2021) *South Africa: Assessment Report on AML* 31.

assessment.³⁴ The preliminary exercise that has been undertaken so far has not revealed much due to its lack of depth in methodology. The IMF notes that the approach South Africa adopts in the preliminary money-laundering risk assessment is largely qualitative rather than quantitative.³⁵ This means that competent authorities mainly rely on the subjective judgment of experts to assess money-laundering threats to South Africa.

The absence of a formal AML strategy and a comprehensive money-laundering risk assessment framework for South Africa is a major shortcoming. Competent authorities may not fully appreciate the money-laundering risks that confront them, including the risk of TBML in trade-finance instruments because of this status. Regionally, South Africa is a participant in the ESAAMLG.³⁶ Unlike other regional organisations modelled after the FATF, including the APG, which has conducted a study and issued guidance practices on TBML, including TBML in trade-finance instruments for its members, the ESAAMLG has not yet done so.³⁷ This leaves out its members, including South Africa, without a position on how to deal with the challenge of TBML should it become a reality in the region.

One of the major concerns the FATF raises on evaluating the AML regime of South Africa is the lack of comprehensive statistical data on the extent of money laundering in the country.³⁸ In terms of Recommendation 31 of the FATF *Standards*, a member country should provide detailed data on money laundering within its jurisdiction.³⁹ Such information enables the FATF to evaluate a member country's extent in implementing its AML measures.⁴⁰ There is, therefore, a need for a holistic money-laundering risk assessment and further research on emerging money-laundering risks for South Africa. Such further research would enable South Africa to understand the money-laundering threats it faces, including the threat of TBML in trade-finance

³⁴ IMF (2021) *South Africa: Assessment Report on AML* 27.

³⁵ Ibid.

³⁶ See Ch 4 para 4.3.3 above.

³⁷ See again Ch 4 para 4.3.3 above.

³⁸ See Tuba (2012) 2 *Acta Criminologica* 103 at 114; FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 19. See also Ch 2 para 2.3.3 above.

³⁹ Recommendation 31 of the FATF (2012) *Standards*.

⁴⁰ Tuba (2012) 2 *Acta Criminologica* 103 at 114.

instruments. This will enable the country to formulate AML strategies commensurate with such threats.⁴¹

5.3 SOUTH AFRICAN AML LEGAL FRAMEWORK FOR TBML

5.3.1 General

In its 2021 *Mutual Evaluation Report*, the FATF rates South Africa as having a strong AML regime.⁴² This section gives an overview of the laws and institutions of South Africa that are used to combat money laundering. The section discusses the role of legislation and institutions involved in the combatting of money laundering in South Africa.⁴³ It also attempts to give an evaluation of the relevance of the present South African AML legislation and institutions to the control of TBML in trade-finance instruments. In the process, the section also draws attention to the inadequacies of the South African AML regime. The intention is to establish how such shortcomings may be remedied through the comparative chapters that follow.⁴⁴

5.3.2 Overview of AML Legislation in South Africa

5.3.2.1 General

The main pieces of legislation dealing with the problem of money laundering in South Africa are the Prevention of Organised Crime Act⁴⁵ (POCA) and the Financial Intelligence Centre Act⁴⁶ (FICA).⁴⁷ These two Acts set the AML statutory foundation to combat money laundering in South Africa.⁴⁸ Both of them are closely related in their regulatory functions against money laundering.⁴⁹ On one hand, the POCA provides for

⁴¹ Schlenther (2013) 16 *JMLC* 126 at 137.

⁴² See FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 6-7. See also De Koker 'Money Laundering in South Africa' 121; Hamman *AML Legislation* 86.

⁴³ See para 5.3.2 and para 5.4 et seq below.

⁴⁴ See Ch 6; Ch 7; Ch 8; and Ch 9 below generally.

⁴⁵ 121 of 1998. See also para 5.3.2.2 below.

⁴⁶ 38 of 2001. See also para 5.3.2.3 below.

⁴⁷ See Hamman *AML Legislation* 87; Paul Nkoane 'Unpacking the Laundry Machine: Why are Debt Instruments Easy Laundry Devices?' (2018) 31 *SACJ* 84 at 102.

⁴⁸ See Johan Henning & Mignon Hauman 'Fortifying a Risk-Based Approach in the South African AML/CFT Process' (2017) 24 *Journal of Fin Crime* 520-528 at 521; Annalise Kempen 'Where Did You Get that Cash? — The Financial Intelligence Centre will Investigate' (April 2016) 109 *Servamus* 24-27 at 25; Schlenther (2013) 16 *JMLC* 126 at 127; and Nkoane (2018) 31 *SACJ* 84 at 102.

⁴⁹ See Van Jaarsveld *Money Laundering* 461; Angela Itzikowitz 'South Africa' in: Arun Srivastava, Mark Simpson & Richard Powell (eds) *International Guide to Money Laundering Law and Practice* (2019) (hereinafter Itzikowitz 'South Africa') 1305.

the substantive aspect of the money-laundering offences while on the other hand, the FICA deals with the administrative element of regulating money laundering.⁵⁰ These two major AML pieces of legislation are briefly examined below.

5.3.2.2 *The Prevention of Organised Crime Act*⁵¹ (POCA)

Before 1998, the only piece of legislation that dealt with the issue of money laundering in South Africa was the Drugs and Drug Trafficking Act.⁵² Under the latter Act, it became illegal to convert the proceeds of drug trafficking and to report suspicious activities related to the issue of drugs and drug trafficking.⁵³ During that period, money-laundering laws in South Africa did not consider the manipulation of criminal proceeds as a crime in and of itself.⁵⁴ Thus, the Drug and Drug Trafficking Act was rather narrow in that it dealt with the issue of money laundering from a drug-problem combatting perspective only.⁵⁵

The promulgation of POCA in 1998 and the FICA in 2001 broadened the legislative scope against money laundering by going beyond the problem of drugs and drug trafficking.⁵⁶ The POCA became operative on 21 January 1999.⁵⁷ It seeks to effectively prevent money laundering in South Africa.⁵⁸ The POCA repealed the Drugs and Drug Trafficking Act and is based on the notion that organised crime needs to be eliminated in South Africa.⁵⁹ The statute is more direct in both scope and application in its coverage of the problem of money laundering compared to the FICA and the POCDATARA.⁶⁰ Among other things, the POCA prohibits organised-crime activities in South Africa, including money laundering.⁶¹ This piece of legislation enjoins all

⁵⁰ See Van Jaarsveld *Money Laundering* 461; Itzikowitz 'South Africa' 1305; and Lawack 'The South African Banking System' 98.

⁵¹ 121 of 1998.

⁵² 140 of 1992. See Itzikowitz 'South Africa' 1305; Howard Chitimira 'An Exploration of the Current Regulatory Aspects of Money Laundering in South Africa (2021) 24 *Journal of Money Laundering Control* 789-805 at 789.

⁵³ See Itzikowitz 'South Africa' 1305.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ See Itzikowitz 'South Africa' 1305; Chitimira (2021) 24 *JMLC* 789.

⁵⁷ See Chitimira (2021) 24 *JMLC* 789.

⁵⁸ See De Koker 'Money Laundering in South Africa' 83; Lawack 'The South African Banking System' 98; and IMF (2021) *South Africa: Assessment Report on AML* 76.

⁵⁹ See De Koker 'Money Laundering in South Africa' 83; Van Jaarsveld *Money Laundering* 466.

⁶⁰ See Chitimira (2021) 24 *JMLC* 790.

⁶¹ See ss 4, 5 and 6 of the POCA. See also Chitimira (2021) 24 *JMLC* 789.

business persons to report any suspicious property or proceeds of unlawful activities to law enforcement agencies.⁶² There are two main categories of money-laundering offences under the POCA, namely, those relating to the proceeds of all forms of crimes and those relating to the proceeds of racketeering.⁶³ It should be noted that the POCA does not address TBML in trade-finance instruments in specific terms. However, the broad provisions of the Act could still cover TBML in trade finance without even mentioning it.⁶⁴ In any case, it is not unusual for AML legislation, in most jurisdictions, not to mention specific types of money laundering under its provisions.⁶⁵

5.3.2.3 The Financial Intelligence Centre Act (FICA)⁶⁶

The FICA, as amended, serves to, *inter alia*, improve not only the regulation of the South African financial sector but also to combat money laundering.⁶⁷ Its provisions are enforced by the FIC, which is South Africa's financial intelligence unit.⁶⁸ The FICA applies to different categories of financial institutions, which are generally referred to under the Act as 'accountable institutions'.⁶⁹ The Act is aimed at achieving two broad objectives. First, it deals with various forms of financial crime, including money laundering. Secondly, it assures the international financial community about the safety and trustworthiness of the South African financial system against abuse by organised crime groups.⁷⁰

The FICA has since been amended three times, first in 2005, second in 2017 and third in 2022. In 2005, the FICA was amended by the POCDATARA⁷¹ to incorporate new developments in the field of money-laundering control such as the combatting of

⁶² Chitimira (2021) 24 *JMLC* 789 at 791.

⁶³ See ss 2, 4, 5, and 6 of the POCA. See also Lawack 'The South African Banking System' 98; Chitimira (2021) 24 *JMLC* 789 at 791; and para 5.3.4 below.

⁶⁴ See para 5.3.2.5 below.

⁶⁵ See Ch 6 para 6.3.2.5 below; Ch 7 para 7.3.2.7 below; and Ch 8 para 8.3.2.5 below.

⁶⁶ 38 of 2001.

⁶⁷ See West 'The Financial Intelligence Centre Amendment Act — The Dawn of a New Era' (April 2019) 19 *Without Prejudice* 11-12 at 11; Chitimira (2021) 24 *JMLC* 789 at 789.

⁶⁸ See Chitimira (2021) 24 *JMLC* 789 at 793. See also para 5.4.2 below.

⁶⁹ See s 1 of the FICA; Smit 'South Africa' 788. It should be noted that the FICA uses the term 'accountable institution' to refer to a 'bank' or 'financial institution'. This thesis uses the terms 'bank' or 'financial institution' interchangeably, to refer to an 'accountable institution' as envisaged under the FICA, see Ch 1 para 1.11 above.

⁷⁰ See Hugo & Spruyt (2018) 2 *TSAR* 227 at 227.

⁷¹ 33 of 2004.

terrorist financing.⁷² In 2017, the FICA was significantly amended through the Financial Intelligence Centre (Amendment) Act⁷³ to enable South Africa to align its AML regime with the requirements of the FATF.⁷⁴ In particular, the FIC (Amendment) Act provides for, *inter alia*, the RBA in client information identification and the assessment of money-laundering risks in general by banks.⁷⁵ In 2022, the FICA was amended to incorporate issues raised by the FATF following the organisation's second evaluation of the South African AML regime in 2021.⁷⁶

The FICA, as amended, also gives power to the FIC to issue guidance notes to financial institutions under the AML regulations.⁷⁷ Such guidance notes direct financial institutions on how to perform and comply with the FICA's provisions.⁷⁸ They are an attempt by South Africa to demonstrate conformity with international best practices.⁷⁹ For example, the RBA under the FIC *Guidance Note 7 on the Implementation of Various Aspects of the Financial Intelligence Centre Act, 2001* (FIC *Guidance Note 7*) shows much similarity to the English Money-Laundering Regulations of 2017 and the EU's Fourth Money Laundering Directive.⁸⁰

Together with the money-laundering regulations, the FICA governs how banks comply with their obligations.⁸¹ The guidance notes issued by the FIC from time to time complement both the FICA and the money-laundering regulations.⁸² It should be noted that the guidance notes are not binding law.⁸³ However, failure to comply with them may lead to the imposition of administrative sanctions on the non-compliant entity by

⁷² See Itzikowitz 'South Africa' 1306.

⁷³ 1 of 2017.

⁷⁴ See Hugo & Spruyt (2018) 2 *TSAR* 227 at 227.

⁷⁵ *Ibid*; Itzikowitz 'South Africa' 1306.

⁷⁶ See General Laws (Anti-Money Laundering and Combatting Terrorism Financing) Amendment Act 22 of 2022 generally.

⁷⁷ See Reg 28 of the Money Laundering and Terrorist Financing Control Regulations of 2002; s 4(c) of the FICA; Hugo & Spruyt (2018) 2 *TSAR* 227 at 253.

⁷⁸ See s 4(c) of the FICA; Chitimira (2021) 24 *JMLC* 789 at 798.

⁷⁹ Hugo & Spruyt (2018) 2 *TSAR* 227 at 253.

⁸⁰ *Ibid*.

⁸¹ See Henning & Hauman (2017) 24 *Journal of Fin Crime* 520 at 521; Hugo & Spruyt (2018) 2 *TSAR* 227 at 253; Chitimira (2021) 24 *JMLC* 789 at 793. See also para 5.3.5 below.

⁸² Hugo & Spruyt (2018) 2 *TSAR* 227 at 253.

⁸³ Chitimira (2021) 24 *JMLC* 789 at 798. Guidance notes can be regarded as soft law in that they are quasi-legal instruments which do not necessarily qualify as legally binding instruments in the sense of legislation or statutory instruments, see s4(c) of the FICA; Schulze 'The Nature of Banking Law' 49. For more detailed analysis of the concept of 'soft law', see generally, Andrew T Guzman & Timothy L Meyer *Explaining Soft Law* (2010); Bryan H Druzin 'Why Does Soft Law Have Any Power Anyway?' (2017) 7 *Asian Journal of International Law* 361-378.

the FIC.⁸⁴ Where a non-compliant bank claims to have followed a guidance note, it may be called upon to demonstrate how it complies with the FICA and the money-laundering regulations.⁸⁵

The FICA does not address TBML in trade-finance instruments directly. However, the AML obligations it provides for banks could still be equally applicable against TBML in trade-finance instruments.⁸⁶

5.3.2.4 *The Crime of Money Laundering and Scope for TBML*

Under South African legislation, money laundering is defined broadly to encompass almost every crime as a potential predicate offence for it.⁸⁷ The POCA provides for the offence of money laundering under three separate sections.⁸⁸ Money laundering is committed when a person is involved directly or indirectly in concealing or disguising the nature, source, location or disposition of property forming part of the proceeds of unlawful activities.⁸⁹

5.3.2.5 *Scope of the POCA for TBML in Trade-Finance Instruments*

Three key terms in the definition of money laundering are worth reviewing for purposes of determining if TBML in trade-finance instruments can be covered under the POCA. These are 'property', 'proceeds of unlawful activity,' and 'unlawful activity'.⁹⁰ These terms are defined under the POCA. The Act defines 'property' as money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges,

⁸⁴ See Hugo & Spruyt (2018) 2 *TSAR* 227 at 253; Chitimira (2021) 24 *JMLC* 789 at 798; and IMF (2021) *South Africa: Assessment Report on AML* 39. Generally, non-compliance with the FICA would attract administrative sanctions such as being cautioned not to repeat the same act of non-compliance, being reprimanded, being given a remedial action directive, suspended from conducting certain business activities, and/or being fined any amount not exceeding R10 million, see s45C(3) of the FICA.

⁸⁵ See para 3 of *Guidance Note 7*; the preface to *Guidance Note 4A* in terms of s 29 of the FICA; and Note 17 of *Guidance Note 05B on Cash Threshold Reporting* to the FIC in terms of s 28 of the FICA, 2001.

⁸⁶ See para 5.3.4 below.

⁸⁷ See Gregory Mthembu-Salter 'Money Laundering in South African Real Estate Market Today' in: Charles Goredema (ed) *Money Laundering Experiences* (2006) (hereinafter Mthembu-Salter 'Money Laundering in South African Real Estate') 23; Nkoane (2018) 31 *SACJ* 84 at 106.

⁸⁸ See ss 4, 5 and 6 of the POCA. See also De Koker 'Money Laundering in South Africa' 84-85; Tuba (2012) 2 *Acta Criminologica* 103 at 109.

⁸⁹ See s 4 of the POCA and s 1 of the FICA. See also *S v De Vries* (2012) (1) SA 186 (SCA); *S v Van der Linde* [2016] 3 All SA 898; Kempen (April 2016) 109 *Servamus* 24 at 25; and Ch 2 para 2.2.3 above.

⁹⁰ See again Ch 2 para 2.2.3 above.

claims and securities and any interest therein and all proceeds thereof.⁹¹ This definition is broad enough to include any type of property irrespective of value.⁹² 'Proceeds of unlawful activity' are also defined widely as any property or service, advantage, benefit or reward which was derived, received or retained directly or indirectly in South Africa or elsewhere in connection with or as a result of any unlawful activity carried on by any person and includes any property representing property so derived.⁹³ The wide nature of this definition implies that in almost every crime involving financial gain, there is a potential for a money-laundering charge.⁹⁴ This may also apply to TBML in trade-finance instruments because they are usually structured to gain financially.⁹⁵ As for the term 'unlawful activity', this is defined under the POCA as meaning any conduct which constitutes a crime or which contravenes any law whether such conduct occurred in South Africa or elsewhere.⁹⁶ This is also broad enough to include even conduct under TBML in trade-finance instruments, which contravenes any law in South Africa or elsewhere.⁹⁷ It is my submission that such a broad coverage of the term is a positive and welcome development. It is positive in the sense that TBML in trade-finance instruments could easily be dealt with under the current laws in South Africa without the need to introduce or amend any legislation. In any case, the wide nature of the definition of money laundering and the predicate offences that may lead to it, are not unique to South Africa but are also similar to other jurisdictions considered in this study.⁹⁸

Money laundering is also committed under the POCA where a person assists another person in retaining, controlling or enjoying the proceeds of unlawful activities.⁹⁹ This provision criminalises the conduct of third parties or gatekeepers who facilitate or help persons to enjoy the benefits of the proceeds of unlawful activities.¹⁰⁰ Thus, financial

⁹¹ See s 1 of the POCA.

⁹² See Tuba (2012) 2 *Acta Criminologica* 103 at 110; IMF (2021) *South Africa: Assessment Report on AML* 166.

⁹³ See s 1 of the POCA; Schlenther (2013) 16 *JMLC* 126 at 129; and Chitimira (2021) 24 *JMLC* 789 at 791.

⁹⁴ See Mthembu-Salter 'Money Laundering in South African Real Estate' 23.

⁹⁵ See Ch 2 para 2.3 et seq; and Ch 3 para 3.3 et seq above.

⁹⁶ See s 1 of the POCA; Schlenther (2013) 16 *JMLC* 126 at 129; and Nkoane (2018) 31 *SACJ* 84 at 106.

⁹⁷ See Ch 2 para 2.2 and 2.3 et seq above.

⁹⁸ See Ch 6 para 6.3.2.4; Ch 7 para 7.3.2.6; and Ch 8 para 8.3.2.4 below.

⁹⁹ See s 5 of the POCA.

¹⁰⁰ See Itzikowitz 'South Africa' 1309; Tuba (2012) 2 *Acta Criminologica* 103 at 110.

institutions may be entangled in such operations where, for example, they are involved in a TBML through a documentary credit transaction without having applied proper CDD measures.¹⁰¹ The provision can be read in conjunction with section 64 of the FICA, which prohibits structuring transactions in such a way as to avoid reporting duties under the Act.¹⁰² Thus, anyone involved in the chain of facilitating TBML in trade-finance transactions may be found liable under this provision.¹⁰³

A further instance under which money laundering may be committed under the POCA is when a person acquires, possesses or uses the proceeds of unlawful activities.¹⁰⁴ This provision also seems to be wide enough to encompass the various methods through which money laundering may be committed, including TBML in trade-finance instruments.¹⁰⁵ I view this as a positive development under the South African AML legislation in that it gives room to cater for almost every possible unlawful activity, which may result in the generation of proceeds of crime.

To commit the offence of money laundering in any of the three foregoing provisions of the POCA, a person must know or ought reasonably to have known, that the property concerned is, or forms part of the proceeds of unlawful activities.¹⁰⁶ It is not necessary to be involved personally or individually in the act from which the unlawful proceeds are derived.¹⁰⁷ Any person who helps or attempts to help a money launderer may be held jointly liable under the POCA.¹⁰⁸ This makes the money-laundering offences under the POCA wide enough to possibly include transactions conducted pursuant to TBML in trade-finance instruments.¹⁰⁹ This seems to be positive in that various possible ways through which money laundering may be committed can easily be catered for under current provisions of the law without expressly mentioning them.

¹⁰¹ See Ch 3 para 3.3 above on the potential TBML risks through documentary credits and other selected trade-finance instruments. See also para 5.3.4.6 below on CDD measures.

¹⁰² See s 64 of the FICA. For the process of structuring in money laundering, see Ch 2 para 2.2.4 above.

¹⁰³ See again Ch 2 para 2.3 et seq; and Ch 3 para 3.3 et seq above.

¹⁰⁴ See s 6 of the POCA.

¹⁰⁵ See again Ch 2 para 2.3 et seq; and Ch 3 para 3.3 et seq above.

¹⁰⁶ See ss 1 of the FICA; 1 (2) and (3) of the POCA; Itzikowitz 'South Africa' 1310; and Chitimira (2021) 24 *JMLC* 789 at 792. See also *Frankel Pollak Vinderine Inc. v Stanton* (1996) 2 SA 582 (W) 596C-D; and *De Vries v The State* [2011] ZASCA 162.

¹⁰⁷ See Itzikowitz 'South Africa' 1309.

¹⁰⁸ See s 5 of the POCA and s 64 of the FICA. See also Schlenther (2013) 16 *JMLC* 126 at 129; Chitimira (2021) 24 *JMLC* 789 at 792.

¹⁰⁹ See again Ch 2 para 2.3 et seq; and Ch 3 para 3.3 et seq above.

5.3.3 Conclusion

South Africa is not immune to the threat of money laundering and that of TBML in trade-finance instruments.¹¹⁰ Many factors may contribute to the country's vulnerability towards emerging forms of money laundering such as TBML in trade-finance instruments.¹¹¹ The high-crime rate in South Africa and its status as a regional financial hub may attract organised crime groups wishing to launder funds by way of TBML in trade-finance instruments.¹¹² In responding to the challenge of money laundering, South Africa relies on two major pieces of legislation, namely, the POCA and the FICA.¹¹³ Neither the POCA nor the FICA, expressly mention TBML as a form of money laundering.¹¹⁴ However, it appears that the scope of the money-laundering offence under the POCA is wide enough to cover even TBML in trade-finance instruments.¹¹⁵ In addition, the all-crimes approach used for the predicate offences of money laundering in South Africa may make the application of the POCA and the FICA relevant to TBML in trade-finance instruments. Any property of value can be used for TBML purposes.¹¹⁶ The wide ambit of the definition of 'property' under the POCA may potentially encompass any valuable asset that may be subject to TBML, including trade-finance instruments.¹¹⁷ TBML in trade-finance instruments usually transcends borders in the process of exploiting international trade.¹¹⁸ The AML provisions under the POCA seem to be extraterritorial in nature as well, making them relevant to TBML in the international context.¹¹⁹

¹¹⁰ See para 5.2 above; Ch 2 para 2.3; and Ch 3 para 3.3 above.

¹¹¹ See Ch 2 para 2.4 et seq for the environments and vulnerabilities posing the risk of TBML.

¹¹² See again para 5.2 above.

¹¹³ See para 5.3.2 above.

¹¹⁴ See para 5.3.2 above.

¹¹⁵ See para 5.3.2.4 above.

¹¹⁶ See Ch 2 para 2.3 et seq above.

¹¹⁷ See again para 5.3.2.4 above. See also Ch 3 para 3.3 et seq above.

¹¹⁸ See again Ch 2 para 2.3 et seq above.

¹¹⁹ See again para 5.3.2.4 above.

5.3.4 Preventive AML Obligations for Banks¹²⁰ in South Africa

5.3.4.1 General

One major consideration of a professional money launderer is the need for an effective financial system to quickly move the funds.¹²¹ Therefore, an effective AML regime must target criminals at the point of utilising the financial system. The AML control measures under the South African framework are provided for under the FICA.¹²² Such measures place certain obligations on banks,¹²³ in an effort to stem out money laundering from the South African financial system.¹²⁴ The obligations imposed on banks by the FICA can be grouped into four classifications, namely, identification and verification of clients,¹²⁵ record keeping,¹²⁶ reporting of suspicious transactions,¹²⁷ and staff training.¹²⁸ The FICA also requires banks to have an AML governance framework and to apply the RBA in the assessment of money-laundering risk.¹²⁹ These obligations are briefly discussed below in order to establish if they could be applied against the problem of TBML in trade-finance instruments.

5.3.4.2 AML Governance and Oversight

The FICA requires each bank to develop, document, maintain and implement a Risk Management and Compliance Programme (RMCP) for money-laundering control purposes.¹³⁰ A bank relies on the RMCP as a foundational governance programme

¹²⁰ The terms 'financial institution' or 'financial institutions' are used interchangeably in this thesis for 'bank' or 'banks' vice versa. For other terminologies used in this thesis generally, see again Ch 1 para 1.11 above. See also para 5.3.2.3 above.

¹²¹ See Ch 2 para 2.2 and Ch 3 para 3.2 above.

¹²² See Smit 'South Africa' 788; IMF (2021) *South Africa: Assessment Report on AML* 39.

¹²³ The term 'bank' means any of the institutions listed in Sch 1 of the FICA and these are banks, foreign exchange dealers, money remitters, lawyers, investment advisers and brokers. The FICA uses the term 'accountable institutions' to refer to financial institutions, including banks, see s 1 of the FICA.

¹²⁴ See Smit 'South Africa' 788; Lawack 'The South African Banking System' 99.

¹²⁵ See para 5.3.4.6 below.

¹²⁶ See para 5.3.4.8 below.

¹²⁷ See para 5.3.4.10 below.

¹²⁸ See Itzikowitz 'South Africa' 1313; and para 5.3.4.12 below.

¹²⁹ See s 28 of the FICA. See also para 5.3.5.2 below.

¹³⁰ See s 42 (1) of the FICA. See also Hugo & Spruyt (2018) 2 *TSAR* 227 at 248; Annalise Kempen 'The Fight against Money Laundering Requires a Team Effort' (July 2018) 111 *Servamus* 10-13 at 11; IMF (2021) *South Africa: Assessment Report on AML* 163; and Shanese Letatia Booysen *A Comparative Analysis of the Aspects of the Law of South Africa and the United States of America Regarding Money Laundering and the Financing of Terrorism* (Unpublished LLM Dissertation, University of Johannesburg, 2022) 43.

when complying with its AML obligations under the FICA on a risk-based approach.¹³¹ It is used by the bank to identify, assess, monitor and manage money-laundering risks that may threaten the bank's provision of products and services.¹³²

At a practical level, the RMCP could be a collection of documents or just a document with policies, processes, procedures and controls used by the bank for its risk management and compliance purposes.¹³³ The board of directors or senior management of the financial institution must approve the RMCP.¹³⁴ Thus, the board of directors and senior management of the bank have the ultimate responsibility of ensuring that the bank maintains an effective internal AML control through the RMCP. Therefore, it is the senior management of the institution that should ensure a culture of compliance with the RMCP.¹³⁵

A bank's RMCP should be proportionate to the size of the institution. It should also be commensurate with the nature and complexity of the business of a given financial institution.¹³⁶ This follows that where a financial institution is relatively small and offers a limited range of products and services, then its RMCP should also be simple.¹³⁷ The FICA requires that a financial institution indicate in its RMCP which of the provisions of section 42 of the Act do not apply to it and provide reasons for that view.¹³⁸

The development of the RMCP may not be separated from the RBA process.¹³⁹ In fact, the scope and content of the RMCP must be substantively informed by the application of the RBA.¹⁴⁰ The programme should indicate how a bank applies the RBA in complying with the AML obligations under the FICA.¹⁴¹ It should be noted that

¹³¹ See FIC *Guidance Note 7* para 180; Kempen (July 2018) 111 *Servamus* 10 at 11; Booysen *Aspects of the Law of South Africa and the United States of America Regarding Money Laundering* 42. See also para 5.3.4.4 below.

¹³² See s 42 (1) of the FICA; and FIC *Guidance Note 7* para 47. See also IMF (2021) *South Africa: Assessment Report on AML* 163.

¹³³ See FIC *Guidance Note 7* para 180; Hugo & Spruyt (2018) 2 *TSAR* 227 at 249.

¹³⁴ See s 42B (2) of the FICA; FIC *Guidance Note 7* para 181; Hugo & Spruyt (2018) 2 *TSAR* 227 at 248; Booysen *Aspects of the Law of South Africa and the United States of America Regarding Money Laundering* 43.

¹³⁵ See FIC *Guidance Note 7* para 182 and para 183.

¹³⁶ See Hugo & Spruyt (2018) 2 *TSAR* 227 at 249; Booysen *Aspects of the Law of South Africa and the United States of America Regarding Money Laundering* 43.

¹³⁷ See FIC *Guidance Note 7* para 185.

¹³⁸ See s 42 (2A) of the FICA; Hugo & Spruyt (2018) 2 *TSAR* 227 at 249.

¹³⁹ See Hugo & Spruyt (2018) 2 *TSAR* 227 at 249 and para 5.3.4.4 below.

¹⁴⁰ See Hugo & Spruyt (2018) 2 *TSAR* 227 at 249.

¹⁴¹ See FIC *Guidance Note 7* para 180.

a bank's ability to effectively apply the RBA depends on the quality of its RMCP.¹⁴² This signifies the centrality of the RMCP to a bank's risk management. The RMCP should also provide for AML training for all employees.¹⁴³

The FICA requires that the RMCP be made available to the FIC or other supervisory body upon request.¹⁴⁴ It must also be made available to all the bank's employees directly involved in transactions relevant to the programme.¹⁴⁵ A bank must regularly review its RMCP so that the programme remains relevant to the institution's operations.¹⁴⁶

5.3.4.3 Scope of the AML Governance for TBML in Trade-Finance Instruments

The RMCP is a chance for banks to address any control deficiencies they may have in their AML regimes especially in trade-finance instruments. Although the requirement to have the RMCP under the FICA does not address specific forms of money laundering, including TBML in trade-finance instruments, it gives leeway to deal with such issues.¹⁴⁷ In the absence of specific guidance from the FIC on how to deal with TBML in trade-finance instruments, banks may find it difficult to decide on what to include in their RMCPs. Since the RMCP is not a one-size fits all programme, banks may be free to include whatever is relevant to them subject to the provisions of the FICA.¹⁴⁸

The RMCP offers an opportunity to banks to provide their own guidance on how to deal with TBML in trade-finance instruments, especially for their trade-finance transactions staff. It also offers a chance to banks to train staff on TBML in trade-finance instruments since these could be covered under a bank's services or products.¹⁴⁹ For example, a bank's RMCP may provide for how staff may process

¹⁴² Ibid.

¹⁴³ See FIC *Guidance Note 7* para 184. See also para 5.3.4.1.2 below.

¹⁴⁴ See s 42(4) of the FICA.

¹⁴⁵ See s 42(3) of the FICA; Hugo & Spruyt (2018) 2 *TSAR* 227 at 248. See also FIC *Guidance Note 7* para 189 which requires that the RMCP be widely shared throughout the organisation.

¹⁴⁶ See s 42(2) (c) of the FICA; Hugo & Spruyt (2018) 2 *TSAR* 227 at 248. See also FIC *Guidance Note 7* para 190.

¹⁴⁷ See para 5.3.4.2 above.

¹⁴⁸ See again para 5.3.4.2 above.

¹⁴⁹ See FIC *Guidance Note 7* para 37.

documentary credits or demand guarantees in the face of potential threats of TBML.¹⁵⁰ The requirement that it should be regularly reviewed, allows a bank to constantly update the RMCP considering emerging money-laundering threats, including TBML in trade-finance instruments. The updating, may also take into account developments in international best practices, relevant to the control of TBML in trade-finance instruments, from organisations such as the FATF, the Wolfsberg Group and the BAFT.¹⁵¹

5.3.4.4 The Risk-Based Approach (RBA)

The RBA can be traced back to the guidance paper issued by the FATF in 2007 on the subject.¹⁵² It is an important introduction into the FICA through the amendment of 2017.¹⁵³ The RBA assists banks to examine and understand their money-laundering risk exposure.¹⁵⁴ The bank's duty to manage money-laundering risks not only protects it but also protects the integrity of the South African banking system.¹⁵⁵ Thus, the RBA is based on the idea that no controls and measures are adequate in the prevention of money laundering.¹⁵⁶ The approach, therefore, prioritises the channelling of resources and attention to those areas considered by the bank to be high risk.¹⁵⁷ It follows that, where the money-laundering risk is generally considered low, a bank may employ simplified controls to deal with the problem.¹⁵⁸ The RBA is the opposite of the rules-based approach where the latter is based on setting absolute minimum requirements to be met by the bank in preventing money laundering.¹⁵⁹

¹⁵⁰ See again Ch 3 para 3.3 et seq above on the potential risks of TBML through selected trade-finance instruments.

¹⁵¹ See Ch 4 above *passim*.

¹⁵² See Chitimira (2021) 24 *JMLC* 789 at 797. See also Ch 4 para 4.3.2.4.5 above.

¹⁵³ See Hugo & Spruyt (2018) 2 *TSAR* 227 at 236.

¹⁵⁴ See Henning & Hauman (2017) 24 *Journal of Fin Crime* 520 at 521; Kempen (July 2018) 111 *Servamus* 10 at 10.

¹⁵⁵ See Itzikowitz 'South Africa' 1324.

¹⁵⁶ See Hugo & Spruyt (2018) 2 *TSAR* 227 at 236. See also Booyesen *Aspects of the Law of South Africa and the United States of America Regarding Money Laundering* 40.

¹⁵⁷ See Hugo & Spruyt (2018) 2 *TSAR* 227 at 236; Chitimira (2021) 24 *JMLC* 789 at 797. See also FIC *Guidance Note* 7 para 30.

¹⁵⁸ See Daleen Millard & Viviana Vergano 'Hung out to Dry? Attorney-Client Confidentiality and the Reporting Duties Imposed by the Financial Intelligence Centre Act 38 of 2001 (2013) 34 *Obiter* 389-427 at 399; Hugo & Spruyt (2018) 2 *TSAR* 227 at 237; and Chitimira (2021) 24 *JMLC* 789 at 797.

¹⁵⁹ See Hugo & Spruyt (2018) 2 *TSAR* 227 at 237.

The RBA is not entirely new to the South African AML framework.¹⁶⁰ Prior to the FIC (Amendment) Act of 2017, the FIC had issued two guidance notes, which provided for the RBA in limited circumstances.¹⁶¹ The guidance notes required banks to on-board customers using verification methods particular to each customer without adopting a blanket approach.¹⁶² To further clarify on how the RBA may be applied within a limited scope, the FIC issued *Guidance Note 3A: Guidance for Accountable Institutions on Client Identification and Verification and Related Matters* (FIC Guidance Note 3A). However, due to the mainly rules-based approach before the FICA amendment of 2017, even the application of FIC Guidance Note 3A was limited.¹⁶³ Although the FICA provides for the RBA, it does not contain details on how the approach should be implemented.¹⁶⁴ FIC Guidance Note 7, however, provides for such details.¹⁶⁵

The method used under the RBA to assess money-laundering risks considers specific-risk factors.¹⁶⁶ Such factors may include the nature of the bank's services or products and their potential to be abused for money-laundering purposes.¹⁶⁷ Other factors to consider are the geographic areas in which the bank conducts its business or where its customers are generally based. With geographic area as a factor, jurisdictions with weak AML control frameworks, tax havens, and those under international sanctions, are regarded as high risk under the RBA.¹⁶⁸ Further factors to consider are delivery channels used by the bank when either accepting a new customer or contacting a customer. Online customers are considered high risk under the RBA compared to face-to-face ones.¹⁶⁹ The industry in which a bank or its customers operate may also be a factor to consider. Where the industry involves the need for the bank to deal with

¹⁶⁰ See Itzikowitz 'South Africa' 1306.

¹⁶¹ See Hugo & Spruyt (2018) 2 TSAR 227 at 237; Itzikowitz 'South Africa' 1306. See also FIC Guidance Note 1 *General Guidance Note Concerning Identification of Clients* and note 4 of FIC Guidance Note 3A *Guidance for Accountable Institutions on Client Identification and Verification and Related Matters*.

¹⁶² See FIC Guidance Note 1 on www.fic.gov.za [Accessed on 22 September 2022].

¹⁶³ See FIC Guidance Note 3A para 4-18 on www.fic.gov.za [Accessed on 22 September 2022].

¹⁶⁴ See Itzikowitz 'South Africa' 1324.

¹⁶⁵ See Hugo & Spruyt (2018) 2 TSAR 227 at 238; FIC Guidance Note 7 para 7-29; Booysen *Aspects of the Law of South Africa and the United States of America Regarding Money Laundering* 41.

¹⁶⁶ See Hugo & Spruyt (2018) 2 TSAR 227 at 239.

¹⁶⁷ Ibid; Booysen *Aspects of the Law of South Africa and the United States of America Regarding Money Laundering* 42. See also FIC Guidance Note 7 para 37 for an extended list of risk factors relating to products and services.

¹⁶⁸ See FIC Guidance Note 7 para 19.

¹⁶⁹ Idem at para 38. See also Hugo & Spruyt (2018) 2 TSAR 227 at 239.

anonymous clients or to transfer high values of funds, these may be regarded as high-risk areas for money laundering.¹⁷⁰

A bank should subject the RBA process to a periodic review to ensure that it remains effective.¹⁷¹ The RBA plays a significant role in the implementation of the CDD measures under the FICA.¹⁷² The approach also feeds directly into the designing and implementation of the RMCP.¹⁷³

5.3.4.5 Scope of the RBA for TBML in Trade-Finance Instruments

The RBA offers an opportunity to banks to deal with almost all forms of money laundering, including TBML in trade-finance instruments.¹⁷⁴ The approach further allows banks to be able to establish systems on how they may deal with money laundering in general; including TBML in trade-finance instruments, should they encounter it.¹⁷⁵ To be able to do this, bank officials require training, not only on the RBA, but also on how to deploy it against TBML in trade-finance instruments.¹⁷⁶ The mere existence of the RBA under South African law without commensurate training of staff may not be enough to deal with the problem of TBML in trade-finance instruments.¹⁷⁷

Depending on the nature of the trade-finance transaction at hand, a bank may need to appropriately deploy the RBA in order to counter TBML. For example, where a bank is processing a documentary credit or a standby letter of credit, it would need to apply CDD measures commensurate with the risk of TBML perceived in the transaction.¹⁷⁸ The RBA, under the FICA, leaves it open to banks to deal with money-laundering risks according to the nature of products or services they are involved in.¹⁷⁹ Thus, where a bank conducts trade-finance transactions where the risk of TBML is perceived to be

¹⁷⁰ See Hugo & Spruyt (2018) 2 *TSAR* 227 at 239.

¹⁷¹ *Idem* at 242.

¹⁷² See Millard & Vergano (2013) 34 *Obiter* 389 at 399 and para 5.3.4.6 below.

¹⁷³ See Henning & Hauman (2017) 24 *Journal of Fin Crime* 520 at 521; Hugo & Spruyt (2018) 2 *TSAR* 227 at 242; Booysen *Aspects of the Law of South Africa and the United States of America Regarding Money Laundering* 42. See also para 5.3.4.2 above.

¹⁷⁴ See para 5.3.4.4 above. See also *FIC Guidance Note 7* para 30 and para 52.

¹⁷⁵ See again para 5.3.4.4 above.

¹⁷⁶ See para 5.3.4.12 below.

¹⁷⁷ See para 5.3.4.12 below.

¹⁷⁸ See *FIC Guidance Note 7* para 30 and para 32. See again Ch 3 para 3.3 et seq above.

¹⁷⁹ See *FIC Guidance Note 7* para 30 and para 52. See again para 5.3.4.4 above.

high, for example, due to the jurisdictions participating in the documentary credit transaction, such a bank would need to apply the RBA in order to avoid being used in TBML.¹⁸⁰

5.3.4.6 The Obligation to Conduct Customer Due Diligence (CDD)

The FATF regards CDD as a significant AML measure in any jurisdiction.¹⁸¹ In this regard, it is equally central to the South African AML regime.¹⁸² In *Energy Measurements (Pty) Ltd v First National Bank of South Africa Ltd*¹⁸³ the court held, *inter alia*, that banks have an obligation to establish and verify the identity of their customers before they conclude any transactions in order to prevent and fight money-laundering activities in South Africa.¹⁸⁴ In terms of the FICA, a bank may not establish a business relationship¹⁸⁵ or conclude a single transaction¹⁸⁶ with an anonymous client or with a client who uses an apparent false or fictitious name.¹⁸⁷

The CDD process allows banks to know who they are doing business with and to avoid being abused for criminal purposes such as money laundering.¹⁸⁸ Knowledge of the customer would enable the bank to identify if there is any deviation on the transactional activity of the customer based on the already established customer profile. Generally,

¹⁸⁰ See FIC *Guidance Note 7* para 52 and Ch 3 para 3.3 above.

¹⁸¹ See Recommendation 10 of the FATF (2012) *Standards*. See also Booysen *Aspects of the Law of South Africa and the United States of America Regarding Money Laundering* 44. Concerning South Africa's initial implementation of the FATF's customer identification standards and historical accounts on the same, see Louis de Koker 'South Africa's Initial Implementation of the Financial Action Task Force's Customer Identity Verification Standards: Perspectives and Reflection on Regulatory Processes and Approaches' in: Howard Chitimira, Tapiwa Warikandwa (eds) *Financial Inclusion Regulatory Practices in SADC Addressing Prospects and Challenges in the 21st Century* (2023).

¹⁸² See Howard Chitimira & Sharon Munedzi 'Selected Challenges Associated with the Reliance on Customer Due Diligence Measures to Curb Money Laundering in South African Banks and Related Financial Institutions' (2021) 8 *Journal of Comparative Law in Africa* 42-66 at 44; Smit 'South Africa' 789. See also *KwaMashu Bakery Ltd v Standard Bank of South Africa Ltd* 1995 (1) SA 377 (D) 395 I para 390B; *Columbus Joint Venture v Absa Bank Ltd* 2002 (1) All SA 105 (SCA). 2001 (3) SA 132 (W) at para 114.2.

¹⁸³ See Chitimira (2021) 24 *JMLC* 789 at 794.

¹⁸⁴ A business relationship is defined as an arrangement between a client and a bank for the purpose of concluding transactions on a regular basis, see s 1 of the FICA.

¹⁸⁵ A single transaction is defined under the FICA as a transaction other than a transaction concluded in the course of a business relationship and where the value of the transaction is not less than R5000, see s 1 of the FICA.

¹⁸⁶ See s 20A of the FICA. See also De Koker 'Money Laundering in South Africa' 101.

¹⁸⁷ See FIC *Guidance Note 7* para 71; Kempen (July 2018) 111 *Servamus* 10 at 10; and Hugo & Spruyt (2018) 2 *TSAR* 227 at 242; Booysen *Aspects of the Law of South Africa and the United States of America Regarding Money Laundering* 44.

such deviation may indicate possible abuse of the bank's services for money-laundering purposes or other forms of criminality.¹⁸⁹ It is a requirement under the FICA that, before a bank engages a prospective client,¹⁹⁰ to enter into a single transaction or business relationship in accordance with its RMCP, it must establish and verify the identity of the client and where applicable the person representing the client as well as any other person on whose behalf the client is acting.¹⁹¹ Although this refers to CDD for money laundering generally, it may equally apply to CDD for TBML in trade-finance instruments when customers engage banks for trade-finance services.¹⁹² In addition, when a bank engages a prospective client as contemplated under section 21 of the FICA, it must, in addition to the steps required, under that section and in compliance with its RMCP, obtain information to reasonably enable the bank to determine whether future business transactions that will be performed are consistent with the institution's knowledge of that client.¹⁹³ Such information includes details about the nature of the business relationship concerned, the intended purpose of the business relationship concerned and the source of the funds, which the prospective client expects to use in concluding transactions in the course of the business relationship concerned.¹⁹⁴

In addition to the foregoing, banks need to adopt an RBA when conducting CDD in line with the FATF's recommendation.¹⁹⁵ Where there is a higher risk of money laundering, enhanced CDD needs to be applied.¹⁹⁶ The RBA enables banks to exercise much discretion in selecting the appropriate level of CDD required for each customer.¹⁹⁷ Thus, depending on the identified levels of risk under the RBA, a bank may apply either simplified, standard or enhanced CDD.¹⁹⁸

¹⁸⁹ See FIC *Guidance Note 7* para 72; Hugo & Spruyt (2018) 2 *TSAR* 227 at 242.

¹⁹⁰ The FICA uses the term 'client' as opposed to 'customer' and defines it as meaning a person who has entered into a business relationship or single transaction with a bank, see s 1 of the FICA.

¹⁹¹ See s 21 (1) of the FICA. See also Kempen (July 2018) 111 *Servamus* 10 at 10; Chitimira & Munedzi (2021) 8 *JCLA* 42 at 44.

¹⁹² See Ch 3 para 3.3 et seq above.

¹⁹³ See s 21A of the FICA. See also De Koker 'Money Laundering in South Africa' 101.

¹⁹⁴ See s 21A of the FICA.

¹⁹⁵ See FIC *Guidance Note 7* para 16; Louis de Koker 'The FATF's Customer Identification Framework: Fit for Purpose?' (2014) 17 *Journal of Money Laundering Control* 281-295 at 282; Kempen (July 2018) 111 *Servamus* 10 at 10. See also para 5.3.4.4 above.

¹⁹⁶ See De Koker (2014) 17 *JMLC* 281 at 282.

¹⁹⁷ See again para 5.3.4.4 above. See also Hugo & Spruyt (2018) 2 *TSAR* 227 at 242.

¹⁹⁸ See FIC *Guidance Note 7* para 31; Hugo & Spruyt (2018) 2 *TSAR* 227 at 242.

The FICA sets out additional due diligence measures that banks need to perform when dealing with legal persons, trusts and partnerships.¹⁹⁹ Thus, where a client is a legal person or a natural person acting or purporting to act on behalf of a partnership, trust or similar arrangement between natural persons, a bank must, in addition and in accordance with its RMCP, establish the nature of the client's business, the ownership and control structure of the business and the identity of the beneficial owner of the client.²⁰⁰ A beneficial owner is defined under the FICA as a natural person who independently or together with another person, directly or indirectly owns the legal persons or exercises control of the legal person.²⁰¹

The obligation to conduct CDD under the FICA includes ongoing due diligence.²⁰² In terms of section 21C of the FICA, a bank must, in accordance with its RMCP, conduct ongoing due diligence in respect of a business relationship which includes two components of the exercise.²⁰³ The first component of the ongoing due diligence entails the bank monitoring transactions undertaken throughout the course of the relationship.²⁰⁴ The transaction-monitoring exercise must, where necessary, include two further steps, namely, identifying the source of funds to ensure that the transactions are consistent with the bank's knowledge of the client and the client's business and risk profile.²⁰⁵ The monitoring must also establish the background and purpose of all complex, unusual large transactions, which have no apparent business or lawful purpose.²⁰⁶

The second component of the ongoing due diligence enjoins banks to keep information obtained for the purpose of establishing and verifying the identities of clients.²⁰⁷ When a bank is unable to adequately verify or has doubts about the information it has gathered, it must repeat the customer due and ongoing diligence processes prescribed in sections 21, 21A, and 21B and in accordance with its RMCP to the extent necessary

¹⁹⁹ See s 21B of the FICA. See also Hugo & Spruyt (2018) 2 *TSAR* 227 at 244.

²⁰⁰ See s 21B of the FICA. See also Hugo & Spruyt (2018) 2 *TSAR* 227 at 244.

²⁰¹ See s 1 of the FICA.

²⁰² See Chitimira & Munedzi (2021) 8 *JCLA* 42 at 44.

²⁰³ See s 21C of the FICA.

²⁰⁴ See De Koker 'Money Laundering in South Africa' 101; Chitimira & Munedzi (2021) 8 *JCLA* 42 at 44.

²⁰⁵ See Hugo & Spruyt (2018) 2 *TSAR* 227 at 243; s 21C of the FICA.

²⁰⁶ See s 21C of the FICA. See also De Koker 'Money Laundering in South Africa' 102-103.

²⁰⁷ See s 21C of the FICA. See also Hugo & Spruyt (2018) 2 *TSAR* 227 at 243; and para 5.3.4.8 below.

to confirm the information in question.²⁰⁸ Where, despite the repetition, a bank is still unable to establish or verify a client, it may not establish or continue a relationship with such client or must terminate the relationship according to its RMCP and consider making a report to the FIC under section 29 of the FICA.²⁰⁹ A bank that fails to identify persons as prescribed or that fails to comply with the duties regarding CDD is non-compliant under the FICA and is subject to administrative sanctions.²¹⁰

5.3.4.7 Scope of the CDD Measures for TBML in Trade-Finance Instruments

The obligation to conduct CDD under the FICA allows banks to know who they are doing business with and to avoid being abused by criminal elements.²¹¹ The CDD obligation is broad.²¹² It seems to cover almost every situation that may arise between the bank and its prospective customers, including those seeking trade-finance services. Such situations may further include those where customers may wish to abuse bank processes through TBML. FIC *Guidance Note 7*, which banks use to conduct CDD measures, does not specifically address TBML in trade-finance instruments.²¹³ However, its broad nature may make it applicable even to TBML in trade-finance instruments.²¹⁴ TBML processes involve a trade element that would require to be factored in the CDD measures.²¹⁵ This requires trade-finance staff to have adequate knowledge about TBML to be able to deploy the CDD measures under the FICA.²¹⁶

Under a typical trade-finance transaction, the bank would need to identify, for example, the applicant of a documentary credit or demand guarantee.²¹⁷ Such identification would also try to establish the purpose for which the instrument is sought. Red-flag indicators of TBML such as those published by the FATF may come in handy in

²⁰⁸ See s 21D of the FICA. See also Hugo & Spruyt (2018) 2 *TSAR* 227 at 243.

²⁰⁹ See s 21D of the FICA.

²¹⁰ See ss 46 and 46A of the FICA. Before the 2017 Amendment of the FICA, banks that failed to comply with their CDD duties were held to be criminally liable (i.e. were guilty of an offence), see s 46 A of the FICA. However, with the changes, the FICA now holds them liable for administrative sanctions only, see s46A of the FICA.

²¹¹ See para 5.3.4.6 above.

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ See FIC *Guidance Note 7* para 30, 37 and 52.

²¹⁵ See again Ch 2 para 2.3 et seq and Ch 3 para 3.3 et seq.

²¹⁶ See para 5.3.4.1.2 below.

²¹⁷ See again Ch 3 para 3.3 et seq above.

flagging up a suspicious TBML in trade-finance transactions.²¹⁸ The requirement for CDD may also be used to establish the identity of the natural person behind shell companies.²¹⁹ Shell companies are often used to structure TBML transactions using fictitious or fraudulent invoices.²²⁰ It appears that the success of a CDD measure against a potential TBML transaction in trade-finance instruments depends on the level of expertise of the bank officials involved. Usually, trade-finance staff are not knowledgeable about TBML issues, and such issues are usually left for compliance officers. There is a need, therefore, to combine compliance and trade-finance staff in CDD training to capacitate them on how to identify TBML in trade-finance instruments.²²¹

5.3.4.8 *The Obligation to Keep Records*

One of the AML obligations under the FICA is the need to keep records of transactions.²²² The purpose of keeping records is to be able to reconstruct such transactions should the need arise in future.²²³ A bank must keep information it obtains under the CDD process pertaining to its customers or prospective customers.²²⁴ Such records must include copies of or references to information provided to or obtained by the institution to verify a person's identity.²²⁵ In the case of a business relationship, the records must reflect information about the nature of such a relationship, the intended purpose of the business relationship and the source of the funds, which the prospective customer is expected to use in concluding transactions in the course of the business relationship.²²⁶

Furthermore, a bank must keep a record of every transaction, whether the transaction is a single transaction or concluded in the course of a business relationship.²²⁷ Section 22A (2) of the FICA provides for all relevant aspects of a transaction to be recorded by a bank such as the amount and currency involved, the date on which the transaction

²¹⁸ See Ch 4 para 4.3.2.4.4 above.

²¹⁹ See again para 5.3.4.6 above.

²²⁰ See Ch 2 para 2.4.9 et seq above.

²²¹ See para 5.3.4.12 below.

²²² See Smit 'South Africa' 790.

²²³ See Smit 'South Africa' 790; IMF (2021) *South Africa: Assessment Report on AML* 188.

²²⁴ See s 22(1) of the FICA; Hugo & Spruyt (2018) 2 *TSAR* 227 at 251.

²²⁵ See Hugo & Spruyt (2018) 2 *TSAR* 227 at 251.

²²⁶ See ss 21A and 22 of the FICA.

²²⁷ See s 22A (2) of the FICA. See also De Koker 'Money Laundering in South Africa' 101-103.

was concluded, the parties involved and the nature of their transaction and any business correspondents involved if any.²²⁸

It is acceptable to keep the records in electronic form²²⁹ and such records must be kept for a period of five years after the conclusion of the transaction or business relationship was terminated.²³⁰ The records must be kept in a form that can easily be reconstructed.²³¹ A bank may outsource their record-keeping obligations to third parties as long as the institution has casual access to the records and the records are readily available to the FIC and other relevant supervisory bodies for the purposes of performing its functions under the FICA.²³² Failure by the third party to comply with the record-keeping requirement will render the bank liable for that failure.²³³ It should be noted that a bank that fails to keep records is non-compliant with the FICA and is, therefore, subject to an administrative sanction by the FIC.²³⁴

5.3.4.9 Scope of the Record Keeping Duty in the Context of TBML in Trade-Finance Instruments

The obligation to keep transaction and customer records does not specifically speak to the issue of TBML in trade-finance instruments.²³⁵ However, the FICA provisions seem to be applicable to almost all forms of records, including those for transactions where TBML in trade-finance instruments may be an issue.²³⁶ In fact, the record-keeping obligation can be used by the FIC to oblige banks to keep records about trade transactions, which may potentially be used for TBML in trade-finance instruments.²³⁷ The FIC, thus, should issue a guidance note on how records of trade-finance transactions should be kept in contemplation of the possible occurrence of TBML.

²²⁸ See s 22A (20 of the FICA.

²²⁹ See s 22(2) of the FICA. See also De Koker 'Money Laundering in South Africa' 102-103; Hugo & Spruyt (2018) 2 *TSAR* 227 at 251-2.

²³⁰ See ss 22A and 23 of the FICA. See also Recommendation 11 of the FATF (2012) *Standards*; Kempen (July 2018) 111 *Servamus* 10 at 11; and Hugo & Spruyt (2018) 2 *TSAR* 227 at 251.

²³¹ See *FIC Guidance Note 7* para 167.

²³² See s 24(1) of the FICA; *FIC Guidance Note 7* para 170.

²³³ See s 24(2) of the FICA.

²³⁴ See s 47 of the FICA.

²³⁵ See para 5.3.4.8 above.

²³⁶ See *FIC Guidance Note 7* para 163.

²³⁷ See again para 5.3.4.8 above.

A bank conscious of the potential hazards of TBML in its trade-finance transactions, may also require its staff to keep records, specifically intended to capture suspected cases of TBML.²³⁸ This requirement may be part of the bank's RMCP.²³⁹ Of importance under the obligation to keep records, is that almost every form of transaction record can be kept, including where TBML in trade-finance instruments is involved.²⁴⁰ For example, records of demand guarantee or documentary collection transactions may be kept and where these are affected by the risk of TBML, such transactions can easily be reconstructed.

The provision under the FICA regarding record keeping seems to be wide enough to permit virtually any record of transaction to be kept.²⁴¹ It is my view that this provision is progressive in that it would allow banks involved in trade-finance transactions to also keep records about their transactions under the provision. It should be noted, however, that to keep records pertaining to TBML in trade-finance instruments would require further expertise about this type of money laundering. Thus, training of staff about TBML in trade-finance instruments is essential to capacitate trade-finance staff to not only identify, but also keep records of transactions where TBML is involved.²⁴²

5.3.4.10 *The Obligation to Report Suspicious Transactions*

Banks have a role to play under section 29 of the FICA to help prevent money laundering in South Africa.²⁴³ The reporting of suspicious or unusual transactions is an essential component of an effective AML regime of a bank.²⁴⁴ It should be noted that the obligation to report suspicious or unusual transactions also applies to transactions that have been attempted but aborted.²⁴⁵ The FICA broadly formulates who should report suspicious or unusual transactions.²⁴⁶

²³⁸ See para 5.3.4.5 above.

²³⁹ See again para 5.3.4.2 above.

²⁴⁰ See *FIC Guidance Note 7* para 163.

²⁴¹ *Ibid.*

²⁴² See para 5.3.4.1.2 below.

²⁴³ See Hugo & Spruyt (2018) 2 *TSAR* 227 at 252; Geldenhuys 'When Vehicles Become a Vehicle for Money Laundering' (February 2019) 112 *Servamus* 33-35 at 34.

²⁴⁴ See *FIC Guidance Note 7* para 130; Geldenhuys (February 2019) 112 *Servamus* 33 at 34.

²⁴⁵ See s 29 (2) of the FICA; Smith 'South Africa ' 791; and Nkoane (2018) 31 *SACJ* 84 at 105.

²⁴⁶ See Sch 1 of the FICA; Nkoane (2018) 31 *SACJ* 84 at 104; Geldenhuys (February 2019) 112 *Servamus* 33 at 34; and IMF (2021) *South Africa: Assessment Report on AML* 201-202.

In terms of section 29 of the FICA, any person who carries on a business, manages or is employed by a business and who knows or ought reasonably to have known or suspected certain facts, must report the grounds for the knowledge or suspicion and prescribed particulars regarding the transaction to the FIC within a prescribed period after they acquired the knowledge or formed the suspicion.²⁴⁷ The duty to report arises in three scenarios. First, where the business has received or is about to receive the proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist and related activities.²⁴⁸ Secondly, where a transaction or series of transactions to which the business is a party facilitated or is likely to facilitate the transfer of proceeds of unlawful activities or property, which is connected to an offence relating to the financing of terrorist and related activities, has no apparent business or lawful purpose or is conducted to avoid giving rise to a reporting duty under the FICA.²⁴⁹ Thirdly, the duty to report arises where the business has been used or is about to be used in any way for money-laundering purposes or to facilitate the commission of an offence relating to the financing of terrorist and related activities. Once a person or business has reported their suspicion, they may carry out the transaction unless otherwise directed by the FIC.²⁵⁰

The FIC has provided guidance notes on how to make suspicious or unusual transactions reports.²⁵¹ *FIC Guidance Note 4A on Reporting of Suspicious and Unusual Transactions and Activities* (FIC Guidance Note 4A) explains reporting timelines, how the reports are to be submitted to the FIC, the nature of information to include and how to use the electronic platform on reporting.²⁵² The guidance also provides for a wide list of examples of suspicious and unusual transactions banks may look out for when making a decision to report a transaction to the FIC.²⁵³ The FICA

²⁴⁷ See s 29(2) of the FICA. See also FIC *Guidance Note 4A* para 1.1; De Koker 'Money Laundering in South Africa' 103.

²⁴⁸ See s 29(2) of the FICA. See also De Koker 'Money Laundering in South Africa' 103.

²⁴⁹ See s 29(2) of the FICA.

²⁵⁰ See FIC *Guidance Note 4A* para 5.1; ss 33 and 34 of FICA.

²⁵¹ See FIC *Guidance Note 4A* generally.

²⁵² See FIC Notice 02/2017 A New Guidance on the Amended Reporting Requirements in terms of the Money Laundering and Terrorist Control Regulations <https://www.fic.gov.za> [Accessed on 23 September 2022]; Hugo & Spruyt (2018) 2 *TSAR* 227 at 252.

²⁵³ See FIC *Guidance Note 4A* para 4.1.

protects people who report suspicious or unusual transactions to the FIC by exempting them from either civil or criminal liability.²⁵⁴

The FICA further provides for some defences where a bank fails to report suspicious transactions directly to the FIC after complying with its internal AML rules.²⁵⁵ After complying with the cash-threshold reporting obligation under section 28 or the unusual and suspicious transaction obligation under section 29, a bank may proceed with the transaction unless the FIC prohibits it.²⁵⁶

5.3.4.11 Scope of the Duty to Report for TBML in Trade-Finance Instruments

The obligation to report suspicious and unusual transactions does not address specific forms of money laundering, including TBML in trade-finance instruments.²⁵⁷ However, the obligation is broad enough to encompass even those suspicious transaction reports made under potential TBML occurrence in trade-finance instruments. The broad nature of the scope of the reporting obligation is a positive development. It allows a bank to report suspicious transactions to the FIC according to the bank's money-laundering risk exposure.²⁵⁸ For example, if a transaction appears to the bank to be suspicious or unusual due to a potential case of TBML through a documentary credit transaction, then it seems that it is reportable under the FICA.²⁵⁹

The FIC has issued a guidance note on how banks can comply with the duty to file suspicious and unusual transaction reports.²⁶⁰ However, it has not issued any guidance on the filing of trade-finance transactions suspected of TBML.²⁶¹ It is unlikely that banks may clearly report a transaction to the FIC as being suspected of TBML in the absence of guidance on how to do it. For example, when banks process documentary credits or collections they may not focus on the reporting of suspicion of

²⁵⁴ See s 38 of the FICA; Geldenhuys (February 2019) 112 *Servamus* 33 at 35.

²⁵⁵ See s 69 of the FICA. See also De Koker 'Money Laundering in South Africa' 104.

²⁵⁶ See FIC *Guidance Note* 4A para 5.1 and ss 33 and 34 of the FICA. See also De Koker 'Money Laundering in South Africa' 105.

²⁵⁷ See para 5.3.4.10 above.

²⁵⁸ See para 5.3.4.3 and 5.3.4.5 above on the contents of the RMCP and flexibility of the RBA respectively.

²⁵⁹ See again para 5.3.4.10 above.

²⁶⁰ See para 5.3.4.10 above and FIC *Guidance Note* 4A.

²⁶¹ The FIC pledges — in future — to issue specific guidance notes to address industry or sector-specific money-laundering challenges through the RBA, see FIC *Guidance Note* 7 para 32.

TBML in the absence of a guidance from the FIC on how to go about it.²⁶² The general practice by FIUs in most countries, including in those under this comparative study, is to issue a specific guidance on TBML control in trade-finance instruments.²⁶³ Similarly, it appears banks may not even prioritise the identification and reporting of TBML in trade-finance instruments due to lack of expertise and the absence of specific guidance on the subject from the FIC. Whatever reporting of TBML cases which may occur in trade-finance instruments may currently be guided by international best practice from the FATF by virtue of South Africa's membership to this organisation.²⁶⁴

5.3.4.12 *Obligation to Train Staff on Money Laundering*

It is a requirement under the FICA for a bank to provide training relating to AML to its employees.²⁶⁵ The AML training must be provided to employees on an ongoing basis.²⁶⁶ This is recognition of the fact that money laundering is ever evolving and there is a need to stay abreast with its changes.²⁶⁷ A bank must train its staff to comply with the provisions of the FICA and the institution's RMCP on AML.²⁶⁸ Although the provision for staff training under the FICA does not specifically refer to TBML in trade-finance instruments, it could be used to provide specialised training on TBML issues to trade-finance staff. It has been argued that the duties imposed by the FICA are onerous.²⁶⁹ For example, compliance with training and record-keeping obligations may prove to be costly especially for small banks.²⁷⁰ However, an application of the RBA should resolve the challenge of cost in that each bank would adopt a training model commensurate with its size and scope of services it offers.²⁷¹

²⁶² See again Ch 3 para 3.3 et seq above.

²⁶³ See the FCA (2013) *Financial-Crime Risks Report* in Ch 6, the FinCEN (2010) *Advisory on TBML* Ch 7; and the MAS (2015) *Guidance on Countering TBML* in Ch 8 below.

²⁶⁴ See Ch 4 para 4.3.2 et seq above.

²⁶⁵ See s 43 of the FICA. See also FIC *Guidance Note 7* para 184.

²⁶⁶ See s 43 of the FICA.

²⁶⁷ See Ch 2 *passim*.

²⁶⁸ See s 43 of the FICA. See also Smith 'South Africa' 793; Kempen (July 2018) 111 *Servamus* 10 at 11.

²⁶⁹ See Smith 'South Africa' 793; Itzikowitz 'South Africa' 1323.

²⁷⁰ Itzikowitz 'South Africa' 1323; Kempen (July 2018) 111 *Servamus* 10 at 11.

²⁷¹ See para 5.3.4.4 above on the RBA.

5.3.4.13 Scope of the Staff Training Duty for TBML in Trade-Finance Instruments

The obligation to train staff on money-laundering issues under the FICA is significant.²⁷² This is because staff members, who are adequately trained on money-laundering prevention, may be able to fulfil other relevant obligations under the FICA. Staff training in TBML issues may capacitate them to react appropriately to the problem once it arises. The FICA requires that there should be a provision on staff training about money laundering in the RMCP.²⁷³ This could also offer an opportunity to train staff about TBML in trade-finance instruments. For example, training of staff on documentary credit or demand guarantee processing, may also include a portion about TBML risks that may affect a bank's operations. The FIC has not issued any guidance note on TBML training and what should be covered.²⁷⁴ This could have been pertinent to banks, which provide trade-finance services and are facing a possible risk of being abused by way of TBML. The worldwide trend is for the FIUs of respective jurisdictions to issue such guidance notes, not only to raise awareness about TBML, but also to ensure uniformity in bank strategies against the problem.²⁷⁵

It should be noted, however, that nothing prevents banks under the FICA provision to offer training on TBML in trade-finance instruments presently. Training on money laundering issues could as well include TBML in trade-finance instruments. For example, a bank could adopt generic training material pertaining to TBML in trade-finance provided by organisations such as the FATF, to train its own staff.²⁷⁶ The bank could also provide for training on TBML in trade-finance instruments in its RMCP on an RBA basis.²⁷⁷

5.3.5 Conclusion

The South African AML preventive measures are mainly provided for under the FICA.²⁷⁸ This piece of legislation seems to be comprehensive in its coverage of AML

²⁷² See para 5.3.4.12 above.

²⁷³ Ibid.

²⁷⁴ Ibid.

²⁷⁵ See, for example, the FCA (2013) *Financial-Crime Risks Report* in Ch 6, the FinCEN (2010) *Advisory on TBML* Ch 7; and the MAS (2015) *Guidance on Countering TBML* in Ch 8 below.

²⁷⁶ See again Ch 4 para 4.3.2 above.

²⁷⁷ See FIC *Guidance Note 7* para 180.

²⁷⁸ See para 5.3.4 et seq above.

obligations for financial institutions. The Act covers standard obligations such as CDD, reporting of suspicious transactions, keeping of records, and training of staff against money laundering.²⁷⁹ However, the FICA does not refer to TBML in trade-finance instruments. It seems that one may need to deal with TBML in South Africa using the current standard provisions against money laundering in general. The FICA requires banks to have an RMCP to govern AML issues for each specific institution.²⁸⁰ Such a programme may be used to develop strategies for the control of TBML in trade-finance instruments aligned to the AML obligations of banks under the FICA. The FICA also requires that an RBA be used in assessing money-laundering risks.²⁸¹ This approach is flexible enough to allow even for the assessment of TBML in trade-finance instruments where it is found to be a heightened risk.

The FICA provides for several obligations necessary to prevent money laundering in the banking sector. Such obligations include the need to conduct CDD on customers,²⁸² the keeping of records,²⁸³ and the reporting of unusual and suspicious transactions.²⁸⁴ The execution of these AML obligations by banks is often assisted through guidance notes that are issued by the FIC from time to time.²⁸⁵ The FIC, however, has not issued any guidance note on how to deal with TBML in trade-finance instruments in the banking sector in respect of each AML obligation. It would have been ideal to have such guidance at industry or sector-specific level to allow for adoption and adaptation by banks depending on their situation.

The FICA requires financial institutions to train staff on money-laundering issues and make provision for such under their respective RMCPs.²⁸⁶ TBML in trade-finance instruments requires specialised training to detect and prevent. The obligation to train staff may be used to focus on TBML control in the trade-finance sector. Without guidance from the FIC, each bank has to determine its own anti-TBML training depending on its own exposure to such risk.

²⁷⁹ See again para 5.3.4 et seq above.

²⁸⁰ See para 5.3.4.2 above.

²⁸¹ See para 5.3.4.4 above.

²⁸² See para 5.3.4.6 above.

²⁸³ See para 5.3.4.8 above.

²⁸⁴ See para 5.3.4.10 above.

²⁸⁵ See para 5.3.2.3 above.

²⁸⁶ See para 5.3.4.13 above.

5.4 INSTITUTIONAL AML FRAMEWORK FOR TBML IN TRADE FINANCE

5.4.1 General

This section presents those institutions tasked with the combatting of money laundering in South Africa either directly or indirectly. These institutions are the Financial Intelligence Centre,²⁸⁷ the SAMLIT,²⁸⁸ the NPA,²⁸⁹ the SAPS,²⁹⁰ and the SARS.²⁹¹ The section comments on the capacity and efficacy of these institutions in so far as their roles are concerned in the context of TBML in trade-finance instruments already discussed in chapter 3. In particular, the section examines what these bodies are doing or could do to improve their roles against TBML in trade-finance instruments.

5.4.2 The Financial Intelligence Centre (FIC)

The FIC is South Africa's FIU modelled along the recommendations of the Egmont Group's best practices.²⁹² The FIC is established by the FICA as an institution outside the public service but with a juristic person status.²⁹³ It is registered as a national public entity under the Public Finance Management Act.²⁹⁴ The FIC started operations in February 2003.²⁹⁵ Its primary objective is to identify the proceeds of unlawful activities and combat money laundering.²⁹⁶ The FIC has three main objectives, namely, to identify the proceeds of unlawful activities, to combat money laundering, and to share the information it collects to investigating and supervisory bodies, including the SARS.²⁹⁷

²⁸⁷ See para 5.4.2 below.

²⁸⁸ See para 5.4.4 below.

²⁸⁹ See para 5.4.6 below.

²⁹⁰ See para 5.4.8 below.

²⁹¹ See para 5.4.10 below.

²⁹² Smit 'South Africa' 793; Kempen (July 2018) 111 *Servamus* 10 at 10; and FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 25. For the FIUs of the comparative jurisdictions, see Ch 6 para 6.4.2 below; Ch 7 para 7.4.2 below; and Ch 8 para 8.4.2 below.

²⁹³ See s 2(2) of the FICA and s 195 of the Constitution of South Africa. See also Van Jaarsveld *Money Laundering* 578; Schlenther (2013) 16 *JMLC* 126 at 133; and Hugo & Spruyt (2018) 2 *TSAR* 227 at 227.

²⁹⁴ 1 of 1999 (Sch 3 Part A). See also Hugo & Spruyt (2018) 2 *TSAR* 227 at 227.

²⁹⁵ See Van Jaarsveld *Money Laundering* 578; <https://www.fic.gov.za> [Accessed on 1 October 2022].

²⁹⁶ See s 3 of the FICA. See also Smit 'South Africa' 792; Kempen (July 2018) 111 *Servamus* 10 at 10.

²⁹⁷ See s 3(2) of the FICA. See also De Koker 'Money Laundering in South Africa' 99; Van Jaarsveld *Money Laundering* 578; and Schlenther (2013) 16 *JMLC* 126 at 133.

The FIC carries out four major functions pursuant to its objectives. First, it collects, processes and analyses information in suspicious transaction reports filed with it.²⁹⁸ Secondly, the FIC advises and cooperates with other law enforcement authorities such as the SARS, the NPA and the SAPS in dealing with money-laundering cases.²⁹⁹ Thirdly, it carries out monitoring of banks for compliance with AML obligations under the FICA.³⁰⁰ Fourthly, the FIC keeps records of information it obtains through filed suspicious transaction reports for a minimum period of five years.³⁰¹

The use of financial intelligence plays a critical role in the fight against money laundering.³⁰² In this regard, the FIC produces reports with operational financial intelligence for use by law enforcement authorities.³⁰³ It also produces guidance notes for the industry on AML issues especially on how to implement the measures under the FICA.³⁰⁴ The FATF has noted that although these reports may help law enforcement authorities to investigate predicate offences and trace proceeds of crime, they are less effective due to lack of skills and resources on the part of investigators.³⁰⁵ The FATF notes that the FIC's supervisory role has been largely focused on registering banks and the filing of cash transaction reports with little regard to other forms of money-laundering risks.³⁰⁶ In this regard, the FIC has not made any reports specific to TBML in trade-finance instruments for its stakeholders despite heightened threats of this form of money laundering.³⁰⁷ As part of its role in assisting banks to comply with the FICA, the FIC issues guidance notes from time to time.³⁰⁸ It has issued

²⁹⁸ See ss 4 and 29 of the FICA. See also De Koker 'Money Laundering in South Africa' 99; Van Jaarsveld *Money Laundering* 638.

²⁹⁹ See s 40 of the FICA. See also De Koker 'Money Laundering in South Africa' 99; Smit 'South Africa' 792; Van Jaarsveld *Money Laundering* 638; Schlenther (2013) 16 *JMLC* 126 at 133; Kempen (July 2018) 111 *Servamus* 10 at 10; and FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 25.

³⁰⁰ See Smit 'South Africa' 793; Kempen (July 2018) 111 *Servamus* 10 at 10; and FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 25.

³⁰¹ See s23 of the FICA. See also Smit 'South Africa' 793; Van Jaarsveld *Money Laundering* 638; and Kempen (July 2018) 111 *Servamus* 10 at 10.

³⁰² See FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 7.

³⁰³ See De Koker 'Money Laundering in South Africa' 99; Schlenther (2013) 16 *JMLC* 126 at 133.

³⁰⁴ See s 4 (c) and s 43A (1) of the FICA. *Guidance Note 7* was issued by the FIC in collaboration with the National Treasury, the SARB and the FSB which is the predecessor to the FSCA, FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 32.

³⁰⁵ See Schlenther (2013) 16 *JMLC* 126 at 133; FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 3.

³⁰⁶ See FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 45.

³⁰⁷ See Ch 2 para 2.3 et seq above.

³⁰⁸ See s 4(c) of the FICA.

several such guidance notes, including those addressing CDD, the RBA and the reporting of suspicious and unusual transactions.³⁰⁹ The FIC, however, has not issued specific guidance on how to manage the risk of TBML in trade-finance instruments. FIC *Guidance Note 7*, which the FIC has issued, seems to be of general application to different sectors, including trade finance.³¹⁰ The FIC has however, pledged to issue, in future, sector-specific guidance notes taking into consideration that different sectors have different money-laundering risk exposures.

In evaluating its role, it is worth noting that the FIC does not conduct money-laundering investigations. However, it plays a significant role in such investigations.³¹¹ It provides support by sharing the financial intelligence it produces, to the investigative authorities so that they may use it in their processes.³¹² The FIC also analyses reports from the feedback it gets from law enforcement authorities in order to understand areas that call for increased investigations.³¹³

It is further worth noting that the FC does not have prosecutorial authority for criminal offences in South Africa, including money-laundering offences.³¹⁴ The authority to prosecute criminal offences lies with the NPA.³¹⁵ Therefore, it follows that the efficiency with which financial crimes may be prosecuted in South Africa remains the function of the NPA with the FIC just playing a supporting role.³¹⁶ Besides the nexus between the FIC and the NPA, there is also a special relationship that exists between the FIC and the SARS in terms of which the FIC provides data to the SARS, which assist the latter to effectively collect taxes and to combat tax evasion.³¹⁷ In turn, the SARS is also obliged at law to disclose any information to the FIC related to possible money-laundering activities through banks.³¹⁸

³⁰⁹ See, for example, FIC *Guidance Note 3A*, 4A and 7 generally.

³¹⁰ See FIC *Guidance Note 7* generally, which covers various the FIC's AML recommendations to financial institutions from the RBA, the RMCP, CDD measures, record keeping, reporting of suspicious transactions and training of staff.

³¹¹ See De Koker 'Money Laundering in South Africa' 99; Kempen (July 2018) 111 *Servamus* 10 at 10.

³¹² See Kempen (July 2018) 111 *Servamus* 10 at 10.

³¹³ See FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 53.

³¹⁴ See Hugo & Spruyt (2018) 2 *TSAR* 227 at 227.

³¹⁵ See para 5.4.6 below.

³¹⁶ *Ibid.*

³¹⁷ See ss 29(1) (b) and 36(1) of the FICA. See also De Koker 'Money Laundering in South Africa' 99-100.

³¹⁸ See s 29 (1) and 36(1) of the FICA. See also De Koker 'Money Laundering in South Africa' 100.

To expand its scope of operation, the FIC has direct access to information possessed by other government departments in their databases, such as the SAPS, the SARB and the SARS.³¹⁹ It also has direct access to commercial databases about registered legal entities and their ownership composition. To further facilitate its role as South Africa's FIU, the FIC also uses open source information.³²⁰

5.4.3 Conclusion

As South Africa's FIU, the FIC is central to the combatting of money laundering, including TBML in trade-finance instruments.³²¹ The body receives and analyses information on money laundering for onward transmission to investigating authorities.³²² Thus, the FIC is at the centre of information sharing in the scheme of money-laundering control in trade finance as per the recommendation of the Egmont Group.³²³ Although the FIC has identified TBML in one of its reports as a threatening form of money laundering in South Africa, the organisation has not produced any comprehensive report about the problem in general or as it affects trade-finance instruments in particular.³²⁴ As a partner to the SAMLIT, the FIC is capable of sponsoring a detailed research on TBML in trade-finance instruments in South Africa in order to come up with a considered response to the challenge commensurate with the available national resources.³²⁵

The practice around the world is for FIUs to issue guidance notes on how TBML in trade-finance instruments may be managed within their jurisdictions. From time to time, the FIC issues guidance notes in terms of the FICA.³²⁶ Such guidance notes, although not binding at law, have persuasive value.³²⁷ Despite it having issued guidance notes on other issues, the FIC has not issued any guidance on TBML or regarding the management of money-laundering risks in trade-finance transactions.³²⁸

³¹⁹ See IMF (2021) *South Africa: Assessment Report on AML 222*; FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 56.

³²⁰ IMF (2021) *South Africa: Assessment Report on AML 222*.

³²¹ See para 5.4.2 above.

³²² See again para 5.4.2 above.

³²³ See Ch 4 para 4.4.4 above.

³²⁴ See again para 5.2 and para 5.4.2 above.

³²⁵ See para 5.4.4 below.

³²⁶ See again para 5.3.2.3 and para 5.4.2 above.

³²⁷ See s 4(c) of the FICA.

³²⁸ See again para 5.4.2 above.

This is a shortcoming that the FIC should attend to in order to give direction to banks and other stakeholders. The FIC can use its strategic partnerships such as the SAMLIT, where other AML stakeholders are present, to at least formulate a strategy against TBML in trade-finance instruments. Alternatively, it may simply adopt the FATF's or the Wolfsberg Group's guidelines on TBML in trade-finance instruments in order to design its own guidance relevant to the South African context.³²⁹

5.4.4 The South African Money Laundering Integrated Task Force (SAMLIT)

The SAMLIT was established in 2019 by the FIC as a public-private partnership between the banking sector and regulatory authorities.³³⁰ Its formation is pursuant to the provisions of the FICA, which authorises the FIC to engage in any lawful activity with other organisations in South Africa or elsewhere aimed at promoting its principal objectives.³³¹ The SAMLIT is part of the global trend of public-private partnerships for information sharing in order to tackle money laundering.³³² It is a product of collaboration among the FIC, the SARB's Prudential Authority and the private sector. The private-sector members are 22 local banks, some international banks and the banking-sector representatives, namely, the South African Banking Risk Information Centre (SABRIC),³³³ and the Banking Association of South Africa (BASA).³³⁴

The SAMLIT operates based on two main objectives, namely, to assist in the effective combatting of financial crime, including money laundering and to enhance the collective understanding of financial-crime trends.³³⁵ Thus, it provides for an organised platform to collectively combat money laundering through information sharing.³³⁶ Such a platform assists in increasing joint understanding of complex financial-crime transactions, which are typical in TBML operations.³³⁷ The SAMLIT also enable banks to improve the quality of reports they send to the FIC. Such reports can be converted

³²⁹ See Ch 10 para 10.7 below.

³³⁰ See The SAMLIT (2020) *Annual Review* 4.

³³¹ See s 4(aA) as read with s 5(h) and (i) of the FICA.

³³² See The SAMLIT (2020) *Annual Review* 15. See also Ch 6 para 6.4.6 below; Chapter 7 para 7.4.2 below; and Ch 8 para 8.4.4 below.

³³³ For the role of the South African Banking Risk Information Centre, see para 5.5.6 below.

³³⁴ The SAMLIT (2020) *Annual Review* 4. For the role of the Banking Association South Africa, see para 5.5.4 below.

³³⁵ See Article 2 of The SAMLIT (2019) *Charter*; FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 46-47.

³³⁶ The SAMLIT (2020) *Annual Review* 18.

³³⁷ See Ch 2 and Ch 3 above generally.

into valuable intelligence for use by law enforcement authorities in investigations and asset forfeiture.³³⁸

The SAMLIT is administered through a Steering Committee, which oversees all its activities. The Steering Committee facilitates the SAMLIT's quarterly forums and all Expert Work Groups.³³⁹ The taskforce relies on two specialised groups to undertake its operations, namely, the Tactical Operations Group, and the Expert Work Group.³⁴⁰ The Tactical Operations Group detects and disrupts financial crime in selected financial-crime investigations as per the FIC's directives.³⁴¹ The Tactical Operations Group also exchanges general and specific information at the SAMLIT's quarterly forums to improve a collective understanding of financial-crime trends and typologies.³⁴² The SAMLIT's quarterly forums are a platform where the taskforce meets and exchanges information with members about local and international trends, risks and best practices in financial-crime control.³⁴³ The Expert Work Group focuses on specific trends and threats of financial crimes, including money laundering, its impact on the South African banking sector and responds by developing solutions to counter such threats.³⁴⁴ The SAMLIT has since produced a report titled *Financial Flows Associated with Illegal Wildlife Trade in South Africa*.³⁴⁵ It has not yet produced anything on TBML in trade-finance instruments. Judging by its structures and operational expertise, it may have the capacity to conduct a study on TBML in trade-finance instruments in the context of South Africa and produce a report on it.³⁴⁶

5.4.5 Conclusion

The SAMLIT is one of the most progressive platforms the FIC has initiated against the money-laundering challenge in South Africa.³⁴⁷ As a public-private partnership, the platform is suitable for the combatting of complex forms of money laundering such as TBML in trade-finance instruments. The SAMLIT has so far made policy

³³⁸ See the SAMLIT (2020) *Annual Review* 15.

³³⁹ See the SAMLIT (2019) *Charter* 5.

³⁴⁰ See *Idem* at 7; The SAMLIT (2020) *Annual Review* 4.

³⁴¹ See the SAMLIT (2019) *Charter* 7.

³⁴² *Ibid.*

³⁴³ *Idem* at 8.

³⁴⁴ *Idem* at 9.

³⁴⁵ See www.fic.co.za [Accessed on 10 February 2023].

³⁴⁶ See Ch 10 para 10.9 below.

³⁴⁷ See para 5.4.4 above.

pronouncements against money laundering in the wildlife sector.³⁴⁸ This shows that the taskforce can be useful against sector-specific forms of money laundering such as TBML in trade-finance instruments. Although the body has not dealt or reported anything on TBML in trade-finance instruments, its capacity and resources are likely to be of value when it comes to dealing with such complex forms of money laundering.³⁴⁹ The SAMLIT houses strategic players against money laundering in South Africa, which makes it an important platform to stimulate research on TBML in trade-finance instruments.³⁵⁰

5.4.6 The National Prosecuting Authority (NPA)

The NPA was established in 1998 under the Constitution of South Africa and the National Prosecuting Authority Act (NPA Act).³⁵¹ It is headed by the office of the National Director of Public Prosecutions.³⁵² The NPA, through the National Prosecuting Services, institutes criminal proceedings on behalf of the State in South Africa.³⁵³ In its Strategic Plan of 2020-2025, the NPA recognised money laundering as an emerging crime but did not indicate the level of priority it should give to it.³⁵⁴ Nonetheless, the NPA has the sole mandate to prosecute any criminal cases, including money laundering referred to it by other competent authorities.³⁵⁵

The NPA operates through specialised units, which include the Specialised Commercial Crime Unit and the Organised Crime Component, which manages and supports money-laundering prosecutions at regional level on an ongoing basis.³⁵⁶ The

³⁴⁸ See para 5.4.4 above.

³⁴⁹ See Ch 10 para 10.9 below.

³⁵⁰ See Ch 10 para 10.9 below.

³⁵¹ See s 179 of the Constitution of South Africa and s 2 of the National Prosecuting Authority Act 32 of 1998. See also Martin Schönteich 'A Story of Trials and Tribulations -The National Prosecuting Authority, 1998 – 2014' (December, 2014) 50 *SA Crime Quarterly* 5-15 at 5.

³⁵² See s 3 of the NPA Act. See also Iole Matthews 'The National Prosecuting Authority' in: Institute of Security Studies (ed) *Criminal (In) Justice in South Africa* (hereinafter Matthews 'The National Prosecuting Authority') 99.

³⁵³ See also Matthews 'The National Prosecuting Authority' 100; IMF (2021) *South Africa: Assessment Report on AML* 32; and FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 25.

³⁵⁴ See NPA '2020-2025 strategic plan' <https://www.npa.gov.za/sites/default/files> [Accessed on 20 February 2024]. See also FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 44.

³⁵⁵ See ss 2(b) and 40(aA) of the FICA. For a discussion of similar prosecutorial authorities in the comparative jurisdictions, see Ch 6 para 6.4.8 below; Ch 7 para 7.4.8 below; and Ch 8 para 8.4.6 below.

³⁵⁶ See Matthews 'The National Prosecuting Authority' 99; IMF (2021) *South Africa: Assessment Report on AML* 32.

NPA's Specialised Commercial Crime Unit directs investigations relating to serious commercial and corruption, including money laundering, and prosecutes them.³⁵⁷ In addition to its Specialised Commercial Crime Unit, the NPA also has the Specialised Tax Unit of the NPA, which is mandated with the investigations, and prosecutions of tax cases, including the offence of money laundering.³⁵⁸ Through its Asset Forfeiture Unit, the NPA is also involved in the implementation of the freezing and forfeiture provisions of the POCA against the proceeds and instrumentalities of organised crime.³⁵⁹ In this regard, the NPA is not relying much on criminal confiscation of property through conviction for money laundering.³⁶⁰ Civil Forfeiture proceedings are civil and not criminal.³⁶¹ Such proceedings are intended to recover the benefits of crime, including money laundering, without establishing the criminal liability of the defendant.³⁶²

Although the NPA is actively prosecuting money-laundering cases, enough has not been done in respect of third-party money laundering and foreign predicate offences considering that South Africa is a regional financial centre.³⁶³ The NPA has been focusing its energies on predicate offences rather than money laundering itself.³⁶⁴ According to the FATF and ESAAMLG, the NPA has not been dealing effectively with money-laundering cases referred to it by the Special Investigating Unit, especially where such money-laundering cases had some connections with the issue of state capture.³⁶⁵ I agree with this view given the lack of meaningful statistics of money laundering linked to state capture.³⁶⁶ In an attempt to solve that problem, the President

³⁵⁷ See Schönteich (December, 2014) 50 *SA Crime Quarterly* 5 at 7; FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 25.

³⁵⁸ See IMF (2021) *South Africa: Assessment Report on AML* 33; FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 26.

³⁵⁹ See Ch 6 of the POCA titled 'Civil Recovery of Property'. See also Schönteich (December, 2014) 50 *SA Crime Quarterly* 5 at 7; FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 26.

³⁶⁰ See FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 8.

³⁶¹ See s 37(1) of the POCA. More on the remedy of civil forfeiture in money-laundering proceedings, see Van Jaarsveld *Money Laundering* 555 et seq.

³⁶² See s 50(4) of the POCA; *National Director of Public Prosecutions v Mohamed NO and others* 2002 (4) SA 843 (CC) para 16C–D.

³⁶³ See FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 45. See *S v Van der Linde* [2016] ZAGPJHC 179; and *S v Moosagie and Another* [2013] ZAECPHC 6.

³⁶⁴ See FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 6.

³⁶⁵ *Idem* at 8.

³⁶⁶ The subject of state capture is beyond this work and more so its links to money laundering. For more on state capture, see Mcebisi Jonas 'The Commercialisation of Politics and Hazards of State Capture: State Capture' (2017) 62 *South African Journal of Social and Economic Policy*

proclaimed the NPA's Investigative Directorate in 2019.³⁶⁷ The Investigative Directorate has special investigative powers to deal with serious and complex economic crimes, especially those crimes detected by the Commission of Inquiry into State Capture, the Public Investment Corporation and the SARS.³⁶⁸ Despite this effort, the FATF has placed the South African government under grey listing partly due to the state capture of the criminal justice institutions such as the NPA.³⁶⁹

The NPA seems to be well structured in terms of specialised units focused on different forms of crime, including money laundering. However, it seems to have no record of having prosecuted cases of TBML in trade-finance instruments in the past. The absence of such statistics could be due to lack of capacity and expertise to encourage investigations and subsequent prosecutions of such forms of money laundering. The NPA has prosecuted tax-related crimes such as VAT fraud, which are often linked to TBML.³⁷⁰ With adequate training, the NPA has potential to successfully combat TBML in trade-finance instruments.³⁷¹

5.4.7 Conclusion

The NPA is mandated with the prosecution of criminal offences in South Africa.³⁷² Although it seems to be doing well in prosecuting money-laundering predicate offences, it appears the authority has no recorded history of prosecuting TBML in trade-finance instruments.³⁷³ The NPA lacks capacity and expertise to prosecute complex money-laundering schemes let alone TBML in trade-finance instruments. It is possible and ideal to capacitate a different arm of the NPA to deal specifically with complex money-laundering schemes such as TBML in trade-finance instruments. Such an initiative may improve the NPA's role in dealing with serious financial crimes that threaten the well-being of South Africa's economy. The NPA may even dedicate

10-12; Momkhre John 'Understanding the Phenomenon of State Capture and its Manifestation in South Africa' (2018) 16 *Commonwealth Youth and Development* 1-7; and February Judith 'State Capture: An Entirely New Type of Corruption' (2019) 25 *ISS Southern Africa Report* 1-16. FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 26.

³⁶⁷

³⁶⁸ Ibid.

³⁶⁹ See para 5.2 above. See also De Koker (2023) 1 *The Forensic Practitioner* 10 at 10; Kempen (April 2023) *Servamus* 23 at 23; and West (2023) 1 *The Forensic Practitioner* 14 at 14.

³⁷⁰ See *S v Moosagie and Another* [2013] ZACPEHC 6; *S v Van der Linde* [2016] ZAGPJHC 179; and *S v Meyer and Others* [2017] ZAGPJHC 286.

³⁷¹ See Ch 10 para 10.5 below.

³⁷² See para 5.4.6 above.

³⁷³ Ibid.

one of its specialised divisions, such as the Specialised Commercial Crime Unit, to concentrate on TBML in trade-finance instruments, among other forms of complex money-laundering schemes.³⁷⁴ Such a proposition may not be difficult to execute since the unit is already in existence, therefore, setting up costs may not be an impediment.³⁷⁵

5.4.8 South African Police Service (SAPS)

The SAPS is a law enforcement agency created under the SAPS Act and the Constitution of South Africa.³⁷⁶ Its primary responsibility is the investigating of criminal offences in South Africa, including money-laundering offences.³⁷⁷ It houses the Directorate for Priority Crimes Investigations (DPCI or the Hawks) which was established in 2009.³⁷⁸ The DPCI's responsibility is to combat national priority crimes such as serious organised commercial crime, corruption, and related money laundering.³⁷⁹ The DPCI operates through three specialised units that are dedicated to investigating different offences that may also pass as money-laundering predicate offences.³⁸⁰ The three units are the Organised Crime Investigations, the Serious Commercial Office, and the Serious Corruption Investigations.³⁸¹ The Organised Crime Investigations deals with crimes related to narcotics and human trafficking, precious metals and illicit mining.³⁸² The Serious Commercial Office deals with banking crime, serious fraud and economic offences.³⁸³ The Serious Corruption Investigations is mandated with corruption investigations in both the public and private

³⁷⁴ Ibid. see also Ch 2 para 2.3 et seq above.

³⁷⁵ See Ch 10 para 10.5 below.

³⁷⁶ See s 5 of the SAPS Act 68 of 1995; s 214 of the Constitution of South Africa Act 200 of 1993. See also DS Lambrechts & J Prinsloo 'The Powers and Functions of the South African Police Service-A 'New' Socio-Legal Perspective?' (1996) 9 *Acta Criminologica* 85-89 at 85.

³⁷⁷ See ss 16(1)-(2) and 17B of the SAPS Act. See also IMF (2021) *South Africa: Assessment Report on AML* 32; FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 25. For similar law enforcement authorities considered in this study under the comparative jurisdictions, see Ch 6 para 6.4.4 and 6.4.10 below; Ch 7 para 7.4.10 and 7.4.12 below; and Ch 8 para 8.4.8 below.

³⁷⁸ FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 42.

³⁷⁹ See ss 16(1)-(2) and 17B of the SAPS Act. See also IMF (2021) *South Africa: Assessment Report on AML* 32; FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 25.

³⁸⁰ See IMF (2021) *South Africa: Assessment Report on AML* 32; FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 25.

³⁸¹ See IMF (2021) *South Africa: Assessment Report on AML* 32; FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 25.

³⁸² FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 25.

³⁸³ Ibid.

sector as well as foreign bribery.³⁸⁴ Despite its specialised branches, the SAPS has no single unit dedicated to the investigation of TBML in trade-finance instruments. One can argue that, since TBML in trade-finance instruments is a complex form of money laundering — which could be deemed a serious crime — then the Serious Commercial Office of the SAPS deals with it. In conducting its investigative role, the SAPS also rely on the services of the Falcons, a crime-reporting media organisation.³⁸⁵ The Falcons' mission is to bring to the attention of the SAPS allegations of corruption and other serious economic crimes.³⁸⁶

The SAPS also uses financial intelligence from the FIC on a routine basis to assist in the investigation of predicate offences and to trace proceeds of crime.³⁸⁷ The use of such financial intelligence, however, is at a minimal level when it comes to investigating money laundering on a proactive basis.³⁸⁸ As the responsible authority for money-laundering investigations, the SAPS has not been adequately requesting and utilising financial intelligence from the FIC.³⁸⁹ In their evaluation of the South African AML regime, the FATF and the ESAAMLG note that the SAPS' efforts are not yet directed at combatting money laundering related to the serious crimes they investigate.³⁹⁰ This might also include TBML in trade-finance instruments since there is no record of such form of money laundering being investigated by the SAPS. The FATF and the ESAAMLG attribute the SAPS' lack of focus on money laundering to the lack of skills and resources within the police service.³⁹¹ This reason may ring even more accurate for TBML in trade-finance instruments, which requires not only adequate resources to deal with, but also expertise to detect. The SAPS's deficiencies in investigating complex money laundering cases have caused the South African government to be grey-listed by the FATF as of February 2023.³⁹²

³⁸⁴ Ibid.

³⁸⁵ See <https://falcons.org.za> [Accessed on 20 January 2024].

³⁸⁶ Ibid.

³⁸⁷ See s 3 (2) (b) of the FICA. See also para 5.4.2 above.

³⁸⁸ FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 49.

³⁸⁹ Idem at 53.

³⁹⁰ Idem at 43.

³⁹¹ Idem at 49.

³⁹² See para 5.2 above. See also De Koker (2023) 1 *The Forensic Practitioner* 10 at 10; Kempen (April 2023) *Servamus* 23 at 23; and West (2023) 1 *The Forensic Practitioner* 14 at 14.

5.4.9 Conclusion

The SAPS is the organ tasked with the investigation of crime in South Africa.³⁹³ Its focus, however, has been more on other criminal offences than it is on TBML in trade-finance instruments.³⁹⁴ This trend is a bit worrisome considering that the SAPS are expected to deal effectively with such forms of financial crimes. There seems to be no evidence in literature or case law to show that the SAPS have dealt with TBML in trade-finance instruments before. This is even more troublesome considering that TBML in general or in trade-finance, instruments may already be in operation in certain vulnerable sectors of South Africa's economy such as free-trade zones and tax administration.³⁹⁵ The FATF and the ESAAMLG have attributed the SAPS' less focus on money laundering to the lack of adequate resources and expertise.³⁹⁶ This might even be more accurate on the issue of TBML in trade-finance instruments, given that it requires specialist knowledge to detect, due to its complexity. There is a need to have the SAPS trained in complex forms of money laundering such as TBML in trade-finance instruments.³⁹⁷ This would enable it to meaningfully investigate and refer such cases to the NPA for prosecution.³⁹⁸ The SAPS may use its already existing relationship with the FIC and the SARS to improve its capabilities on complex forms of money laundering, including TBML in trade-finance instruments.³⁹⁹ It already has specialised divisions within its structures, which it may deploy to focus on TBML issues as a specialist unit.⁴⁰⁰

5.4.10 South African Revenue Service (SARS)

The SARS is the country's tax collecting and customs administration authority, which was created in terms of the SARS Act.⁴⁰¹ It controls the movement of goods and

³⁹³ See para 5.4.8 above.

³⁹⁴ See again para 5.4.8 above.

³⁹⁵ See Ch 2 para 2.4.8 and para 5.4.10 below.

³⁹⁶ See again para 5.4.8 above.

³⁹⁷ See Ch 10 para 10.4 below.

³⁹⁸ See para 5.4.6 above.

³⁹⁹ See para 5.4.2 above and para 5.4.10 below.

⁴⁰⁰ See again para 5.4.8 above.

⁴⁰¹ 34 of 1997. See www.sars.gov.za/about [Accessed on 1 October 2022]; FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 26. For similar customs authorities with AML duties to play in their respective comparative jurisdictions considered in this thesis, see Ch 6 para 6.4.12 below; Ch 7 para 7.4.12 below; and Ch 8 para 8.4.10 below.

people across the country's borders together with the SAPS and the National Immigration Branch of the Department of Home Affairs.⁴⁰²

The Egmont Group and the WCO have both indicated the significant role that customs authorities play in the combatting of money laundering, especially TBML.⁴⁰³ In addition to dealing with tax offences, the SARS also handles money laundering and other potential financial crimes.⁴⁰⁴ Tax evasion is considered a predicate offence for money laundering, and as such, the SARS investigates money laundering as part of its obligation to investigate tax offences.⁴⁰⁵ Once such cases are concluded, the SARS refers them to the SAPS and the NPA.⁴⁰⁶ However, the SARS's scope is restricted to offences such as failing to submit tax returns and tax frauds.⁴⁰⁷ It does not have an active and direct mandate to investigate money laundering, which is the preserve of the SAPS.⁴⁰⁸ It is, therefore, the SAPS and the NPA, which— on receiving files from the SARS— may then add money-laundering charges if they find it appropriate to do so.⁴⁰⁹ Although there seems to be no specific cases of TBML in trade-finance instruments that the SARS have tackled in South Africa, it has dealt with some of the offences related to TBML such as tax evasion and VAT fraud.⁴¹⁰ Based on the data it has reviewed, the FATF has discovered that few money-laundering cases related to tax fraud and customs offences have been prosecuted in South Africa.⁴¹¹ Nonetheless, the number of such cases might have increased since the FATF and the ESAAMLG conducted the mutual evaluation in 2019.

In terms of information sharing, the SARS has a role to play in conjunction with other significant institutions in the combatting of TBML such as the FIC. In fact, the SARS has an obligation to report money laundering to the FIC whenever it comes across it

⁴⁰² See FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 26.

⁴⁰³ See Ch 4 para 4.4.3 and para 4.4.4 above.

⁴⁰⁴ See Schlenther (2013) 16 *JMLC* 126 at 133.

⁴⁰⁵ See FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 26.

⁴⁰⁶ See IMF (2021) *South Africa: Assessment Report on AML* 69; FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 64.

⁴⁰⁷ See FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 64.

⁴⁰⁸ See IMF (2021) *South Africa: Assessment Report on AML* 70.

⁴⁰⁹ See FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 64.

⁴¹⁰ See *S v Moosagie and Another* [2013] ZACPEHC 6; *S v Van der Linde* [2016] ZAGPJHC 179; *S v Meyer and Others* [2017] ZAGPJHC 286.

⁴¹¹ See FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 64.

during its investigations of tax and customs offences.⁴¹² The suspicious-activity indicators for money laundering, within the purview of SARS, may include complicated tax schemes designed to evade taxes, the use of shell companies and tax havens and trade misinvoicing.⁴¹³ These may also act as possible indicators for TBML in trade-finance instruments reportable to the FIC by the SARS' staff provided they are trained to identify this type of money laundering. The SARS is also obliged to share AML information with other law enforcement agencies such as the SAPS under the provisions of the POCA.⁴¹⁴

5.4.11 Conclusion

The SARS is the tax and customs authority in South Africa. It has a statutory obligation to report money laundering to the FIC.⁴¹⁵ However, the SARS' focus is mainly on tax and customs offences.⁴¹⁶ The WCO and the Egmont Group have emphasised the importance of customs authorities, within their jurisdictions, in the combatting of money laundering, including TBML in trade-finance instruments.⁴¹⁷ Despite this, the FATF has found that the SARS' focus on money laundering is minimal.⁴¹⁸ Thus, given this limited focus on money laundering in general, it may not come as a surprise that the organisation has not dealt with TBML in trade-finance instruments at all.

The SARS' biggest shortcoming on TBML issues is its exclusive focus on tax and customs offences.⁴¹⁹ It does not have an active mandate to investigate money laundering which remains under the purview of the SAPS.⁴²⁰ This, therefore, implies that the success or failure in pursuing money-laundering cases occurring within the domain of the SARS depends on the cooperation of the SARS and the SAPS.⁴²¹ Although tax evasion is closely related to the *modus operandi* of TBML in trade-finance instruments, the absence of expertise and limited focus on money laundering in

⁴¹² See ss 29(1)(b) and 36(1) of the FICA. See also Schlenther (2013) 16 *JMLC* 126 at 133; FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 64.

⁴¹³ See Schlenther (2013) 16 *JMLC* 126 at 134.

⁴¹⁴ See ss 71 and 73 of the POCA. See also s 3 of the FICA.

⁴¹⁵ See para 5.4.10 above.

⁴¹⁶ See again para 5.4.10 above.

⁴¹⁷ See Ch 4 para 4.4.3 and para 4.4.4 above.

⁴¹⁸ See again para 5.4.10 above.

⁴¹⁹ See para 5.4.10 above.

⁴²⁰ See again para 5.4.10 above.

⁴²¹ See again para 5.4.8 and 5.4.10 above.

general, may hinder the SARS' scope to scrutinise potential TBML in the tax authority's operations.⁴²² By way of a general recommendation, the SARS could use its obligation, to report money laundering in general, to report TBML in trade-finance instruments to the FIC. However, to report suspected cases of TBML, presumes knowledge or suspicion of its occurrence, which the SARS staff may not have. There is, therefore, a need to train the SARS' staff on TBML in general and TBML in trade-finance instruments in particular. This may enable them to detect the offence before referring it to the SAPS.⁴²³

5.5 SOME INITIATIVES BY THE FINANCIAL-SECTOR BODIES AGAINST TBML

5.5.1 General

The financial sector is significant in the combatting of TBML in trade-finance instruments.⁴²⁴ Almost all proceeds of crime in the form of illegal funds, one way or the other, find themselves in the financial system. In fact, organised crime groups are prepared to pay the cost of adopting a circuitous route in 'cleaning' their tainted funds through the banking system to get 'clean' money.⁴²⁵ It is, therefore, significant to establish the role that some financial-sector bodies can play, in support of the banks' AML obligations against TBML in trade-finance instruments, which I have already reviewed.⁴²⁶ This section therefore analyses the role played by certain institutions in the South African financial sector, which include the Prudential Authority of the South African Reserve Bank,⁴²⁷ the Banking Association South Africa,⁴²⁸ and the South African Banking Risk Information Centre.⁴²⁹ I have conveniently selected these institutions due to their function, and representative roles in the banking sector. An attempt will be made to establish the AML efforts of these institutions, including their contributions in combatting TBML in trade-finance instruments, if any, in South Africa.

⁴²² See again Ch 2 para 2.3 above.

⁴²³ See Ch 10 para 10.8 below.

⁴²⁴ See Ch 3 para 3.2 et seq above.

⁴²⁵ See again Ch 2 para 2.2 above.

⁴²⁶ See again para 5.3.4 above.

⁴²⁷ See para 5.5.2 below.

⁴²⁸ See para 5.5.4 below.

⁴²⁹ See para 5.5.6 below.

5.5.2 The South African Reserve Bank (SARB)

5.5.2.1 General

The SARB, which falls under the Ministry of Finance, is the central bank of South Africa.⁴³⁰ It is a juristic person whose primary objective is to protect the value of the currency in support of South Africa's equitable and long-term economic development.⁴³¹ The SARB administers the Banks Act,⁴³² in order to protect the safety of depositors' funds and the integrity of the South African financial system.⁴³³ It is also responsible for monitoring risks within the financial sector in order to ensure financial stability.⁴³⁴ The SARB deals with money-laundering control through divisions under it, namely, the Prudential Authority,⁴³⁵ and the Financial Surveillance Department.⁴³⁶ These two divisions of the SARB are briefly explained below.⁴³⁷

5.5.2.2 The SARB's Prudential Authority

The Prudential Authority was established in 2018 under the Financial Sector Regulation Act (FSRA).⁴³⁸ It is a juristic person within the administration of the SARB.⁴³⁹ It is the first prudential peak under the South African Twin Peaks regulatory model within the financial sector.⁴⁴⁰ The Financial Sector Conduct Authority (FSCA),

⁴³⁰ See s 223 of the Constitution of the Constitution of South Africa. See also Johann De Jager 'The South African Reserve Bank: Blowing Winds of Change (Part I)' (2013) 25 *SA Merc L J* 342-361 at 342; IMF (2021) *South Africa: Assessment Report on AML* 33.

⁴³¹ See s 224(1) of the Constitution of South Africa; ss 2 and 3(1) of the SARB Act 90 of 1989.

⁴³² 94 of 1990.

⁴³³ See ss 2 and 3(1) of the SARB Act and ss 11 and 12 of the Financial Sector Regulation Act No 9 of 2017 (FSRA).

⁴³⁴ See ss 11 and 12 of the FSRA.

⁴³⁵ See para 5.5.2.2 below. For a consideration of similar bank regulatory authorities with AML roles to play in their respective comparative jurisdictions, see Ch 6 para 6.5.2 below; Ch 7 para 7.5.2 below; and Ch 8 para 8.5.2 below.

⁴³⁶ See para 5.5.2.3 below.

⁴³⁷ See para 5.5.2.2 and para 5.5.2.3 below.

⁴³⁸ 9 of 2017.

⁴³⁹ See s 32(1) and (2) of the FSRA. See also Uraysha Ramracheya 'The Twin Peaks Model-A New Approach' (September 2018) *Without Prejudice* 18-19 at 18.

⁴⁴⁰ See Ramracheya (September 2018) *Without Prejudice* 18; SARB-Prudential Authority (2021-2024) *Regulatory Strategy* 3. For a more detailed discussion on the 'Twin Peaks' model of regulation in the South African financial sector, see Martha Gertruida van Niekerk *A Comparative Analysis of the Role of the Central Bank in Promoting and Maintaining Financial Stability in South Africa* (Unpublished LLD Thesis, University of Pretoria, 2018); Gerda van Niekerk & Corlia van Heerden 'The Importance of a Legislative Framework for Co-operation and Collaboration in the Twin Peaks Model of Financial Regulation' (2020) 137 *South African Law Journal* 108-144; Gerda van Niekerk & Corlia van Heerden 'Twin Peaks: The Role of the South African Central Bank in Promoting and Maintaining Financial Stability' (2017) 80 *Journal of Contemporary Roman-Dutch*

which was also established in 2018 under the FSRA, forms the second peak for financial conduct regulation.⁴⁴¹ The SARB's Prudential Authority and the FSCA assist the SARB in maintaining financial stability. The SARB's Prudential Authority aims to advance and strengthen the security and integrity of financial institutions that offer financial services and products.⁴⁴² To achieve its objectives the SARB's Prudential Authority cooperates with other competent authorities such as the FIC.⁴⁴³ In terms of the FICA, the SARB's Prudential Authority is responsible for the AML supervision of banks.⁴⁴⁴ Through the AML/CFT Division,⁴⁴⁵ which was established in 2012, the SARB's Prudential Authority supervises and enforces compliance with the FICA within banks.⁴⁴⁶ The SARB's Prudential Authority inspects banks for compliance with the FICA especially with respect to the development and implementation of the RMCP for money laundering.⁴⁴⁷

The SARB's Prudential Authority has a good appreciation of the problems associated with money laundering in the banking industry.⁴⁴⁸ This understanding, however, is limited when it comes to the appreciation of risks at individual bank level.⁴⁴⁹ To prevent organised crime groups from entering the banking sector, the SARB's Prudential Authority puts market entry controls.⁴⁵⁰ However, it has not yet implemented a fit and proper vetting system for significant owners of banks and not much is being done to verify the information submitted to it.⁴⁵¹ The SARB's Prudential Authority also uses a risk-based supervisory framework to assess money-laundering risks in the banking

Law 636-656; Darius Zeederberg *The Role of the South African Reserve Bank as Central Bank in the South African Twin Peaks Model* (Unpublished LLM Dissertation, University of Pretoria, 2018); and Mmiselo Freedom Qumba 'A Comparative Analysis of the Twin Peaks Model of Financial Regulation in South Africa and the United Kingdom' (2022) 139 *SA L J* 78-113.

⁴⁴¹ See SARB-Prudential Authority (2021-2024) *Regulatory Strategy* 3.

⁴⁴² See s 33(a) of the FSRA. See also Ramracheya (September 2018) *Without Prejudice* 18.

⁴⁴³ See s 34 (1)(b) of the FSRA; Ramracheya (September 2018) *Without Prejudice* 18.

⁴⁴⁴ See Item 2 of Sch 2 of the FICA which lists the SARB as a supervisory body. See also IMF (2021) *South Africa: Assessment Report on AML* 33.

⁴⁴⁵ It was previously known as the Bank Supervision Department, see SARB-Prudential Authority (2021-2024) *Regulatory Strategy* 19.

⁴⁴⁶ See SARB-Prudential Authority (2021-2024) *Regulatory Strategy* 19.

⁴⁴⁷ See IMF (2021) *South Africa: Assessment Report on AML* 120; FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 128.

⁴⁴⁸ See IMF (2021) *South Africa: Assessment Report on AML* 120; FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 117.

⁴⁴⁹ See IMF (2021) *South Africa: Assessment Report on AML* 125.

⁴⁵⁰ See FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 119.

⁴⁵¹ *Ibid.*

sector. This implies that the SARB's Prudential Authority does not use a blanket approach in its supervisory interactions with financial institutions over money-laundering issues.⁴⁵² However, in their evaluation of the South African AML regime, the FATF and the ESAAMLG have found that the SARB's Prudential Authority does not undertake a proper RBA in its AML supervisory roles.⁴⁵³ In its 2021-2024 Regulatory Strategy, the SARB's Prudential Authority pledges to improve its supervisory role in terms of the RBA as per the recommendation of the FATF.⁴⁵⁴

To risk-rate banks and assess their levels of compliance with AML requirements, the SARB's Prudential Authority uses a risk matrix.⁴⁵⁵ Through such risk-matrix ratings, the SARB's Prudential Authority has identified customers, products, services and delivery channels as high-risk factors for money laundering. In particular, the authority has identified trade finance, cross-border wire transfers and online banking as some of the high-risk areas for money laundering.⁴⁵⁶ However, it has not made any statement about TBML in trade-finance instruments. Thus, currently the SARB's Prudential Authority deals with TBML in trade-finance instruments as part of its focus on money laundering in general.

The SARB's Prudential Authority also collaborates with the FIC in engaging private-sector players on a quarterly basis.⁴⁵⁷ In 2018, it signed a memorandum of understanding with the FIC to regulate matters of common interest.⁴⁵⁸ The SARB's Prudential Authority is also a member of SAMLIT where it interacts with other organisations relevant in the combatting of money laundering in South Africa.⁴⁵⁹ It takes advantage of the AML meetings it holds with stakeholders to share national and international policy and regulatory developments with banks.⁴⁶⁰ For AML violations by banks, the SARB's Prudential Authority imposes remedial actions and sanctions.

⁴⁵² See www.resbank.co.za [Accessed 26 September 2022].

⁴⁵³ See FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 117.

⁴⁵⁴ See SARB-Prudential Authority (2021-2024) *Regulatory Strategy* 19.

⁴⁵⁵ See FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 121.

⁴⁵⁶ Ibid.

⁴⁵⁷ Idem at 135.

⁴⁵⁸ See ss 40(3) and 45 (1D) of the FICA; and ss 27, 77, and 251 (3(e) of the FSRA. See also Clause 3 of the FIC-SARB & Prudential Authority (2018) Memorandum of Understanding.

⁴⁵⁹ See again para 5.4.4 above.

⁴⁶⁰ See IMF (2021) *South Africa: Assessment Report on AML* 139; FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 135.

However, the FATF has rated such remedial actions and sanctions as less dissuasive.⁴⁶¹

5.5.2.3 The SARB's Financial Surveillance Department

The Financial Surveillance Department is another arm of the SARB whose role is to licence and supervise Authorized Dealers with Limited Authority for compliance with the FICA.⁴⁶² The department also supervises cross-border money value transfer-services activities. The SARB's Financial Surveillance Department also ensures that Authorized Dealers with Limited Authority are compliant with foreign exchange regulations.⁴⁶³

The Financial Surveillance Department's understanding of the risks of money laundering in the banking industry is limited.⁴⁶⁴ This is even more so in relation to TBML in trade-finance instruments where the department has not made any pronouncements on the subject. The SARB's Financial Surveillance Department is yet to fully apply the RBA in its supervisory roles and in this regard, it trails the SARB's Prudential Authority in this area.⁴⁶⁵ The department, however, makes an effort to detect illegal cross-border money value transfer-service activities but not as a high priority.⁴⁶⁶ The SARB's Financial Surveillance Department provides to the FIC, information pertaining to cross-border transactions for electronic fund transfers, to and from South Africa.⁴⁶⁷ There seems to be less cooperation between the SARB's Financial Surveillance Department and the SAPS with the latter not following up to sanction and close illegal operators in the money value transfer-services sector.⁴⁶⁸

⁴⁶¹ FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 117.

⁴⁶² *Idem* at 126.

⁴⁶³ See s 9 of the Currency and Exchange Act 9 of 1933; FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 34.

⁴⁶⁴ See FATF & ESAAMLG (2021) *South Africa Mutual Evaluation Report* 135.

⁴⁶⁵ *Idem* at 45.

⁴⁶⁶ *Ibid.*

⁴⁶⁷ *Idem* at 217.

⁴⁶⁸ *Idem* at 135.

5.5.3 Conclusion

The SARB is the central bank of South Africa.⁴⁶⁹ Its Prudential Authority and Financial Surveillance Departments deal with money-laundering issues.⁴⁷⁰ Through its risk-rating matrix, the SARB's Prudential Authority has identified trade finance as one of the areas being threatened by money laundering in South Africa.⁴⁷¹ This is a step in the right direction, which shows that the SARB's Prudential Authority is aware of new methods of money laundering that are constantly emerging and threatening the South African economy, such as TBML in trade-finance instruments. However, it has not issued any best-practice note regarding the control of TBML in trade-finance instruments to guide, either banks or other financial institutions, on how to respond to the problem. The SARB's Prudential Authority occupies a strategic position in the combatting of money laundering in South Africa. Besides its individual role as an AML supervisory authority, it is also a member of the SAMLIT.⁴⁷² The SARB's Prudential Authority can use its presence in the SAMLIT to raise TBML issues affecting banks in their use of trade-finance instruments.

5.5.4 The Banking Association South Africa (BASA)

The BASA is an industry body, which represents domestic and international banks that legally operate under the South African jurisdiction. The BASA advances the interests of the banking industry against regulators, legislators and other stakeholders in order to make the industry profitable and sustainable.⁴⁷³

One of the goals of the BASA is to contribute to the social and economic development and transformation of South Africa.⁴⁷⁴ The BASA is a significant player in the AML efforts of South Africa.⁴⁷⁵ The organisation is a member of SAMLIT where it works

⁴⁶⁹ See para 5.5.2 above.

⁴⁷⁰ See para 5.5.2.2 and 5.5.2.3 above.

⁴⁷¹ See again para 5.5.2.2 above.

⁴⁷² See para again para 5.4.4 above.

⁴⁷³ See BASA www.banking.org.za [Accessed on 5 February 2022]. For a discussion of similarly structured associations in the comparative jurisdictions, see Ch 6 para 6.5.6 below; Ch 7 para 7.5.6 below; and Ch 8 para 8.5.4 below.

⁴⁷⁴ See BASA www.banking.org.za [Accessed on 5 February 2022].

⁴⁷⁵ See para 5.4.4 above.

together with the SARB's Prudential Authority, the FIC, the SABRIC and 22 national and international banks.⁴⁷⁶

The BASA has not made any position statement regarding TBML in trade-finance. However, its presence in the SAMLIT may enable it to contribute on various money-laundering issues affecting the banking sector, including TBML in trade-finance instruments.

5.5.5 Conclusion

The BASA is the industry representative of banks in South Africa.⁴⁷⁷ It has not made any policy pronouncements or conducted any research focused on TBML in trade-finance instruments. The BASA is a good platform to create an industry position against TBML in trade-finance instruments. As an industry representative of the banking sector, its views on TBML, if it makes any, could be valued by its members and other relevant stakeholders at large.

5.5.6 The South African Banking Risk Information Centre (SABRIC)

The SABRIC is a non-profit organisation created in 2002 by South African banks in order to give support to the banking industry in the combatting of crime, including money laundering.⁴⁷⁸ The SABRIC's major clients are the South African banks and cash-in-transit companies.⁴⁷⁹ In its operations, the SABRIC conducts and coordinates activities that are aimed at, *inter alia*, combatting bank-related financial crimes, including money laundering.⁴⁸⁰ In trying to achieve this broad mandate, the SABRIC assists banks to comply with their obligations when applying CDD measures under the FICA.⁴⁸¹

⁴⁷⁶ See again para 5.4.4 above.

⁴⁷⁷ See para 5.5.4 above.

⁴⁷⁸ The four founding banks at the time were Absa, FNB, Nedbank and Standard Bank, see Annalise Kempen 'SABRIC-A Vital Partner to Law Enforcement in Fighting Organised Bank-Related Crime' (November 2017) 110 *Servamus* 26-28 at 26. www.sabric.co.za [Accessed on 8 February 2022].

⁴⁷⁹ See www.sabric.co.za [Accessed on 8 February 2022].

⁴⁸⁰ See www.sabric.co.za [Accessed on 8 February 2022]; Kempen (November 2017) 110 *Servamus* 26.

⁴⁸¹ See Kempen (November 2017) 110 *Servamus* 26 at 27.

The SABRIC also manages a centralised repository on financial-crime information.⁴⁸² It analyses the information and comes up with crime-combatting strategies tailored to benefit their members.⁴⁸³ Not only is the crime-related information shared with banks, but it is also used to support the activities of the SAPS and the NPA.⁴⁸⁴ In 2020, the SABRIC designed a Data Hub and Collaboration Platform for the collation of crime data in the banking industry.⁴⁸⁵ The Data Hub is a point of connection between users and data suppliers where other value-addition services like data de-duplication and quality checks are conducted.⁴⁸⁶ Through its Analytics and Insights Centre, the SABRIC produces industry-wide data insights in the form of actionable and data-informed predictions and conclusions. Such analytics and insights are meant to understand the financial-crime environment and to combat crime in the business sector.⁴⁸⁷

Besides being the custodian of financial-crime information, the SABRIC contributes towards the effectiveness of public-private partnerships for the benefit of the banking industry.⁴⁸⁸ In this regard, it facilitates the exchange of information between its members, industry regulators and law enforcement authorities.⁴⁸⁹ For example, the organisation works in close cooperation with the SAPS and the NPA in the combatting of crime.⁴⁹⁰ The SABRIC also participates in the SAMLIT platform with other organisations central to the combatting of money laundering such as the FIC.⁴⁹¹

The SABRIC also conducts public awareness campaigns of bank-related crimes, including money laundering, and educates the public on how to protect themselves against potential crimes generally.⁴⁹² It also carries out organised-crime research in order to provide meaningful insights into crime developments in the banking sector.⁴⁹³

⁴⁸² Idem at 26.

⁴⁸³ Ibid.

⁴⁸⁴ Ibid.

⁴⁸⁵ See SABRIC (2020) *Annual Report* 10.

⁴⁸⁶ Ibid.

⁴⁸⁷ See SABRIC (2020) *Annual Report* 10; Kempen (November 2017) 110 *Servamus* 26 at 26.

⁴⁸⁸ See Kempen (November 2017) 110 *Servamus* 26 at 26; SABRIC (2020) *Annual Report* 4.

⁴⁸⁹ See Kempen (November 2017) 110 *Servamus* 26 at 26; SABRIC (2020) *Annual Report* 4.

⁴⁹⁰ See Kempen (November 2017) 110 *Servamus* 26 at 26.

⁴⁹¹ See para 5.4.2 and para 5.4.4 above.

⁴⁹² See Kempen (November 2017) 110 *Servamus* 26 at 27. See also www.sabric.co.za [Accessed on 8 February 2022].

⁴⁹³ See SABRIC (2020) *Annual Report* 10.

This places the SABRIC at the forefront of discovering emerging forms of crime such as TBML in trade-finance instruments.

5.5.7 Conclusion

The SABRIC is a significant repository for financial-crime information in South Africa.⁴⁹⁴ Its strategic position between banks and law enforcement agencies is vital in the combatting of serious organised crime in South Africa, including money laundering. Although the SABRIC has not made any specific contributions directed at TBML in trade-finance instruments, its expertise and focus on technology-based solutions in the combatting of crime are relevant in the fight against such complex forms of money laundering.⁴⁹⁵ It is submitted that the SABRIC could be central to the idea of information sharing on TBML using trade-finance instruments between the FIC and banks. Its inclusion in the SAMLIT structures is an encouraging development in resolving money laundering in South Africa.⁴⁹⁶ The greatest strength of the SABRIC is its capabilities in data analytics, which can be harnessed to combat TBML in trade-finance instruments by integrating all relevant institutions within the South African AML regime. Additionally, the use of data analytics in combatting TBML in trade-finance instruments could make investigations easy since such operations are usually international and complex in nature.

5.6 CONCLUSION

South Africa has a comprehensive regime against money laundering in general.⁴⁹⁷ It has passed legislation that deals with money laundering, in accordance with both worldwide best practices and recommendations of the FATF.⁴⁹⁸ Under the POCA and the FICA, South Africa has dealt with the offence of money laundering in a broad way.⁴⁹⁹ This is a welcome development that caters for emerging and complex forms of money laundering, including TBML in trade-finance instruments. The FICA, in particular, requires banks to identify clients, report suspicious transactions and keep records of transactions dealt with for a stipulated period.⁵⁰⁰ Despite this, South Africa

⁴⁹⁴ See para 5.5.6 above.

⁴⁹⁵ See again para 5.5.6 above.

⁴⁹⁶ See again para 5.4.4 above.

⁴⁹⁷ See para 5.3 et seq above.

⁴⁹⁸ See para 5.3.2 above.

⁴⁹⁹ See again para 5.3.2 above.

⁵⁰⁰ See para 5.3.4 et seq above.

does not have an AML strategy to inform its decisions against money laundering at national level. The country has not conducted any national money-laundering risk assessment to fully appreciate the nature of money-laundering risks that may be threatening it. This could leave South Africa potentially exposed to the risks of TBML in trade-finance instruments unknowingly. The POCA does not refer to TBML in general or to TBML in trade-finance instruments in specific terms. However, there is a possibility that TBML in trade-finance instruments could be dealt with using the current legislative provisions within the POCA. The reason for this is that the concept of money laundering under these statutes is broad enough to encompass TBML in trade-finance instruments.⁵⁰¹ In addition, the all-crimes approach adopted under the South African AML regime seems to be adequate for the inclusion of possible predicate offences even for TBML in trade-finance instruments.⁵⁰²

The money-laundering preventive obligations under the FICA are largely compliant with the FATF *Standards*. This is arguably so because they provide for CDD measures, the RBA, record keeping, reporting of suspicious transactions and the training of staff on money laundering.⁵⁰³ These are standard AML measures expected by the FATF in its recommendations.⁵⁰⁴ Both the IMF and the FATF have rated them adequate.⁵⁰⁵ However, the AML provisions under the FICA do not refer to TBML or TBML in trade-finance instruments expressly in any of them. Despite this, it is still possible to interpret the AML provisions under the South African legislation as including TBML in trade-finance instruments. The requirements for applying CDD measures and for the reporting of suspicious transactions under the FICA, for example, are broad enough to include even TBML in trade-finance instruments.⁵⁰⁶ The only shortcoming is whether the bank staff will be knowledgeable enough to report TBML using trade-finance instruments. This also depends on the provisions of the RMCP of a particular bank, which ideally, should cover TBML in its scope. The RMCP

⁵⁰¹ See again para 5.3.2.4 above.

⁵⁰² *Ibid.*

⁵⁰³ See again para 5.3.4 et seq above.

⁵⁰⁴ See Ch 4 para 4.3.2 above.

⁵⁰⁵ See again para 5.3.4 et seq above.

⁵⁰⁶ See para 5.3.4.7 and para 5.3.4.11 above.

requirement under the FICA is an important one, and could be used to provide for training in TBML in trade-finance instruments.⁵⁰⁷

From an institutional AML capacity, South Africa has well-structured and resourced institutions that are relevant to the combatting of TBML in trade-finance instruments.⁵⁰⁸ Central to its institutional AML regime is the FIC, which is South Africa's FIU. The FIC receives and analyses information on suspicious money-laundering activities from banks and other reporting entities.⁵⁰⁹ It also conducts research and produces reports on various types of money laundering affecting South Africa. However, the FIC has not done any report specific to TBML in trade-finance instruments nor has it produced any specific case studies for this form of money laundering.⁵¹⁰ The trend, world over, has been to produce guidance practices on TBML in trade-finance instruments — either at industry or jurisdiction level — to guide banks and other stakeholders on what to do when confronted with the problem. The FIC has power under the FICA to produce such guidance notes. It has produced some before, on how to implement the FICA provisions, and on how to file suspicious transactions reports with the FIC.⁵¹¹

Besides the FIC, South Africa also has other institutions relevant to the combatting of TBML in trade-finance instruments. These institutions work in close cooperation with the FIC. They include the SAMLIT,⁵¹² the NPA,⁵¹³ the SAPS,⁵¹⁴ the SARS,⁵¹⁵ and the SABRIC.⁵¹⁶ These institutions, although very active in contributing to the combatting of money laundering in general, they have not been so active in terms of combatting TBML in trade-finance instruments. The presence of institutions such as the SAMLIT and the SABRIC, both of which are designed specifically for information sharing, is more suitable for cooperation against TBML in trade-finance instruments. The institutions offer a ready-made vehicle to formulate preventive strategies against TBML in the context of South Africa.

⁵⁰⁷ See para 5.3.4.3 above.

⁵⁰⁸ See para 5.4 et seq above.

⁵⁰⁹ See again para 5.4.2 above.

⁵¹⁰ Ibid.

⁵¹¹ See again para 5.3.2.3 above.

⁵¹² See again para 5.4.4 above.

⁵¹³ See again para 5.4.6 above.

⁵¹⁴ See again para 5.4.8 above.

⁵¹⁵ See again para 5.4.10 above.

⁵¹⁶ See again para 5.5.6 above.

TBML in trade-finance instruments requires specialised training to detect because it is a complex form of money laundering. Under the RBA, it would require more resources to be channelled towards TBML, than to any other type of money laundering due to its complexity. Although most AML institutions in South Africa seem to be well resourced, they lack expertise to deal with complex money-laundering methods like TBML in trade-finance instruments. The thrust seems to be on basic, cash-based forms of money laundering. There is a need to capacitate staff at most South African AML institutions to be able to investigate and report on TBML in trade-finance instruments.

South Africa has a lot of comparative learning to do from other jurisdictions on how to deal with TBML using trade-finance instruments. Such comparative learning may come from legislative, institutional capacity and supervisory initiatives and innovations of other countries. The following chapters are an attempt to draw insights from such other jurisdictions, on how to further strengthen the South African AML regime against TBML in trade-finance instruments.

CHAPTER 6: THE CONTROL OF TBML IN TRADE-FINANCE INSTRUMENTS UNDER ENGLISH LAW

6.1 GENERAL

In the previous chapter, I examined the South African AML regime with a view to establishing how it could be applied against the challenge of TBML in trade-finance instruments.¹ The chapter examined the legislative and institutional capacity of the South African AML framework and, in the process, identified gaps and weaknesses, which could be cured by adopting solutions from a comparative study.²

This chapter discusses the English AML regime and its possible contribution to the fight against the risk of TBML in trade-finance instruments.³ It begins by giving an overview of the threat of TBML in England.⁴ This is followed by a concise evaluation of the English AML legislation relevant to the combatting of TBML in trade-finance instruments.⁵ The chapter further discusses the English AML preventive measures and reviews the role of institutions in preventing money laundering, especially in trade-finance instruments.⁶ The overall aim of this chapter is to establish if there are any lessons to be drawn for the South African AML regime in the fight against TBML in trade-finance instruments.⁷ Thus, the chapter generally follows the structure used under Chapter 5 for ease of comparison in Chapter 9.⁸

6.2 OVERVIEW OF THE THREAT OF TBML IN ENGLAND

In its December 2018 *Mutual Evaluation Report*⁹ for England, the FATF concludes that the country's AML framework has significantly strengthened since the previous

¹ See Ch 5 above generally. See also Ch 3 para 3.3 et seq above.

² See again Ch 5 above generally. For a detailed comparison of selected legal aspects of the South African AML regime against TBML in trade-finance instruments and other jurisdictions, see Ch 9 *passim* below.

³ See para 6.2 et seq below. See also Ch 3 para 3.3 et seq above.

⁴ See para 6.2 below.

⁵ See para 6.3.2 below. See also Ch 3 para 3.3 et seq above.

⁶ See para 6.2 and para 6.4 below. See also Ch 3 para 3.3 et seq above.

⁷ For the discussion of the South African AML regime, see Ch 5 above generally. See also Ch 9 below generally.

⁸ See again Ch 5 above and Ch 9 below generally.

⁹ This FATF (2018), *Anti-Money Laundering and Counter-Terrorist Financing Measures - United Kingdom, Fourth Round Mutual Evaluation Report* (hereinafter 'FATF (2018) UK Mutual Evaluation Report') is the most comprehensive one undertaken for the UK and covering the entire AML regime of England. Therefore, this study constantly refers to it on various points it covers.

assessment.¹⁰ The FATF notes improvement particularly in three areas, namely, improved investigation tools, procedures for exchanging public and private information, and operational coordination between law enforcement agencies.¹¹ The *Mutual Evaluation Report*, however, does not address the challenge of TBML generally or TBML in trade-finance instruments in particular.¹²

In the 2020 *National Risk Assessment Report*, HM Treasury recognises TBML as one of the emerging threats in England.¹³ However, author Marzouk argues that HM Treasury seems to under-estimate the threats of TBML that comes with trading with high-risk countries post-Brexit.¹⁴ Therefore, the legislature seems to be reluctant to change the current AML approach England uses. This attitude is, partly due to the assurance, the country got from the FATF's mutual evaluation, that its AML regime is adequate.¹⁵

In various studies conducted by scholars specific to England, TBML has been found to be a threatening type of money laundering to the country's economy.¹⁶ For example, author Chhina carried out a study in order to investigate the role of banks in detecting money-laundering risks when using trade-finance instruments.¹⁷ The study also sought to establish if banks were not in danger of non-compliance with their AML obligations *vis-à-vis* their duties in trade-finance transactions as governed by the ICC rules.¹⁸ The study noted that banks might find it difficult to comply with their AML

However, there is a follow up report of 2022 (only 8 pages), which addresses deficiencies identified in the detailed 2018 report particularly in relation to FATF Recommendations 13 (Correspondent Banking) and 29 (Financial Intelligence Units), see FATF (2022), *Anti-Money Laundering and Counter-Terrorist Financing Measures –United Kingdom 1st Regular Follow-up Report*, FATF, Paris <https://www.fatf-gafi.org/en/countries/detail/united-kingdom.html> [Accessed on 20 June 2023].

¹⁰ See FATF (2018) *UK Mutual Evaluation Report* 5. The previous FATF mutual evaluation of England's AML regime took place in June 2007, see 'United Kingdom' www.fatf-gafi.org/en/countries [Accessed on 18 April 2023].

¹¹ See FATF (2018) *UK Mutual Evaluation Report* 3.

¹² See *Idem* generally.

¹³ See HM Treasury (2020) *National Risk Assessment of Money Laundering and Terrorist Financing Report* (hereinafter 'HM Treasury (2020) *National Risk Assessment Report*') 31 et seq.

¹⁴ Mariola Jolanta Marzouk 'Trade-Based Money Laundering (TBML) Empowers Criminals to Run Free Post-Brexit' (2021) *Journal of Money Laundering Control* 1-12 at 1.

¹⁵ *Idem* at 8.

¹⁶ See Elizabeth Baker 'UK Part I: UK Money Laundering — Typological Considerations' in: Arun Srivastava, Mark Simpson & Richard Powell (eds) *International Law Guide to Money Laundering Law and Practice* (2019) 43 et seq.

¹⁷ See Chhina (2016) 19 *JMLC* 158 at 158.

¹⁸ *Ibid.*

obligations against TBML in documentary credits due to rules, which stipulate otherwise such as the UCP600.¹⁹ Through this study, Chhina concludes that banks in England are in danger of non-compliance with their AML obligations against TBML in trade-finance instruments.²⁰

In addition, another study by Menz also confirms that TBML threatens the operation of banks in England when using trade-finance instruments.²¹ Menz investigated the perception of trade-finance practitioners in England towards TBML through documentary credits. The intention was to compare the findings with those of the FCA, which the latter had conducted in 2013.²² The study discovered that trade-finance practitioners are overly obsessed with the traditional form of money laundering rather than TBML in trade-finance instruments such as the documentary credit.²³ Menz, therefore, concludes that there is a need for banks to improve their understanding of TBML under the applicable AML laws in England.²⁴

Besides the scholarly views, there is a general awareness of the threat of TBML by England's competent authorities. For example, the Financial Conduct Authority (FCA), which is the financial-sector regulator in England, carried out a study in the banking sector and found TBML to be a problem in trade-finance instruments.²⁵ The JMLSG, a private-sector organisation with statutory recognition under English laws, also concludes that TBML is a threat to the use of trade-finance instruments by banks in England.²⁶ Despite the obvious threats of TBML in the country, there is no strategy specifically addressed to the problem by way of express legislation.²⁷ Even banks and law enforcement agencies in England do not seem to prioritise TBML in their investigations due to lack of expertise in the area.²⁸ The FCA and the JMLSG, to their

¹⁹ Idem at 159.

²⁰ Idem at 166.

²¹ See Menz (2019) 22 *JMLC* 614 at 614.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ For more about the FCA's study and its general role against TBML in trade-finance instruments, see para 6.5.2 below.

²⁶ For more on the AML role of the JMLSG in England and its contribution against TBML in trade-finance instruments, see para 6.5.4 below.

²⁷ See para 6.3.2.2 and para 6.3.2.3 below.

²⁸ See Marzouk (2021) *JMLC* 1 at 1. For the investigative roles of AML institutions in England, see para 6.4.2 and para 6.4.4 below.

credit, have only issued guidance practices on how banks can mitigate the risk of TBML in trade-finance instruments using the current AML legislation.²⁹ There is a need, therefore, for more research in order to clarify the scope and impact of TBML in England.³⁰

6.3 ENGLISH AML LEGAL FRAMEWORK FOR TBML

6.3.1 General

This part of the thesis gives an overview of AML laws in England. It explores the current AML provisions in order to evaluate their possible application to the challenge of TBML in trade-finance instruments.³¹ The part also attempts to indicate areas of strengths, which could be used as learning points for the South African AML regime.³²

The AML regime in England has two main components.³³ The first component is entrenched in making money laundering a crime in order to prohibit it.³⁴ The second component is the preventive one and revolves around the regulation of markets, and the imposing of AML obligations on banks and other financial institutions.³⁵ These components will be shortly explained below under the relevant paragraphs.

6.3.2 Overview of AML Legislation in England

6.3.2.1 General

The major AML legislative instruments in England are the Proceeds of Crime Act 2002 (POCAE),³⁶ and the Money Laundering, Terrorist Financing, and Transfer of Funds

²⁹ See para 6.5.2 and para 6.5.4 below.

³⁰ See Menz (2019) 22 *JMLC* 614 at 622.

³¹ See para 6.3.2 and para 6.3.3 below.

³² See Ch 5 above generally.

³³ See Peter Alldridge 'Money Laundering and Globalization' (2008) 35 *Journal of Law and Society* 437-463 at 442.

³⁴ See Veng Mei A Leong 'Chasing Dirty Money: Domestic and International Measures against Money Laundering' (2007) 10 *Journal of Money Laundering Control* 140 -156 at 141; Alldridge (2008) 35 *JL & Soc'y* 437 at 442. See also para 6.3.2.2 below.

³⁵ See Leong (2007) 10 *JMLC* 140 at 141; Alldridge (2008) 35 *JL & Soc'y* 437 at 442. See also para 6.3.4 et seq below.

³⁶ See para 6.2.2 below.

(Information on the Payer) Regulations as amended (MLRs).³⁷ An overview of these AML laws is briefly given below.³⁸

6.3.2.2 *The Proceeds of Crime Act 2002 (POCAE)*

The POCAE is the principal AML legislation in England. It creates a single set of money-laundering offences applicable to the proceeds of almost all forms of crime.³⁹ The POCAE took effect in February 2003 and repealed the Drug Trafficking Act of 1994, which dealt with the proceeds of drug trafficking only.⁴⁰ It also creates a new offence of failing to report suspicious money-laundering activities in connection with any crime within the regulated sector.⁴¹ In 2017, the Criminal Finances Act amended the POCAE to introduce a number of changes some of which are the introduction of unexplained wealth orders, and extending investigative and recovery powers to certain institutions in England, which had no such powers before.⁴²

6.3.2.3 *The Money-Laundering Regulations (MLRs)*

The MLRs reinforce the AML framework under the POCAE and implement EU's Money-Laundering Directives in England. They impose strict requirements on regulated persons aimed at preventing money laundering in England.⁴³ They were first passed in 1994 and they have since been amended regularly.⁴⁴ The current applicable

³⁷ See para 6.2.3 below.

³⁸ See para 6.2.2 and para 6.2.3 below.

³⁹ See Mark Simpson & Richard Powell 'UK Part III: Practical Implementation of Regulations and Rules' in: Arun Srivastava, Mark Simpson & Richard Powell (eds) *International Law Guide to Money Laundering Law and Practice* (2019) (hereinafter Simpson & Powell 'Practical Implementation of Regulations and Rules') 134; HM Treasury (2020) *National Risk Assessment Report* 12. See also para 6.3.2 below.

⁴⁰ See Simpson & Powell 'Practical Implementation of Regulations and Rules' 134; Srivastava 'UK Part II: UK Law and Practice' in: Arun Srivastava, Mark Simpson & Richard Powell (eds) *International Law Guide to Money Laundering Law and Practice* (2019) 62. See also ss 327-340 of the POCAE. Other jurisdictions that followed this approach are South Africa, see Ch 5 para 5.3.2.2 above; the US, Ch 7 para 7.3.2.2 below and Singapore, Ch 8 para 8.3.2.2 below.

⁴¹ See s 330 of the POCAE. See also Arun Srivastava 'UK Part II: UK Law and Practice' in: Arun Srivastava, Mark Simpson & Richard Powell (eds) *International Law Guide to Money Laundering Law and Practice* (2019) (hereinafter Srivastava 'UK Law and Practice') 62.

⁴² See s 1 of the Criminal Finances Act of 2017; Simpson & Powell 'Practical Implementation of Regulations and Rules' 129; and HM Treasury (2020) *National Risk Assessment Report* 12-13. For example, His Majesty Revenue and Customs (HMRC) and the FCA are given new civil recovery powers of proceeds of unlawful conduct, see ss 19 and 20 of the Criminal Finances Act of 2017. See also para 6.4.12 and para 6.5.2 below regarding the general AML roles of the HMRC and the FCA respectively.

⁴³ See Hufnagel & King (2019) *Legal Studies* 1 at 13.

⁴⁴ See Leong (2007) 10 *JMLC* 140 at 143.

regulations are MLRs of 2017.⁴⁵ They came into force on 26 June 2017 and implements the EU's Fourth Money-Laundering Directive in England.⁴⁶ The MLRs 2017 have since been amended by the MLRs 2019, which came into force on 10 January 2020, and these regulations implement the EU Fifth Money Laundering Directive.⁴⁷

The Money-Laundering Directives are Europe's way of implementing the FATF's recommendations. They are intended to achieve a uniform AML approach in Europe.⁴⁸ It should be noted that England is no longer part of Europe after Brexit.⁴⁹ However, the country has continued to implement some of the EU's Money-Laundering Directives even after the withdrawal from Europe.⁵⁰ For example, part of the implementation of the EU's Fourth Money-Laundering Directive is the treatment of tax offences as predicate offences for money laundering in England.⁵¹

The MLRs occupy a significant place in England's AML regime. They apply to specific categories of 'relevant persons'⁵² in some regulated businesses carrying out operations in England.⁵³ Financial institutions, which are also relevant persons, are obliged to comply with the MLRs provisions on conducting CDD, monitoring, reporting suspicious transactions, and record keeping.⁵⁴ Failing to comply with the provisions of the MLRs is a criminal offence punishable by a prison term or fine.⁵⁵ This offence is considered committed irrespective of whether money laundering has occurred or not.⁵⁶

⁴⁵ See SI 2017/692.

⁴⁶ See Srivastava 'UK Law and Practice' 105.

⁴⁷ See reg 1(2) of the MLRs 2019.

⁴⁸ See Srivastava 'UK Law and Practice' 105.

⁴⁹ See Norman Mugarura 'The Implications of Brexit for UK Anti-Money Laundering Regulations: Will the Fourth AML Directive Be Implemented or be Binned?' (2018) 21 *JMLC* 5-21 at 8.

⁵⁰ See 'EU Legislation and UK Law' www.legislation.gov.uk [Accessed 4 June 2022].

⁵¹ See Mugarura (2018) 21 *JMLC* 5 at 16; Srivastava 'UK Law and Practice' 105.

⁵² The term 'relevant person' is used in the MLRs to refer to regulated entities or businesses under certain specific supervisory bodies, for example banks are relevant persons under the supervision of the FCA, see reg 7(1)(a) and reg 8 of the MLRs 2017. See also Srivastava 'UK Law and Practice' 63.

⁵³ See reg 8 of the MLRs 2017. See also Leong (2007) 10 *JMLC* 140 at 143.

⁵⁴ See Chhina (2016) 19 *JMLC* 158 at 160; Simpson & Powell 'Practical Implementation of Regulations and Rules' 135; and Srivastava 'UK Law and Practice' 63. See also para 6.3.3 et seq below.

⁵⁵ For example, a term of imprisonment not exceeding two years is imposed by reg 86 of the MLRs for failing to comply with relevant requirements under the AML regulations. See also Srivastava 'UK Law and Practice' 115.

⁵⁶ Ibid.

Appropriate supervisory authorities such as the National Crime Agency (NCA),⁵⁷ His Majesty Revenue and Customs (HMRC),⁵⁸ and the Financial Conduct Authority (FCA),⁵⁹ may also impose civil penalties for failing to comply with the MLRs.⁶⁰

The POCAE and the MLRs complement each other in strengthening the English AML regime.⁶¹ Whereas the POCAE creates substantive criminal laws against money laundering, the MLRs require entities operating in certain regulated sectors to establish and maintain policies, controls, and procedures to mitigate and manage money-laundering risks.⁶² However, both the POCAE and the MLRs do not refer to TBML or any other type of money laundering in specific terms. Thus, the legislature adopts a blanket approach in dealing with TBML under money laundering in general. I submit that this approach is flexible and positive in that it is capable of accommodating emerging and complex types of money laundering. The approach also saves time for lawmakers in that they need not repeatedly amend AML laws to accommodate new forms of money laundering such as TBML in trade-finance instruments.

6.3.2.4 *The Crime of Money Laundering and Scope for TBML*

The POCAE provides for three primary offences relating to money laundering.⁶³ First, money laundering is committed under the Act if there is concealing, disguising, converting, or transferring of criminal property in violation of section 327.⁶⁴ Secondly, an offence of money laundering is committed when one becomes involved in arrangements that facilitate the acquisition, retention, use, or control of criminal

⁵⁷ See para 6.4.2 below.

⁵⁸ See para 6.4.12 below.

⁵⁹ See para 6.5.2 below.

⁶⁰ See Srivastava 'UK Law and Practice' 64-65.

⁶¹ See para 6.2.2 above and para 6.3.3 et seq below.

⁶² See Alldridge (2008) 35 *JL & Soc'y* 437 at 443; Srivastava 'UK Law and Practice' 105. See also para 6.2.2 above and para 6.3.2 below.

⁶³ See Hopton *Money Laundering Guide* 43-44; Zaiton Hamin, Wan Rosalili Wan Rosli, Normah Omar & Awang Armadajaya PA Mahmud 'Configuring Criminal Proceeds in Money Laundering Cases in the UK' (2014) 17 *Journal of Money Laundering Control* 374-384 at 377; Chhina (2016) 19 *JMLC* 158 at 160; and FATF (2018) *UK Mutual Evaluation Report* 177.

⁶⁴ See s 327 of the POCAE. See also Hopton *Money Laundering Guide* 43; Srivastava 'UK Law and Practice' 72.

property in violation of section 328.⁶⁵ Thirdly, an offence of money laundering is committed if a person acquires, possesses, or uses criminal property in violation of section 329.⁶⁶

These three primary money-laundering offences are hinged on the concept of 'criminal property'.⁶⁷ For anyone to commit one of the primary money-laundering offences, they must commit some act involving criminal property.⁶⁸ 'Criminal property' is defined under the POCAE as property that constitutes or represents a person's benefit from criminal conduct.⁶⁹ In other words, for property to be designated as 'criminal property' it must constitute a person's benefit from criminal conduct or represent such a benefit.⁷⁰ I submit that the definition of criminal property is wide enough to include almost all types of property be they tangible or intangible, movable or immovable.⁷¹ It can also include tainted money in its many forms, be it cash, e-money or trade-finance instruments.⁷² Thus, criminal property may also extend to any benefit from criminal conduct, which is acquired either directly or indirectly.⁷³ It is clear from the definition that there is no difference between the proceeds of the accused's own crimes and those of crimes committed by others.⁷⁴ It follows that when one launders their own benefit of crime, the situation is treated similarly to that of professional money launderers who do the laundering for others.⁷⁵

⁶⁵ See s 328 of the POCAE. See also Hufnagel & King (2019) *Legal Studies* 1 at 11; Srivastava 'UK Law and Practice' 72.

⁶⁶ See s 329 of the POCAE. See also Hufnagel & King (2019) *Legal Studies* 1 at 11; Srivastava 'UK Law and Practice' 72.

⁶⁷ See s 340 of the POCAE; *R v Geary* [2010] EWCA Crim 1925 para 19. See also Hopton *Money Laundering Guide* 43-44; Hamin *et al* (2014) 17 *JMLC* 374 at 377; and Kenneth Murray 'In the Shadow of the Dark Twin — Proving Criminality in Money Laundering Cases (2016) 19 *Journal of Money Laundering Control* 447-458 at 452.

⁶⁸ See Hopton *Money Laundering Guide* 43-44; Hamin *et al* (2014) 17 *JMLC* 374 at 377; and Srivastava 'UK Law and Practice' 68-70.

⁶⁹ See s 340(3) of the POCAE. See also Hufnagel & King (2019) *Legal Studies* 1 at 11; Srivastava 'UK Law and Practice' 68-70.

⁷⁰ See s 326(4) of the POCAE; Alldridge *Money Laundering Law* 182.

⁷¹ See Hamin *et al* (2014) 17 *JMLC* 374 at 377. For a discussion of money as property generally, see Proctor *Mann on Money* 43 et seq; Alison Clarke & Paul Kohler *Property Law: Commentary and Materials* (2005) 398-399.

⁷² See Ch 2 para 2.2 et seq and Ch 3 para 3.3 et seq above.

⁷³ See s 328 of the POCAE. See also Murray (2016) 19 *JMLC* 447 at 448; and Hufnagel & King (2019) *Legal Studies* 1 at 13.

⁷⁴ See s 340(4) of the POCAE; Hamin *et al* (2014) 17 *JMLC* 374 at 377.

⁷⁵ See Hamin *et al* (2014) 17 *JMLC* 374 at 377.

To qualify as 'criminal property', an individual must have knowledge or suspicion that the property constitutes or represents such a benefit.⁷⁶ For criminal property to exist there has to be an underlying criminal activity that generates the property, also known as a predicate offence.⁷⁷ This is defined under the POCAE as any conduct that constitutes an offence in any part of England or conduct that would constitute an offence in any part of England if it occurred there.⁷⁸ Consequently, conduct committed abroad is included in the definition of criminal conduct if it would have resulted in the commission of an offence if carried out in England.⁷⁹

Disclosure of knowledge or suspicion of money laundering by a person or financial institution may absolve it from the allegations of having committed the offence.⁸⁰ In addition to the disclosure, a party needs also to seek consent to proceed to undertake an act that would otherwise be a principal money-laundering offence.⁸¹ In practice, such disclosures and requests for consent are made to the NCA or even to any customs officer in terms of the POCAE.⁸² Two exceptions may be given under the POCAE for failing to report a suspected case of money laundering. First, a person has not committed money laundering if they fail to declare, on reasonable grounds, an offence that occurred outside England and is not prohibited under the laws of that jurisdiction.⁸³ Secondly, an employee in the financial sector who has not received training in AML issues may also raise it as a defence for failing to report knowledge or suspicion of money laundering.⁸⁴ However, a financial institution employing such an employee may be found liable for breaching the provisions of the MLRs 2017.⁸⁵

⁷⁶ See Srivastava 'UK Law and Practice' 68-70. In *R v Da Silva* [2006] EWCA Crim 1654, suspicion was held to be more than 'a vague feeling of unease' and 'a possibility, which is more than fanciful, that the relevant facts exist'.

⁷⁷ See *R v GH* [2015] UKSC24. See also Hopton *Money Laundering Guide* 42-43; Murray (2016) 19 *JMLC* 447 at 452; and Srivastava 'UK Law and Practice' 67.

⁷⁸ See s 340(2) of the POCAE. See also Hopton *Money Laundering Guide* 43.

⁷⁹ See Srivastava 'UK Law and Practice' 68.

⁸⁰ See Chhina (2016) 19 *JMLC* 158 at 160; Simpson & Powell 'Practical Implementation of Regulations and Rules' 181.

⁸¹ See Simpson & Powell 'Practical Implementation of Regulations and Rules' 181.

⁸² See s 338 of the POCAE. See also para 6.4.2 below.

⁸³ See s 330(7A) of the POCAE.

⁸⁴ See s 330(7) of the POCAE.

⁸⁵ See s 330(7) of the POCAE. See also Srivastava 'UK Law and Practice' 77.

6.3.2.5 Scope of the POCAE for TBML in Trade-Finance Instruments

The traditional understanding of money laundering usually suggests that ‘money’ or ‘cash’ has to be involved in the predicate offences that generate the proceeds to be laundered.⁸⁶ This is not the case with TBML in general or TBML through trade-finance instruments.⁸⁷ In terms of the POCAE, making a benefit from any criminal conduct also constitutes money laundering.⁸⁸ The possession and movement of goods, including their concealment in an attempt to legitimise them is also considered money laundering under the POCAE.⁸⁹ The POCAE deems almost all forms of criminal conduct as potential predicate offences for money laundering that may generate criminal proceeds in England.⁹⁰ Due to the expansive definition of criminal conduct in the POCAE, money-laundering issues may arise even from what may appear to be minor or technical violations of the criminal law.⁹¹

Murray argues that the scope of TBML may not be adequately addressed through confining the regulatory regime to trade-finance transactions.⁹² He argues that the problem of TBML is too wide to be dealt with using current approaches applicable to traditional money laundering.⁹³ This argument seems to be correct in view of the broad definition of TBML.⁹⁴ However, it may be incorrect in light of TBML affecting the use trade-finance instruments in international trade.⁹⁵ In contrasting Murray’s argument, Menz contends that the definition of money laundering under the POCAE is wide enough to include even TBML in trade-finance instruments.⁹⁶ I agree with this view for two reasons. First, the crime of money laundering under the POCAE is triggered by

⁸⁶ See Ch 2 para 2.2 above.

⁸⁷ See Ch 2 para 2.3 et seq and Ch 3 para 3.3 above.

⁸⁸ See s 340 of the POCAE; Menz (2019) 22 *JMLC* 614 at 619.

⁸⁹ See ss 327-329 of the POCAE; Menz (2019) 22 *JMLC* 614 at 619.

⁹⁰ See s 340(2) of the POCAE. See also Hufnagel & King (2019) *Legal Studies* 1 at 13; Srivastava ‘UK Law and Practice’ 68.

⁹¹ See Srivastava ‘UK Law and Practice’ 70.

⁹² See Kenneth Murray ‘Fake Passports’: What Is to Be Done About Trade-Based Money Laundering?’ in: Colin King, Clive Walker & Jimmy Gurulé (eds) *The Palgrave Handbook of Criminal and Terrorism Financing Law* (2018) (hereinafter Murray ‘Fake Passports’) 213.

⁹³ See Murray ‘Fake Passports’ 213.

⁹⁴ For a broader discussion of the concept of TBML, see Ch 2 para 2.3 et seq above.

⁹⁵ See Ch 3 para 3.3 et seq above.

⁹⁶ See Menz (2019) 22 *JMLC* 614 at 621.

the usual commercial activities, which may involve trade and trade finance.⁹⁷ Thus, when banks are using trade-finance instruments they may be in danger of being abused through TBML.⁹⁸ Secondly, as long as a person is involved in the process of transferring or acquiring goods or funds paid for through trade-finance instruments, but which may turn out to be criminal property, they may find themselves in breach of the AML provisions under the POCAE.⁹⁹ This will effectively bring the trade-finance money-laundering offence under the purview of the POCAE.

A transaction involving a documentary credit, for instance, does not usually involve cash between buyers and sellers.¹⁰⁰ While banks may not directly be involved in the negotiating of the underlying trade transaction, they are somehow involved at the trade-financing stage.¹⁰¹ This status puts them in a situation where they could potentially facilitate the retention, use or control of any criminal property as envisaged under the POCAE.¹⁰² Thus, aiding TBML through a trade-finance transaction unknowingly.

It is significant to note that there are no specific legal requirements under the POCAE for banks to follow when preventing TBML in trade-finance instruments.¹⁰³ The banks are; however, required to comply with their general AML obligations under the MLRs.¹⁰⁴ It is under this broad ambit of their AML obligations under the MLRs that banks may also address the risk of TBML when using trade-finance instruments.¹⁰⁵ In support of this view, Murray points out that the intention of the HM Treasury is to deal with TBML through the current AML regime under the POCAE and the MLRs.¹⁰⁶ Such an intention suggests that the primary responsibility of combatting TBML rests with the financial sector.¹⁰⁷ Thus, banks could partly exercise that responsibility through

⁹⁷ See Hufnagel & King (2019) *Legal Studies* 1 at 12; JMLSG (2020) *Sectoral Guidance* 155 para 15.12.

⁹⁸ See Chhina (2016) 19 *JMLC* 158 at 166; Hufnagel & King (2019) *Legal Studies* 1 at 12. See also Ch 3 para 3.3 et seq above.

⁹⁹ See Hufnagel & King (2019) *Legal Studies* 1 at 12. See also ss 327, 328 and 329 of the POCAE.

¹⁰⁰ See Menz (2019) 22 *JMLC* 614 at 621. See also Ch 3 para 3.3 et seq above.

¹⁰¹ See Ch 3 para 3.2 above.

¹⁰² See Menz (2019) 22 *JMLC* 614 at 621.

¹⁰³ See Chhina (2016) 19 *JMLC* 158 at 166.

¹⁰⁴ See para 6.3.2.4 above and para 6.3.4 below.

¹⁰⁵ See Chhina (2016) 19 *JMLC* 158 at 166.

¹⁰⁶ See Murray 'Fake Passports' 213.

¹⁰⁷ Ibid.

designing and deploying AML policies appropriate for detecting forms of money laundering such as TBML in trade-finance instruments.¹⁰⁸

6.3.3 Conclusion

The FATF rates England as having a robust AML framework. In its 2018 *Mutual Evaluation Report*, the FAFT concludes that the country is quite aware of the money laundering risks, which affect it.¹⁰⁹ However, the FATF *Mutual Evaluation Report* is silent on the threat of TBML through trade-finance instruments to the economy of England.¹¹⁰ This is despite the fact that HM treasury has found TBML to be a problem in the national money-laundering risk assessment.¹¹¹ England has two sets of AML legislation, which are comprehensive in providing for money-laundering risks.¹¹² Although these laws, namely the POCAE and the MLRs, cover a wide variety of money-laundering issues, they do not refer to TBML through trade-finance instruments in specific terms.¹¹³ However, these laws can be harnessed and adapted to address the challenge of TBML through supplementary guidance notes from the AML regulators. In the same breath, the crime of money laundering under the POCAE is defined widely in such manner as to include various types of money laundering, including TBML in trade-finance instruments.¹¹⁴

6.3.4 Preventive AML Obligations for Banks¹¹⁵ in England

6.3.4.1 General

The MLRs require banks in England to comply with certain AML obligations in order to effectively combat money laundering.¹¹⁶ The AML obligations imposed on banks include the need to apply an RBA,¹¹⁷ governance and oversight,¹¹⁸ CDD,¹¹⁹

¹⁰⁸ See Chhina (2016) 19 *JMLC* 158 at 166. See also para 6.3.4.3 below.

¹⁰⁹ See para 6.2 above.

¹¹⁰ See again para 6.2 above.

¹¹¹ See again para 6.2 above.

¹¹² See para 6.3.2 above.

¹¹³ See para 6.3.2.2 and para 6.3.2.3 above.

¹¹⁴ See para 6.3.2.4 above.

¹¹⁵ The terms 'financial institution' or 'financial institutions' are used interchangeably in this thesis for 'bank' or 'banks' vice versa. For other terminologies used in this thesis generally, see Ch 1 para 1.11 above.

¹¹⁶ See Chhina (2016) 19 *JMLC* 158 at 161.

¹¹⁷ See para 6.3.3.2 below.

¹¹⁸ See para 6.3.3.3 below.

¹¹⁹ See para 6.3.3.4 below.

transaction reporting,¹²⁰ record keeping,¹²¹ and training of staff.¹²² These obligations are generally regarded by the FATF as foundational AML obligations, which are necessary in the combatting of money laundering and TBML in any jurisdiction.¹²³ Thus, the intention of reviewing the AML obligations under the MLRs is to establish if they could be applied against TBML in trade-finance instruments in the English context. Financial institutions are the key providers of trade-finance services such as documentary credits or documentary collections.¹²⁴ They also abide by the AML obligations to combat money laundering which may threaten their services, including in the provision of trade-finance services.¹²⁵ Therefore, it would make sense to focus on banks as the primary defenders against TBML in trade-finance instruments since these institutions already have the architecture and systems to combat traditional money laundering.¹²⁶ Such architecture may be adapted for TBML purposes without the need to begin from nowhere.¹²⁷

6.3.4.2 AML Governance and Oversight

There are legal, reputational and regulatory risks that come with a financial institution being used for money laundering.¹²⁸ Therefore, a financial institution's senior management has a responsibility to ensure that AML internal policies, controls and procedures are designed and implemented effectively.¹²⁹

The MLRs require financial institutions to develop and maintain adequate and appropriate internal policies, controls, and procedures to mitigate money-laundering risks identified in risk assessments.¹³⁰ Such policies, controls and procedures should be reviewed regularly.¹³¹ The MLRs require that the policies, controls and procedures adopted by a financial institution be proportionate to the size of the institution's

¹²⁰ See para 6.3.3.5 below.

¹²¹ See para 6.3.3.6 below.

¹²² See para 6.3.3.7 below.

¹²³ See, for example, Recommendations 1, 10 and 11 of the FATF (2012) *Standards*. See also Ch 4 para 4.3.2 et seq and Ch 3 para 3.4 et seq above.

¹²⁴ See Ch 3 para 3.3 above.

¹²⁵ See para 6.3.2 et seq above.

¹²⁶ See Ch 2 para 2.3 above and para 6.3.4 below.

¹²⁷ See para 6.3.4 et seq below.

¹²⁸ See JMLSG (2020) *Sectoral Guidance* para 1.1.

¹²⁹ *Ibid.*

¹³⁰ See reg 19 (1) (a) of the MLRs 2017. See also para 6.3.3.2 above.

¹³¹ See reg 19(1) (b) of the MLRs 2017.

business and must be approved by its senior management.¹³² The MLRs further require that the policies, controls and procedures capture five items. These are risk-management practices,¹³³ internal controls,¹³⁴ CDD,¹³⁵ record keeping,¹³⁶ and the monitoring and management of compliance policies, controls and procedures. The policies, controls and procedures must be disseminated to everyone in the financial institution for awareness.¹³⁷

Most importantly, the MLRs require that the policies, controls and procedures include directions for the identification and scrutiny of three types of transactions.¹³⁸ First, any case where a transaction is complex and unusually large or there is an unusual pattern of transactions, which must be scrutinised.¹³⁹ Secondly, any case where the transaction or transactions have no apparent economic or legal purpose must also be scrutinised.¹⁴⁰ Thirdly, any other activity or situation, which the financial institution may regard as particularly likely to be related to money laundering by its nature, must also be investigated.¹⁴¹

6.3.4.3 Scope of the AML Governance for TBML in Trade-Finance Instruments

The POCAE and the MLRs do not directly address the risk of TBML in trade-finance instruments under the AML governance requirements.¹⁴² However, both the FCA and the JMLSG have issued directives on how banks can use the current AML framework to address the problem in England.¹⁴³

The FCA encourages banks to have an AML governance framework directed specifically at the risk of TBML in trade-finance transactions.¹⁴⁴ This could be in the

¹³² See reg 19(2) (a) (b) of the MLRs 2017. See again para 6.3.3.2 above.

¹³³ See reg 19(3) (a) of the MLRs 2017. See again para 6.3.3.2 above.

¹³⁴ See reg 19(3) (b) of the MLRs 2017. See also regs 21 and 24 of the MLRs 2017.

¹³⁵ See reg 19(3) (c) and regs 27 to 38 of the MLRs 2017. See also para 6.3.3.4 below.

¹³⁶ See reg 19(3) (d) and regs 39 and 40 of the MLRs 2017. See also para 6.3.3.5 below.

¹³⁷ See reg 19(3)(e) of the MLRs 2017.

¹³⁸ See reg 19(4)(a) of the MLRs 2017.

¹³⁹ See reg 19(4)(a)(i)(aa) of the MLRs 2017.

¹⁴⁰ See reg 19(4)(a)(i)(bb) of the MLRs 2017.

¹⁴¹ See reg 19(4)(ii) of the MLRs 2017.

¹⁴² See para 6353 above.

¹⁴³ See para 6.5.2 and para 6.5.4 below.

¹⁴⁴ See FCA (2013) *Financial-Crime Risks Report* 12. See also Chhina (2016) 19 *JMLC* 158 at 160; Murray (2016) 19 *JMLC* 447 at 457.

form of policies and procedures directed at combatting TBML in trade-finance instruments.¹⁴⁵ The FCA considers it a good practice for banks in England, to document clearly, the roles and responsibilities of each staff member in managing the risks of TBML in trade-finance transactions.¹⁴⁶ To further strengthen the AML governance policy, the FCA recommends that banks should share information relevant to the management of TBML in trade-finance transactions.¹⁴⁷ In designing their own AML policies and procedures, banks in England are also encouraged by the FCA to take into account policy guidance from the FATF and the Wolfsberg Group on the control of TBML in trade-finance instruments.¹⁴⁸ These organisations have researched and published on the subject before, hence their guidance may be enlightening to this current study.¹⁴⁹

6.3.4.4 The Risk-Based Approach (RBA)

The MLRs codify the concept of an 'RBA' in England.¹⁵⁰ The regulations require banks to conduct a written risk assessment that takes into account the outcomes of the national risk assessment.¹⁵¹ The risk assessment should take into account two important items such as information from the FCA's risk assessment and risk factors peculiar to the bank.¹⁵² The risk factors that may be relevant to a bank's risk assessments may relate to the customer, geographic areas in which it carries out its business, its products or services, its transactions, and delivery channels.¹⁵³ The RBA should not be taken on a one-size fits all basis.¹⁵⁴ Each bank must take into consideration the size and nature of its business.¹⁵⁵ Most importantly, the bank must

¹⁴⁵ See FCA (2013) *Financial-Crime Risks Report* 17; Chhina (2016) 19 *JMLC* 158 at 160.

¹⁴⁶ See FCA (2013) *Financial-Crime Risks Report* 12.

¹⁴⁷ Ibid

¹⁴⁸ See Chhina (2016) 19 *JMLC* 158 at 166.

¹⁴⁹ See Ch 4 para 4.3.2 and para 4.4.5 above.

¹⁵⁰ See Ch 2 reg 16 et seq of the MLRs 2017; JMLSG (2020) *Sectoral Guidance* para 4.1 et seq. See also Srivastava 'UK Law and Practice' 106.

¹⁵¹ See reg 18 of the MLRs 2017. See also JMLSG (2020) *Sectoral Guidance* para 1.2.

¹⁵² See reg 18(2) (a) (b) of the MLRs 2017. See also reg 17(a) and reg 47 of the MLRs 2017.

¹⁵³ See reg 18 (2) (b) (i)-(v) of the MLRs 2017. See also JMLSG (2020) *Sectoral Guidance* para 1.2.

¹⁵⁴ See JMLSG (2020) *Sectoral Guidance* para 1.2.

¹⁵⁵ See reg 18(3) of the MLRs 2017.

keep a record of the risk assessments that it has undertaken for onward transmission to the FCA upon request.¹⁵⁶

The RBA under the MLRs does not end with the conducting of risk assessments only. The MLRs further require financial institutions to conduct CDD and ongoing transaction monitoring on a risk-sensitive basis.¹⁵⁷ The application of the RBA on CDD and transaction monitoring should, however, be undertaken with considerations on the type of the customer, transaction or business relationship in mind.¹⁵⁸ The risk-based framework should be updated regularly. The FCA considers it a poor AML practice for banks to fail to update the risk-assessment framework to be able to take into account emerging money-laundering risks.¹⁵⁹

6.3.4.5 Scope of the RBA for TBML in Trade-Finance Instruments

There is guidance from both the FCA and the JMLSG on how the RBA could be applied in the context of TBML in trade-finance instruments. The JMLSG encourages banks to use their risk-based approaches to detect TBML in areas they deem to be most vulnerable.¹⁶⁰ Similarly, the FCA encourages banks to conduct a money-laundering risk assessment specific to trade-finance instruments under the services they offer.¹⁶¹ In carrying out a risk assessment, the FCA advises that banks should not only focus on credit and reputational risks. Consideration should also be given to the risk of TBML in trade-finance instruments.¹⁶² When assessing the vulnerability of their trade-finance transactions for potential TBML, the JMLSG encourages financial institutions to consider the parties involved, the countries they are operating from and the nature of goods in the underlying trade transaction.¹⁶³ These are pertinent factors in assessing the TBML-risk exposure of a bank, particularly where it processes a trade-finance instrument such as a documentary credit in the international context.

¹⁵⁶ See reg 18 (6) of the MLRs 2017. See also para 6.3.4.8 below and JMLSG (2020) *Sectoral Guidance* para 4.74.

¹⁵⁷ See reg 28 (12) and (13) of the MLRs 2017. See also para 6.3.3.4 below.

¹⁵⁸ See reg 28 (12) and (13) of the MLRs 2017.

¹⁵⁹ See FCA (2013) *Financial-Crime Risks Report* 15.

¹⁶⁰ See JMLSG (2020) *Sectoral Guidance* 158 para 15.30.

¹⁶¹ See FCA (2013) *Financial-Crime Risks Report* 15.

¹⁶² Ibid.

¹⁶³ See JMLSG (2020) *Sectoral Guidance* 159 para 15. 31.

6.3.4.6 *The Obligation to Conduct Customer Due Diligence*

It is a requirement under the MLRs for financial institutions to conduct CDD on a risk-sensitive basis.¹⁶⁴ The carrying out of CDD measures is intended to enable a financial institution to establish a reasonable belief that it is aware of two things.¹⁶⁵ First, that it knows the identity of both the customer and the beneficial owner of a transaction.¹⁶⁶ Secondly, that it knows, with an appropriate level of confidence, the type of business and transactions that the customer is likely to conduct.¹⁶⁷

The CDD measures must include customer and beneficial owner identification and verification.¹⁶⁸ The MLRs require financial institutions to conduct due diligence on customers in four different circumstances.¹⁶⁹ First, when a financial institution establishes a business relationship with a customer it has to carry out CDD.¹⁷⁰ Secondly, a financial institution must carry out CDD when it conducts an occasional transaction on behalf of the customer that amounts to a transfer of funds within the meaning of Article 3.9 of the Funds Transfer Regulations and exceeds €1,000 or more.¹⁷¹ Thirdly, when a financial institution suspects money laundering or terrorist financing it has to carry out CDD.¹⁷² Fourthly, when a financial institution doubts the correctness or adequacy of documents or information previously obtained for the purposes of identification or verification, it has to carry out CDD.¹⁷³

In general, a financial institution must identify the customer and verify the customer's identity using documents, data, or information obtained from a reliable and independent source.¹⁷⁴ A financial institution must also identify the beneficial owner, where the beneficial owner is not the customer and take reasonable steps to verify the beneficial owner's identity, including in the case of a legal person, a trust, or similar

¹⁶⁴ See Simpson & Powell 'Practical Implementation of Regulations and Rules' 144; JMLSG (2020) *Sectoral Guidance* para 4.33.

¹⁶⁵ See JMLSG (2020) *Sectoral Guidance* para 4.30.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ See reg 28(1) and (2) of the MLRs 2017. See also JMLSG (2020) *Sectoral Guidance* para 5.15.

¹⁶⁹ See reg 19 of the MLRs 2017.

¹⁷⁰ See reg 27(1) (a) of the MLRs 2017. See also Srivastava 'UK Law and Practice' 108.

¹⁷¹ See reg 27(1) (b) of the MLRs 2017. See also Srivastava 'UK Law and Practice' 108.

¹⁷² See reg 27(1) (c) of the MLRs 2017. See also Srivastava 'UK Law and Practice' 108.

¹⁷³ See reg 27(1) (d) of the MLRs 2017. See also Srivastava 'UK Law and Practice' 108.

¹⁷⁴ See reg 28 of the MLRs 2017 generally. See also Srivastava 'UK Law and Practice' 109.

entity.¹⁷⁵ A beneficial owner is an individual who ultimately owns or controls the entity or arrangement or on whose behalf a transaction is being conducted.¹⁷⁶

While the MLRs include a list of situations in which CDD must be performed, they do not define the term ‘customer’.¹⁷⁷ The JMLSG provides little additional guidance in this regard, stating only that in the absence of a specific definition in the MLRs, the term must be inferred from the definitions of ‘business relationship’ and ‘occasional transaction’.¹⁷⁸ A ‘business relationship’ is defined under the MLRs as a business, commercial, or professional relationship between a financial institution and a customer that arises out of the financial institution’s business and is expected to have a duration element when contact is established.¹⁷⁹ Any transaction that is not part of a business relationship is defined as an ‘occasional transaction’.¹⁸⁰ Simpson and Powell define a customer as a party, or parties, giving rise to the business relationship or for whom the transaction is conducted.¹⁸¹ They, however, note that where several parties are involved in a transaction, not all of them may be regarded as a customer.¹⁸²

In addition, the MLRs require that financial institutions take measures if there is any doubt about previously provided information or if there is reason to suspect money laundering.¹⁸³ Such measures are to be implemented at ‘other appropriate times’ on a ‘risk-based basis’.¹⁸⁴ The MLRs also require financial institutions to keep their customer information current. Therefore, financial institutions have an ongoing obligation to ensure that they know who their clients are.¹⁸⁵ The frequency with which due diligence measures are applied may be determined by the financial institution’s RBA, which is a central concept under the MLRs and the FATF *Standards*.¹⁸⁶

¹⁷⁵ See reg 28(4) of the MLRs 2017. See also Srivastava ‘UK Law and Practice’ 109.

¹⁷⁶ See reg 6(9) of the MLRs 2017. See also JMLSG (2020) *Sectoral Guidance* para 5.3.8.

¹⁷⁷ See Srivastava ‘UK Law and Practice’ 109. See the MLRs 2017 generally.

¹⁷⁸ See JMLSG (2020) *Sectoral Guidance* para 5.3.4. See also Srivastava ‘UK Law and Practice’ 109.

¹⁷⁹ See reg 4 of the MLRs 2017.

¹⁸⁰ See reg 3(1) of the MLRs 2017.

¹⁸¹ See Simpson & Powell ‘Practical Implementation of Regulations and Rules’ 152.

¹⁸² *Ibid.*

¹⁸³ See Srivastava ‘UK Law and Practice’ 110.

¹⁸⁴ See para 6.3.3.2 and 6.3.3.3 above.

¹⁸⁵ See JMLSG (2020) *Sectoral Guidance* para 5.1.9.

¹⁸⁶ See again para 6.3.3.2 above. See FATF (2014) *Risk-Based Approach Guidance* generally.

The MLRs further require financial institutions to conduct enhanced due diligence measures on a risk-sensitive basis.¹⁸⁷ In this regard, the MLRs require that enhanced due diligence be applied in the following seven circumstances.¹⁸⁸ First, where there is a high risk of money laundering or terrorist financing.¹⁸⁹ A high risk of money laundering can be in relation to the person or transaction information.¹⁹⁰ Secondly, in any business relationship or transaction with a person established in a high-risk country.¹⁹¹ Thirdly, in relation to correspondent relationships with financial institutions.¹⁹² Fourthly, where a customer is determined to be a politically exposed person.¹⁹³ Fifthly, where the financial institution discovers that a customer has provided false or stolen identification documentation or information.¹⁹⁴ Sixthly, where a transaction is complex and unusually large, or there is an unusual pattern of transactions and the transaction or transactions have no apparent economic or legal purpose.¹⁹⁵ Seventhly, in any other case which by its nature can present a higher risk of money laundering.¹⁹⁶

6.3.4.7 Scope of the CDD Measures for TBML in Trade-Finance Instruments

The CDD measures under the MLRs do not directly address the issue of TBML in trade-finance instruments. However, there is guidance from AML institutions in England on the issue. Both the FCA and the JMLSG consider it a good practice for financial institutions to have clear written procedures to provide for the necessary checks that should be applied on trade-finance customers to prevent TBML.¹⁹⁷ The FCA encourages trade-finance processing teams to make adequate use of the CDD information from relationship managers in order to effectively detect potential TBML in trade-finance instruments.¹⁹⁸ In addition, the JMLSG recommends that financial

¹⁸⁷ See Simpson & Powell 'Practical Implementation of Regulations and Rules' 167.

¹⁸⁸ See reg 33 of the MLRs 2017.

¹⁸⁹ See reg 33 (1) (a) of the MLRs 2017. See also JMLSG (2020) *Sectoral Guidance* para 5.5.9.

¹⁹⁰ See reg 33 (1)(i)(ii) of the MLRs 2017.

¹⁹¹ See reg 33 (1) (b) of the MLRs 2017. See also Ch 2 para 2.4.3 above.

¹⁹² See reg 33 (1)(c) of the MLRs 2017. See also JMLSG (2020) *Sectoral Guidance* para 5.5.9.

¹⁹³ See reg 33 (1)(d) of the MLRs 2017.

¹⁹⁴ See reg 33 (1)(e) of the MLRs 2017. See also JMLSG (2020) *Sectoral Guidance* para 5.5.9.

¹⁹⁵ See reg 33 (1)(f) of the MLRs 2017. See also JMLSG (2020) *Sectoral Guidance* para 5.5.9.

¹⁹⁶ See reg 33 (1)(g) of the MLRs 2017.

¹⁹⁷ See FCA (2013) *Financial-Crime Risks Report* 21; JMLSG (2020) *Sectoral Guidance* 160 para 15.41. See also Chhina (2016) 19 *JMLC* 158 at 162.

¹⁹⁸ See FCA (2013) *Financial-Crime Risks Report* 21.

institutions should conduct CDD on the instructing party in a trade-finance transaction.¹⁹⁹ Alternatively, the financial institution may undertake further CDD measures on other parties, if its risk policy provides for it and depending on the level of the TBML-risk exposure perceived by the institution.²⁰⁰

The instructing party in the trade-finance transaction is usually a known customer of the financial institution whose risk profile is somehow appreciated by the financial institution.²⁰¹ However, where the instructing party is not an existing customer, the bank must conduct CDD on it before proceeding with the transaction for which an application is being made.²⁰² For example, in a documentary credit transaction the applicant is the instructing party. It is this party that should be subjected to CDD.²⁰³ The JMLSG encourages that at the initial stage of applying for a documentary credit, a financial institution should enquire about countries involved in the trade, trade routes, goods being traded, type and/or identity of parties with whom the applicant is trading and role or location of any third parties who may be involved in the transaction.²⁰⁴ Chhina suggests that principles such as those of the Wolfsberg Group may help clarify issues when conducting CDD for customers using documentary credits.²⁰⁵

Depending on the position of the bank, sometimes the customer may be the issuing bank in relation to the advising or confirming bank.²⁰⁶ Generally, CDD measures may not be applied to the beneficiary under a documentary credit transaction.²⁰⁷ However, the JMLSG encourages financial institutions to consider making some checks on the beneficiary as well to mitigate the risk of TBML in trade-finance instruments.²⁰⁸ Such checks may include establishing the existence of the beneficiary through company registries, online trade databases or through some professional advisers such as accountants.²⁰⁹ This may be necessary, especially where the transaction or type

¹⁹⁹ See JMLSG (2020) *Sectoral Guidance* 160 para 15.41.

²⁰⁰ Ibid.

²⁰¹ See Ch 3 para 3.3 et seq above.

²⁰² See JMLSG (2020) *Sectoral Guidance* 160 para 15.42.

²⁰³ See again Ch 3 para 3.3 et seq above.

²⁰⁴ See JMLSG (2020) *Sectoral Guidance* 160 para 15.42. See again Ch 3 para 3.3 et seq above.

²⁰⁵ See Chhina (2016) 19 *JMLC* 158 at 162. See also Ch 4 para 4.4.5 above.

²⁰⁶ See JMLSG (2020) *Sectoral Guidance* 160 para 15.43.

²⁰⁷ See para 6.3.4.6 above.

²⁰⁸ See JMLSG (2020) *Sectoral Guidance* 160 para 15.43.

²⁰⁹ Ibid.

and/or identity of parties involved or bank are domiciled in a high-risk jurisdiction or where the nature of goods involved may warrant further scrutiny.²¹⁰

As regards enhanced CDD, the JMLSG encourages financial institutions to escalate the scrutiny where the trade-finance transaction displays characteristics of TBML.²¹¹ Such characteristics may include the buyer in the underlying transaction falling into the category generally regarded as high risk for money laundering.²¹² In such situations, financial institutions are encouraged by the JMLSG to deepen background checks of the parties involved.²¹³ They may also check the transaction using external public sources such as the International Maritime Bureau.²¹⁴ The financial institutions are also encouraged by the JMLSG to refer documents under the transaction to external specialised agencies for validation.²¹⁵ The Commercial Crime Services of the ICC may prove to be valuable in the verification of authenticity of documents used in trade-finance transactions such as the bills of lading.²¹⁶

An important component of the CDD process is the monitoring of transactions. The JMLSG encourages banks in England to invest in the automatic monitoring of transactions in order to check for red flags for potential TBML in trade-finance instruments.²¹⁷ The JMLSG notes that indicators for unusual transactions pointing to TBML in trade-finance transactions may be around the amount, volume, countries or the parties involved in the payment.²¹⁸ The JMLSG further points out that the ongoing transaction-monitoring exercise may differ between banks depending on the AML governance framework in place at particular banks together with the RBA being used.²¹⁹

²¹⁰ Ibid. See also Ch 2 para 2.4.3 above.

²¹¹ See JMLSG (2020) *Sectoral Guidance* 162 para 15.56.

²¹² Ibid. These situations include political exposed persons, being in tax haven, trading from a free zone trade, trading using cryptocurrencies, gold, diamonds or antiques, see Ch 2 para 2.4 et seq above.

²¹³ See JMLSG (2020) *Sectoral Guidance* 162 para 15.56.

²¹⁴ For a discussion of the International Maritime Bureau and its role in combatting TBML in trade-finance instruments, see Ch 4 para 4.4.2.4 above.

²¹⁵ See JMLSG (2020) *Sectoral Guidance* 162 para 15.56.

²¹⁶ Ibid. For a broader discussion of the Commercial Crime Services of the ICC, see also Ch 4 para 4.4.2.4 above.

²¹⁷ See JMLSG (2020) *Sectoral Guidance* 164 para 15.62.

²¹⁸ Ibid.

²¹⁹ Ibid. See also para 6.3.4.2 and para 6.3.4.4 above.

6.3.4.8 *The Obligation to Keep Records*

The duty to keep records is a significant AML obligation for a financial institution.²²⁰ It ensures that there is an audit trail to assist in tracing and recovering the proceeds of crime.²²¹ The MLRs require financial institutions to create and maintain records relating to their CDD measures.²²² Such information must pertain to the identification of customers, verification of procedures and transactions.²²³ The keeping of records of transactions and customers also serves as evidence of compliance with the AML regulatory requirements.²²⁴ All records must be retained for a prescribed period of five years from the date the file is closed.²²⁵

6.3.4.9 *Scope of the Record Keeping Duty for TBML in Trade-Finance Instruments*

The MLRs do not require banks and other financial institutions in England to specifically keep records pertaining to TBML in trade-finance instruments.²²⁶ However, the FCA provides guidance to banks on the subject. It recommends that banks should keep records, which indicate that specific AML reviews were done in trade-finance transactions.²²⁷ The exercise is necessary to show that a bank's AML controls are functional.²²⁸ The regulatory body considers it poor practice to simply keep records of trade documents under a transaction without keeping corresponding documents of the money-laundering reviews undertaken.²²⁹ Also failing to keep adequate records may result in the bank being unable to conduct appropriate compliance monitoring against the risk of TBML in trade-finance instruments.²³⁰ Thus, the record-keeping obligation can be argued to be an important AML obligation in the combatting of TBML in trade-finance instruments upon which other obligations depend.

²²⁰ See Simpson & Powell 'Practical Implementation of Regulations and Rules' 190.

²²¹ Ibid.

²²² See reg 40 of the MLRs of the MLRs 2017. See Srivastava 'UK Law and Practice' 113.

²²³ See reg 40(2) of the MLRs 2017. See also Srivastava 'UK Law and Practice' 113.

²²⁴ See Simpson & Powell 'Practical Implementation of Regulations and Rules' 190.

²²⁵ See reg 40(3) of the MLRs 2017. See also Srivastava 'UK Law and Practice' 113.

²²⁶ See para 6.3.4.8 above.

²²⁷ See FCA (2013) *Financial-Crime Risks Report* 29.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid.

6.4.5.10 The Obligation to Report Suspicious Transactions

The duty to report suspicious money-laundering transactions to relevant authorities is a central component of a financial institution's AML obligations.²³¹ There is a standing obligation for a bank to file a suspicious activity report where there are reasons to suspect that a person is engaged in a money-laundering activity.²³² The MLRs require banks to appoint a 'nominated officer' also called a Money Laundering Reporting Officer (MLRO) whose role is to receive disclosures under the POCAE.²³³ The MLRO will then decide whether such disclosures should be reported to the NCA.²³⁴ The duty to report any suspected money-laundering activity applies to the proceeds of any criminal activity even where such activity has occurred outside England and it also constitutes an offence in England.²³⁵

It is a criminal offence for internal staff to fail to report suspected money-laundering activities to the MLRO or for the MLRO to fail to report such suspicion further to the NCA when they receive it internally.²³⁶ This offence may be committed where the person knows or suspects or has reasonable grounds to know or suspect that another person is engaging in money-laundering activities.²³⁷ For liability to arise under section 330 of the POCAE, the standard applied by the courts is both subjective and objective.²³⁸ On the first part, liability depends on the factual knowledge or fault of the offender whereas on the second part liability depends on 'reasonable grounds' or negligence of the offender.²³⁹ Thus, even in circumstances where the person does not factually know or suspect money laundering, liability may arise under the POCAE.²⁴⁰ It will be adequate for the prosecution to prove that the person 'ought to have' known

²³¹ See Simpson & Powell 'Practical Implementation of Regulations and Rules' 175.

²³² Ibid.

²³³ See s 330 and 331 of the POCAE; JMLSG (2020) *Sectoral Guidance* para 6.1.

²³⁴ See Simpson & Powell 'Practical Implementation of Regulations and Rules' 146. See also para 6.4.2 below.

²³⁵ See s 340(2) and (11) of the POCAE. See also JMLSG (2020) *Sectoral Guidance* para 6.25 and para 6.3.2.4 above.

²³⁶ See s 330 of the POCAE. See also Simpson & Powell 'Practical Implementation of Regulations and Rules' 175; Srivastava 'UK Law and Practice' 75.

²³⁷ See s 330(2) (a) (b) of the POCAE; *R v Swan and Woolf* [2012] 1 CAR (S) 544.

²³⁸ See s 330(2)(a) and s 330(2)(b) of the POCAE.

²³⁹ See s 330(2)(a) and s 330(2)(b) of the POCAE.

²⁴⁰ See s 330(2)(b) of the POCAE. See also Srivastava 'UK Law and Practice' 75.

or suspected that money laundering was occurring.²⁴¹ However, not every unusual transaction should be regarded as a suspected case of money laundering. In its guidance note, the JMLSG in its guidance note explains that even customers with stable and predictable transactions may have an occasional outlying transaction that may turn out to be unusual yet not signalling money laundering.²⁴² It therefore follows that each case has to be treated differently depending on the surrounding risk factors on the application of an RBA.²⁴³

To assist banks in submitting suspicious activity reports of better quality, the NCA published a guidance in 2016 and has updated it since then.²⁴⁴ The NCA decided to do this after realising that reporting institutions were giving insufficient and/or unclear information for the suspicion or context of the proposed transaction.²⁴⁵

6.3.4.11 Scope of the Duty to Report for TBML in Trade-Finance Instruments

The JMLSG acknowledges that detecting TBML in trade-finance transactions may not be an easy exercise for banks due to the fragmented nature of trade-finance arrangements.²⁴⁶ This may cause banks to have inadequate information, which may not be useful in establishing a reasonable suspicion that TBML has been committed. It should be noted that the presence of red-flag indicators or the occurrence of unusual transactions might not necessarily indicate the presence of money-laundering activities.²⁴⁷ The JMLSG encourages banks to put additional safeguards where they discover that transactions are being carried out by related parties. Related-party transactions are susceptible to manipulation through TBML.²⁴⁸ In such instances, the

²⁴¹ See s 330(2) (b) of the POCAE; *R v Sally Lane and John Letts* [2018] UKSC 36. It should be noted that the imputation of liability to staff for failing to report money-laundering cases which they ought to have known or suspected, has been criticised by the UK Finance for punishing its members over activities which may not be in their knowledge or committed through negligence, see Srivastava 'UK Law and Practice' 75-76.

²⁴² See JMLSG *Sectoral Guidance* para 6.12.

²⁴³ See Simpson & Powell 'Practical Implementation of Regulations and Rules' 178. See also para 6.3.4.4 above.

²⁴⁴ See NCA, 'Guidance on Submitting Better Quality SARs', September 2016. See also August 2017 update at www.nationalcrimeagency.gov.uk/publications/899-guidance-on-submitting-betterquality-sars-v2/file [Accessed on 9 June 2022].

²⁴⁵ See Simpson & Powell 'Practical Implementation of Regulations and Rules' 180.

²⁴⁶ See JMLSG (2020) *Sectoral Guidance* 164 para 15.65.

²⁴⁷ Ibid.

²⁴⁸ See Ch 2 para 2.3.4 and Ch 3 para 3.3 et seq above.

JMLSG advises banks to request further documentary evidence in order to establish the authenticity of the transactions.²⁴⁹

The JMLSG also encourages banks to make use of red-flag indicators to detect TBML in trade-finance transactions involving related parties.²⁵⁰ Some of the red-flag indicators banks may rely on include the use of the same address for the different parties involved in a transaction and the presence of unexplained parties to a transaction whose identities or roles are unclear.²⁵¹ Further red flags include the receipt of funds from a third party who had no clear connection with the transaction.²⁵² The same goes for requests for payment to be made to an unrelated third party whose role in the transaction is vague.²⁵³ In considering the use of the red-flag indicators, the JMLSG also encourages banks to refer to the FATF's reports, which outline some of the TBML red-flag indicators.²⁵⁴ In addition, such red flags should be updated regularly to capture changes in the operating environment and in the criminal world.²⁵⁵

6.3.4.12 *Obligation to Train Staff on Money-Laundering Issues*

The provision of adequate training to appropriate staff within a financial institution is a vital component of the institution's compliance with its AML duties.²⁵⁶ This is because banking staff who are inadequately trained may compromise the implementation of even the best-designed control systems.²⁵⁷ Thus, a bank should have a clear AML training policy, which addresses its AML training needs with respect to its risk profile.²⁵⁸

The MLRs impose an obligation on banks to educate and train employees about money-laundering issues.²⁵⁹ Such training should ensure that staff members

²⁴⁹ See JMLSG (2020) *Sectoral Guidance* 155 para 15.12.

²⁵⁰ Ibid. See also FCA (2013) *Financial-Crime Risks Report* 34; Ch 4 para 4.3.2 and 4.4.5 above et seq above.

²⁵¹ See JMLSG (2020) *Sectoral Guidance* 155 para 15.12. See also Ch 4 para 4.3.2 and para 4.4.6 et seq above.

²⁵² See JMLSG (2020) *Sectoral Guidance* 155 para 15.12.

²⁵³ Ibid.

²⁵⁴ Idem at 159 para 15.34. See also Ch 4 para 4.3.2 et seq above.

²⁵⁵ See FCA (2013) *Financial-Crime Risks Report* 34.

²⁵⁶ See Simpson & Powell 'Practical Implementation of Regulations and Rules' 186; JMLSG (2020) *Sectoral Guidance* para 7.1.

²⁵⁷ See JMLSG (2020) *Sectoral Guidance* para 7.2.

²⁵⁸ Idem at para 7.3.

²⁵⁹ See reg 24 of the MLRs 2017. See also Srivastava 'UK Law and Practice' 114.

appreciate their obligations under relevant AML laws such as the MLRs, the POCAE and the FCA guidance.²⁶⁰ Banks must take appropriate measures to ensure that all employees are aware of the risks of money laundering and their responsibilities under applicable law.²⁶¹ All employees must receive regular training on how to recognise and deal with suspicious transactions that may be indicative of money laundering.²⁶²

Generally, staff need to be alerted about current and emerging money-laundering risks in the bank's products and services.²⁶³ Training should also focus on making staff aware of their legal obligations when executing transactions suspected of money laundering and the consequences of failure to adhere to such obligations.²⁶⁴ This would also assist the employees to guard against their own possible criminal liability for failing to report known or suspected cases of money laundering under the POCAE.²⁶⁵ Most importantly, staff training should vary depending on the area of specialisation of the employee within the bank.²⁶⁶ For example, staff members involved in transaction monitoring, may need to be trained on what could pass as a suspicious transaction for money laundering.²⁶⁷ In this regard, red-flag indicators for money laundering may become pertinent in their training.²⁶⁸ It, therefore, follows that the content and effectiveness of training are critical in a bank's AML strategy.²⁶⁹

6.3.4.13 Scope of the Staff Training Duty for TBML in Trade-Finance Instruments

Compliance officers and anyone providing AML training to staff need to appreciate that money laundering occurs in various forms, including through TBML using trade-finance transactions.²⁷⁰ The requirement to train staff in terms of MLRs does not directly address training needs for TBML in trade-finance transactions.²⁷¹ However,

²⁶⁰ Simpson & Powell 'Practical Implementation of Regulations and Rules' 187.

²⁶¹ See reg 24(1)(a)(i) of the MLRs 2017. See also Srivastava 'UK Law and Practice' 114.

²⁶² See reg 24(1)(a)(ii) of the MLRs 2017. See also Srivastava 'UK Law and Practice' 114.

²⁶³ Simpson & Powell 'Practical Implementation of Regulations and Rules' 187.

²⁶⁴ Ibid. See also para 6.3.4.10 above.

²⁶⁵ See s 330(2)(a)(b) of the POCAE. See also Srivastava 'UK Law and Practice' 75.

²⁶⁶ See Simpson & Powell 'Practical Implementation of Regulations and Rules' 188; JMLSG (2020) *Sectoral Guidance* para 7.3.

²⁶⁷ See Simpson & Powell 'Practical Implementation of Regulations and Rules' 188; JMLSG (2020) *Sectoral Guidance* para 7.1.

²⁶⁸ See again para 6.3.4.10 above.

²⁶⁹ See JMLSG (2020) *Sectoral Guidance* para 7.2.

²⁷⁰ See Ch 2 para 2.2 and 2.3 et seq above.

²⁷¹ See Menz (2019) 22 *JMLC* 614 at 621; reg 24 of the MLRs 2017.

the FCA and the JMLSG, which provide guidance to banks on how the MLRs may be applied in various AML training needs, including in the capacitation of staff about TBML in trade-finance instruments, solve this hurdle.

The FCA notes that the provision of generic AML training to staff is inadequate for the detection of TBML in trade-finance instruments because it may not factor in risks of TBML.²⁷² In addition, failure to train staff on AML issues relevant to trade-finance transactions may make banks unable to detect TBML, even where it appears obvious, through documentary examination.²⁷³ The FCA, therefore, encourages banks to provide tailored training specifically aimed at raising awareness and understanding of TBML risks in trade-finance instruments.²⁷⁴ The training may also include sensitising staff about the bank's procedures for managing the risk of TBML in trade-finance transactions.²⁷⁵

Furthermore, the FCA discourages banks from relying solely on 'experienced' trade processing officials in examining documents for potential TBML in trade-finance instruments. Such staff may not have been trained to detect TBML thereby exposing the bank to that type of risk.²⁷⁶ Thus, the JMLSG encourages banks to emphasise AML training to those staff directly dealing with trade-finance transactions and those carrying out back office functions relevant to trade finance.²⁷⁷ Such training should be tailored around the TBML risks that may be encountered in the process of providing trade-finance services such as documentary credits or collections.²⁷⁸

In designing training programmes, the JMLSG recommends that banks adopt and use red-flag indicators from the FATF and other relevant organisations in the fight against TBML.²⁷⁹ This is a positive recommendation for banks in England in that it would likely

²⁷² See FCA (2013) *Financial-Crime Risks Report* 24.

²⁷³ See Chhina (2016) 19 *JMLC* 158 at 165.

²⁷⁴ See FCA (2013) *Financial-Crime Risks Report* 24. See also JMLSG (2020) *Sectoral Guidance* 165 para 15.65.

²⁷⁵ See JMLSG (2020) *Sectoral Guidance* 165 para 15.65.

²⁷⁶ See FCA (2013) *Financial-Crime Risks Report* 24.

²⁷⁷ See JMLSG (2020) *Sectoral Guidance* 165 para 15.66.

²⁷⁸ *Ibid.*

²⁷⁹ See JMLSG (2020) *Sectoral Guidance* 165 para 15.68. See also Ch 4 para 4.3.2, para 4.4.5 and para 4.4.6 et seq above.

assist banks to adopt already established practices while they design their own best responses in line with their AML risk profiles.

6.3.5 Conclusion

To adequately curb money laundering, the English AML system relies on the responsibilities of banks to screen who may do business with them.²⁸⁰ Thus, the MLRs place certain obligations on financial institutions to be at the forefront of combatting money laundering in England.²⁸¹ Among other issues, banks are required to employ the RBA in their day-to-day transactions in order to detect potentially money-laundering activities.²⁸² In addition, the MLRs require banks to keep controls, policies and procedures for purposes of detecting money laundering.²⁸³ Most importantly, banks are required under the MLRs, to fulfil certain AML obligations such as CDD, record keeping, transaction reporting and training of staff.²⁸⁴ These are necessary obligations in the fight against money laundering recommended by the FATF.

Despite provision for the AML obligations, the MLRs do not address, in specific terms, TBML in trade-finance instruments.²⁸⁵ To fill in the gap, the FCA and the JMLSG have come up with specific recommendations on how banks can fulfil their AML obligations using the current legal framework when combatting TBML in trade-finance.²⁸⁶ For each AML obligation under the MLRs, the FCA and the JMLSG have shown, through interpretative guidance reports, how they may be directed towards the problem of TBML in trade-finance transactions.²⁸⁷ This has demonstrated that, although it could be desirable to specifically legislate against TBML in trade-finance instruments, it is still possible to use current AML systems and processes to deal with the problem. The FCA and the JMLSG have both shown that guidance could be provided to interpret and apply AML provisions designed for traditional money laundering, to TBML in trade-finance instruments.²⁸⁸

²⁸⁰ See para 6.3.4.1 above.

²⁸¹ See para 6.3.4 et seq above.

²⁸² See para 6.3.4.4 above.

²⁸³ See para 6.3.4.2 above.

²⁸⁴ See para 6.3.4.6 et seq above.

²⁸⁵ See again para 6.3.2.4 above.

²⁸⁶ See again para 6.3.4 et seq above.

²⁸⁷ See again para 6.3.4.6 et seq above.

²⁸⁸ See again para 6.3.4.6 et seq above.

6.4 INSTITUTIONAL AML FRAMEWORK FOR TBML IN TRADE FINANCE

6.4.1 General

Sharing financial information, through an inter-agency approach is critical in the fight against TBML in trade-finance instruments. In this part of the thesis I explore the AML role of various institutions in England. In the process, I attempt to establish the role, if any, which these institutions play against TBML in trade-finance instruments. The intention is to draw lessons, if any, for AML institutions in South Africa on how they may combat TBML in trade-finance instruments.

6.4.2 The National Crime Agency (NCA)

The NCA serves as England's financial intelligence agency (FIU).²⁸⁹ It was established in December 2013 as part of the reforms in the Crime and Courts Act of 2013 (CCA) under which it replaced the Serious Organised Crime Agency.²⁹⁰ Under the South African AML regime, the FIC is the equivalent institution to the NCA.²⁹¹ The NCA is responsible for managing disclosures of information concerning potential money laundering or terrorist financing.²⁹² It has a consent team that manages reports of suspicious activity and requests for consent to act under the POCAE.²⁹³

Besides the functions given to it under the CCA, the NCA also carries out functions conferred to it under the POCAE.²⁹⁴ Under the CCA, the NCA has two broad functions, namely, the crime-reduction and criminal-intelligence functions.²⁹⁵ Under the crime-reduction function, the NCA has the obligation of ensuring that efficient and effective activities to combat serious and organised crime are carried out in England either by

²⁸⁹ See Srivastava 'UK Law and Practice' 65; HM Treasury (2020) *National Risk Assessment Report* 18; Goran Nikolic 'National Crime Agency-NCA' (2020) 10 *Int'l J Econ & L* 18-26 at 21.

²⁹⁰ See s1 (1) of the Crime and Courts Act, 2013; Srivastava 'UK Law and Practice' 65. The NCA is an outcome of integrated former organisations namely, the Organised Crime Command, the Centre for Combatting Child Exploitation and Child Protection on the Internet, the Economic Crime Command, the Border Police Command and the National Cybercrime Unit, see Nikolic (2020) 10 *Int'l J Econ & L* 18 at 21.

²⁹¹ See Ch 5 para 5.4.2 above. See also Ch 7 para 7.4.2 above and Ch 8 para 8.4.2 below for similar FIUs in the other comparative jurisdictions.

²⁹² See Srivastava 'UK Law and Practice' 65.

²⁹³ Ibid.

²⁹⁴ See s 1(3) of the Crime and Courts Act, 2013. See also Part 7 of the POCAE.

²⁹⁵ See s 1(4) and (5) of the Crime and Courts Act, 2013.

the NCA or by other law enforcement agencies.²⁹⁶ The NCA must discharge its crime-reduction function in three ways. First, by preventing and detecting organised and serious crime.²⁹⁷ This obligation further entails investigating offences relating to organised crime and instituting criminal proceedings in England.²⁹⁸ Secondly, the NCA is obligated to ensure that activities to combat organised crime are carried out by other institutions in the criminal justice system.²⁹⁹ Thirdly, the NCA has to ensure that there is co-operation between other institutions involved in the combatting of organised crime through coordination of such activities.³⁰⁰ It should be noted that the crime-reduction function of the NCA does not include its general duty of prosecuting offences.³⁰¹

In conducting its crime-reduction function, the NCA has been central in coordinating efforts to combat money laundering in England.³⁰² In this regard, it has created the Joint Money-Laundering Intelligence Taskforce (JMLIT) and the National Economic Crime Centre (NECC).³⁰³ The JMLIT and the NECC are central to the general response to the challenge of organised crime in England, including money laundering.³⁰⁴ One of the thematic objectives the JMLIT considers a priority, is TBML.³⁰⁵

Under the criminal-intelligence function, the NCA carries out the role of England's FIU.³⁰⁶ The function entails the gathering, storing, and processing, analysing, and disseminating information relevant to the combatting of organised crime by the NCA.³⁰⁷ Through its FIU role in England, the NCA actively collaborates with other

²⁹⁶ See s 1(4) of the Crime and Courts Act, 2013. See also Nikolic (2020) 10 *Int'l J Econ & L* 18 at 22.

²⁹⁷ See s 1(7) (a) of the Crime and Courts Act, 2013. See also Nikolic (2020) 10 *Int'l J Econ & L* 18 at 22.

²⁹⁸ See s 1(7) (b) (c) of the Crime and Courts Act, 2013.

²⁹⁹ See s 1(8) of the Crime and Courts Act, 2013. See also Nikolic (2020) 10 *Int'l J Econ & L* 18 at 22.

³⁰⁰ See s 1(9) of the Crime and Courts Act, 2013. See also Nikolic (2020) 10 *Int'l J Econ & L* 18 at 22.

³⁰¹ See s 1(10) of the Crime and Courts Act, 2013.

³⁰² See www.nationalcrimeagency.gov.uk [Accessed on 30 May 2022].

³⁰³ See para 6.4.4 and para 6.4.6 below.

³⁰⁴ See para 6.4.4 and para 6.4.6 below.

³⁰⁵ See para 6.4.6 below.

³⁰⁶ See s 1(5) of the Crime and Courts Act, 2013.

³⁰⁷ See s 1(5) of the Crime and Courts Act, 2013. See also HM Treasury (2020) *National Risk Assessment Report* 18.

international organisations significant in the global AML activities such as the Egmont Group.³⁰⁸ Supervisory authorities under the MLRs have a duty to report any suspected money-laundering activity to the NCA, which they encounter in their financial transactions.³⁰⁹ The NCA has an obligation under the MLRs to provide feedback on suspicious money-laundering disclosures it receives from supervisory authorities either on its own or in conjunction with another institution.³¹⁰

In its capacity as an FIU, the NCA has not published any guidance regarding the risk of TBML in England. In the *High End Money Laundering: Strategy and Action Plan*, the NCA acknowledges that it does not know much about TBML and the exploitation of corporate vehicles by organised crime groups.³¹¹ This is disconcerting considering that TBML has been identified by HM Treasury in the *National Money Laundering Risk Assessment Report* as a threat to England's economy.³¹² In a study that confirms NCA's deficiencies regarding TBML, Marzouk established that compliance officers within banks were more knowledgeable about TBML than law enforcement agencies, including the NCA.³¹³ This partly contributes to the lack of motivation to pursue investigations related to TBML.³¹⁴ Marzouk further notes that the law enforcement agencies seem not to have enough resources and the expertise needed to investigate TBML.³¹⁵ Consequently, they emphasise on the pursuit of traditional money-laundering cases, which prove easier for them to complete.³¹⁶ There is a need, therefore, for the law enforcement agencies, including the NCA, to develop their competencies, not only to understand TBML, but also to be able to investigate it.³¹⁷ In a latest development, which appears to indicate the NCA's increasing interest in the subject, the FIU examines the aspect of TBML in its magazine called *SARs in Action*

³⁰⁸ See HM Treasury (2020) *National Risk Assessment Report* 18. For the AML role of the Egmont Group and its contribution in combatting of TBML in trade-finance instruments, see Ch 4 para 4.4.4 et seq above.

³⁰⁹ See reg 46(5) of the MLRs 2017.

³¹⁰ See reg 104(1)-(3) of the MLRs 2017.

³¹¹ See www.nationalcrimeagency.gov.uk [Accessed on 24 October 2022].

³¹² See para 6.2 above.

³¹³ See Marzouk (2021) *JMLC* 1 at 6.

³¹⁴ Ibid. See also Murray (2016) 19 *JMLC* 447 at 457.

³¹⁵ See Marzouk (2021) *JMLC* 1 at 7.

³¹⁶ Ibid.

³¹⁷ See Murray (2016) 19 *JMLC* 447 at 457.

of 2022.³¹⁸ However, in that instalment the NCA only explores TBML in relation to the role of HMRC.³¹⁹ It would have been better had the NCA taken this opportunity to outline its strategies on how it deals with the challenge of TBML in England as the FIU.

6.4.3 Conclusion

The NCA is England's FIU responsible for dealing with reports of suspicious money-laundering activities.³²⁰ The organisation plays a central coordinating role in the fight against money laundering in England. Significant contributions have been made by the NCA in controlling organised crime in general and money laundering in particular. It has either spearheaded or participated in establishing institutions relevant in the fight against TBML such as the NECC and the JMLIT.³²¹ Although the NCA has not issued any guidance specific to the combatting of TBML in trade-finance instruments, it seems to have the capacity to tackle this form of money laundering through either the JMLIT or the NECC.³²²

6.4.4 National Economic Crime Centre (NECC)

The NECC was established in October 2018 by the NCA.³²³ It is a multi-agency centre with representatives from the Serious Fraud Office (SFO),³²⁴ His Majesty Revenue and Customs (HRMC),³²⁵ City of London Police, the Crown Prosecution Services (CPS),³²⁶ and the FCA,³²⁷ among others.³²⁸ The organisation co-ordinates England's response to economic crime by using intelligence and skills from across the public and private sectors.³²⁹

³¹⁸ See Leader 'Trade-Based Money Laundering — Hidden in Plain Sight?' (Issue 17-October 2022) *SARs in Action Magazine* 12-13.

³¹⁹ See Leader (Issue 17-October 2022) *SARs in Action Magazine* 12-13.

³²⁰ See para 6.4.2 above.

³²¹ See again para 6.4.2 above.

³²² See para 6.4.4 and para 6.4.6 below.

³²³ See HM Treasury (2020) *National Risk Assessment Report* 18. See also para 6.4.2 above.

³²⁴ See also para 6.4.10 below.

³²⁵ See also para 6.4.12 below.

³²⁶ See also para 6.4.8 below.

³²⁷ See also para 6.5.2 below.

³²⁸ See <https://www.nationalcrimeagency.gov.uk> [Accessed on 27 May 2022].

³²⁹ Ibid. See also HM Treasury (2020) *National Risk Assessment Report* 18.

The objective of the NECC is to decrease organised economic crime, protect the public and safeguard the reputation of England's financial system.³³⁰ In trying to achieve its objective, the NECC identifies and prioritises appropriate civil or criminal investigations to tackle economic crime.³³¹ The organisation deploys various crime-fighting mechanisms such as the use of unexplained-wealth orders and account-freezing orders in order to tackle illicit finance that may be used to further fund organised-crime operations.³³²

In addition, the NECC also coordinates and hosts the Expert Laundering Evidence cadre.³³³ The Expert Laundering Evidence cadre provides independent expert evidence to courts in money-laundering cases.³³⁴ The cadre also assists investigators to understand complex money-laundering typologies and how the evidence in such cases can be interpreted.³³⁵

It should be noted that the NECC has not issued any guidance or publication, which directly speaks to the challenge of TBML in trade-finance instruments. However, its objective to combat economic crime in England is broad enough to include even TBML through trade-finance transactions. In addition, its status as a unit of the FIU may also help it address this type of economic crime since the NCA is a member of the JMLIT whose focus is also on TBML.

6.4.5 Conclusion

The NECC generally focuses and combats crimes threatening England's economy.³³⁶ The organisation is representative enough to ensure adequate sharing of information about economic crimes. The NECC has no single published report on TBML through trade-finance transactions. However, it prides itself as a leading authority on economic-crime issues.³³⁷ In this regard, the term 'economic crime' may broadly be construed to include even TBML in trade-finance instruments. Additionally, the organisation's

³³⁰ See <https://www.nationalcrimeagency.gov.uk> [Accessed on 27 May 2022].

³³¹ Ibid.

³³² Ibid. See HM Treasury (2020) *National Risk Assessment Report* 18.

³³³ See HM Treasury (2020) *National Risk Assessment Report* 18.

³³⁴ Ibid.

³³⁵ Ibid.

³³⁶ See para 6.4.4 above.

³³⁷ See again para 6.4.4 above.

operational structure may be suitable for the combatting of TBML in trade-finance instruments. The NECC is located within the NCA, which is England's FIU. This strategic location gives it the advantage of receiving suspicious transaction reports of various money-laundering cases, which may include TBML through trade-finance transactions. As part of the NCA, the NECC also seats in the JMLIT, which is a national taskforce, created with one of its mandates as the combatting of TBML.³³⁸ Thus, through its broad objective of fighting economic crimes and its membership in strategic AML institutions, the NECC has great potential to control TBML through trade-finance instruments in England.

6.4.6 The Joint Money-Laundering Intelligence Taskforce (JMLIT)

The JMLIT was established in 2015 as a model for co-operation between law enforcement agencies and the financial sector.³³⁹ Its mandate is the exchange and analysis of information regarding money laundering and broader economic-crime concerns.³⁴⁰ The taskforce includes more than forty financial institutions: the FCA,³⁴¹ Cifas,³⁴² and five other law enforcement agencies, which are the NCA,³⁴³ HMRC,³⁴⁴ the SFO,³⁴⁵ the City of London Police and the Metropolitan Police Service.³⁴⁶ Under the South African AML regime, the SAMLIT is the equivalent taskforce to the JMLIT.³⁴⁷

³³⁸ See para 6.4.6 below.

³³⁹ See Nick Maxwell *Expanding the Capability of Financial Information-Sharing Partnerships* (2019) (hereinafter 'Maxwell *Financial-Information Sharing*') 48; HM Treasury (2020) National Risk Assessment Report 22. It should be noted that the JMLIT was established as a pilot programme with temporary duration but has since become permanent as of April 2016, see www.nationalcrimeagency.gov.uk [Accessed on 24 October 2022].

³⁴⁰ See Maxwell *Financial-Information Sharing* 48; Menz (2019) 22 *JMLC* 614 at 622. See also www.nationalcrimeagency.gov.uk [Accessed on 24 October 2022].

³⁴¹ See para 6.5.2 below.

³⁴² Cifas is a non-profit organisation dedicated to fraud prevention in England. It collaborates with private and public institutions to create a fraud-prevention environment using various methods including fraud-risk databases and information-sharing, see www.cifas.org.uk/about-cifas [Accessed on 30 May 2022].

³⁴³ See again para 6.4.2 above.

³⁴⁴ See para 6.4.12 below.

³⁴⁵ See para 6.4.10 below.

³⁴⁶ See www.nationalcrimeagency.gov.uk [Accessed on 30 January 2023].

³⁴⁷ See Ch 5 para 5.4.4 above. See also Ch 7 para 7.4.6 below and Ch 8 para 8.4.4 below for similar AML information-sharing platforms in the other comparative jurisdictions.

The JMLIT model is regarded by the FATF as an example of best practice in the combatting of money laundering.³⁴⁸ For that reason, it has since been replicated in various jurisdictions, including those under examinations in this study.³⁴⁹ The JMLIT aspires to tackle complex money-laundering schemes such as TBML, through information sharing.³⁵⁰ The idea behind its establishment is that complex, multi-institutional and multi-jurisdictional forms of money laundering may require a forum where current vulnerabilities, new typologies and tactical intelligence, are shared.³⁵¹

In carrying out its operations, the JMLIT seeks to achieve four objectives. First, it seeks to inform its partners about the existence of economic crimes in England and how to tackle them.³⁵² The broad nature of this objective can cover TBML in trade-finance instruments since it is a financial crime with economic consequences for a country. Secondly, the JMLIT seeks to improve information exchange between law enforcement agencies in order to increase efficiency in criminal investigations.³⁵³ This objective is wide enough to include the sharing of information even for the fighting of TBML in trade-finance instruments. Thus, where the sharing of information to control TBML in trade-finance transactions becomes necessary, it could be done by the JMLIT under this objective. Thirdly, the JMLIT seeks to enable financial institutions to understand existing methods being used by organised crime groups to commit money laundering. The JMLIT hopes that such understanding may provide a basis for the institutions to proactively mitigate the risk of money laundering within their financial transactions.³⁵⁴ Fourthly, the JMLIT also seeks to assist regulators to develop an understanding of current and emerging threats of money laundering. This would assist the regulators to improve their risk-based approaches to the problem.³⁵⁵ The FATF

³⁴⁸ See FATF (2018) *UK Mutual Evaluation Report* 6. See also Ch 5 para 5.4.4 above; Ch 7 para 7.4.6; Ch 8 para 8.4.4 below.

³⁴⁹ For South Africa there is SAMLIT, see Ch 5 para 5.4.4 above; for the US there is FinCEN Exchange, see Ch 7 para 7.4.4 below and for Singapore there is the ACIP, see Ch 8 para 8.4.4 below.

³⁵⁰ See Menz (2019) 22 *JMLC* 614 at 622; Marzouk (2021) *JMLC* 1 at 6. See also www.nationalcrimeagency.gov.uk [Accessed on 30 January 2023].

³⁵¹ See Menz (2019) 22 *JMLC* 614 at 622; Maxwell *Financial-Information Sharing* 48. See also www.nationalcrimeagency.gov.uk [Accessed on 30 January 2023].

³⁵² See Maxwell *Financial-Information Sharing* 48.

³⁵³ Ibid.

³⁵⁴ See Maxwell *Financial-Information Sharing* 48. See also www.nationalcrimeagency.gov.uk [Accessed on 30 May 2022].

³⁵⁵ See Maxwell *Financial-Information Sharing* 48. See also www.nationalcrimeagency.gov.uk [Accessed on 30 May 2022].

has identified TBML as an emerging type of financial crime requiring AML institutions to adopt a proactive approach. Thus, the JMLIT's role in assisting stakeholders to develop AML strategies against emerging types of money laundering could prove to be timely for the threat of TBML in trade-finance instruments.

Since June 2020, the JMLIT has been hosting, as permanent staff, officers from the NECC, the HMRC and the private sector.³⁵⁶ It is not apparent whether the hosting of permanent staff from the other law enforcement agencies was in response to the Covid-19 pandemic or was just motivated by the need to constantly share information on the combatting of economic crimes. However, to do its work generally, the JMLIT relies on two types of groups, namely, the Operations Groups and the Expert Working Groups.³⁵⁷ The Operations Groups come into two further types, which are the Banking Sector Operations Group and the Insurance and Investment Sector Operations Group.³⁵⁸ The JMLIT shares information and intelligence through these two operations groups using the information-sharing gateway provided for under the CCA.³⁵⁹ The Expert Working Groups are composed of representatives from academia, law enforcement, industry and non-governmental organisations who converge on set intervals to share knowledge about current and emerging threats of money laundering.³⁶⁰ The findings and conclusions of these Expert Working Groups are published by the JMLIT as money-laundering red flags, alerts or typologies for the benefit of the financial sector, the government and law enforcement agencies.³⁶¹ Currently, the JMLIT has Expert Working Groups on TBML, money laundering through markets, organised immigration crime, bribery and corruption, terrorist financing, future threats and tax evasion.³⁶²

Since its inception in 2015, the JMLIT has had successes in supporting and developing law enforcement investigations directly contributing to more than 280 arrests and the seizure of more than 86 million pounds sterling.³⁶³ Through the platform, the banking

³⁵⁶ See Maxwell *Financial-Information Sharing* 49. See also www.nationalcrimeagency.gov.uk [Accessed on 30 May 2022].

³⁵⁷ See Maxwell *Financial-Information Sharing* 49.

³⁵⁸ Ibid.

³⁵⁹ See s 7 of the Crime and Courts Act, 2013.

³⁶⁰ See Maxwell *Financial-Information Sharing* 49.

³⁶¹ Ibid.

³⁶² Ibid. See also Marzouk (2021) *JMLC* 1 at 6.

³⁶³ See www.nationalcrimeagency.gov.uk [Accessed on 30 May 2022].

sector has identified numerous accounts in England connected to suspicious money-laundering activity.³⁶⁴ These discoveries have led to the enhancement of banking systems and controls to mitigate such threats in future.³⁶⁵ In addition, the quality of suspicious activity reports related to TBML from the JMLIT to law enforcement agencies seem to be higher than those generated by any individual bank.³⁶⁶

6.4.7 Conclusion

The JMLIT is a public-private partnership whose objective is the combatting of money laundering in England through timely information sharing.³⁶⁷ It brings together law enforcement agencies, banks and regulators with the mission of researching money-laundering trends and how to counter them. The JMLIT is regarded by the FATF as a pioneering taskforce of private-public partnerships in the fight against money laundering.³⁶⁸ Its model is central to information sharing and exchange of expertise on money-laundering issues. The JMLIT model has since been replicated in other jurisdictions across the world.³⁶⁹ Most importantly, the JMLIT has an expert working group dedicated to dealing with the challenge of TBML.³⁷⁰ Such a gesture is significant in setting the right tone as a starting point in combatting TBML in trade-finance instruments. The JMLIT model is also suitable for combatting complex forms of money laundering such as TBML through trade-finance transactions because ideas are shared across institutions whose members may lack expertise on certain issues.³⁷¹ It is a necessary platform capable of strengthening institutional capacity against money laundering through synergies.

6.4.8 The Crown Prosecution Service (CPS)

The CPS was established in 1985 under the Prosecution of Offences Act.³⁷² It is an independent prosecuting authority in England except where this function is performed

³⁶⁴ Ibid.

³⁶⁵ Ibid.

³⁶⁶ See Marzouk (2021) *JMLC* 1 at 6. See also Menz (2019) 22 *JMLC* 614 at 622.

³⁶⁷ See para 6.4.6 above.

³⁶⁸ See again para 6.4.6 above.

³⁶⁹ See SAMLIT for South Africa, Ch 5 para 5.4.4 above; The FinCEN Exchange for the US, Ch 7 para 7.4.6 below; and the ACIP for Singapore, Ch 8 para 8.4.4 below.

³⁷⁰ See again para 6.4.6 above.

³⁷¹ See again para 6.4.6 above.

³⁷² See s 1(1) of the Prosecution of Offences Act, 1985.

by the SFO and the FCA.³⁷³ It is responsible for prosecuting criminal offences in the country, including money laundering.³⁷⁴ It receives money-laundering cases from other investigative institutions in England such as the police, HMRC, the NCA, and other government agencies.³⁷⁵ Under the South African AML regime, the NPA is the equivalent prosecutorial authority to the CPS in England.³⁷⁶

The CPS also provides guidance to law enforcement authorities on potential lines of inquiry and evaluates cases to determine whether they should be prosecuted.³⁷⁷ At the international front, the CPS is active in obtaining restraint and confiscation orders on behalf of other jurisdictions under mutual legal assistance arrangements.³⁷⁸ In its asset recovery strategy of 2014-2021, the CPS emphasises the need for confiscation as a strategy to pursue proceeds of serious and organised economic crime.³⁷⁹ As an international crime, the proceeds of TBML through trade-finance transactions are likely to be pursued by the CPS under its asset recovery strategy.

In carrying out its functions, the CPS operates through two major divisions namely, the Serious Economic, Organised Crime and International Directorate (SEOCID) and the Proceeds of Crime Division.³⁸⁰ The SEOCID merges two divisions of the CPS, namely, the International Justice and Organised Crime Division and the Specialist Fraud Division together so that they operate alongside the CPS' Proceeds of Crime Division as one team. The SEOCID is a prosecution and advisory branch for complex economic crimes.³⁸¹ The Proceeds of Crime Division is tasked with enforcing restraining and confiscating orders in order to recoup the proceeds of criminal activity in England and abroad.³⁸² The CPS developed an *Economic Crime Strategy 2025* in March 2021 through which it commits to adopt a proactive approach in combatting economic

³⁷³ See HM Treasury (2020) *National Risk Assessment Report* 21; FATF (2018) *UK Mutual Evaluation Report* 25. See also para 6.4.10 and para 6.5.2 below.

³⁷⁴ See HM Treasury (2020) *National Risk Assessment Report* 21.

³⁷⁵ Ibid. See also para 6.4.2 above and para 6.4.12 below.

³⁷⁶ See Ch 5 para 5.4.6 above. See also Ch 7 para 7.4.8 below and Ch 8 para 8.4.6 below for similar prosecutorial authorities in the other comparative jurisdictions.

³⁷⁷ See FATF (2018) *UK Mutual Evaluation Report* 66; HM Treasury (2020) *National Risk Assessment Report* 21.

³⁷⁸ See HM Treasury (2020) *National Risk Assessment Report* 21.

³⁷⁹ See FATF (2018) *UK Mutual Evaluation Report* 72.

³⁸⁰ See www.cps.gov.uk [Accessed on 3 June 2022].

³⁸¹ Ibid.

³⁸² Ibid.

crimes by collaborating with investigators at an early stage.³⁸³ Although this strategy does not specifically address TBML in trade-finance instruments, its 'economic-crime' nature is likely to encompass TBML. However, to address TBML would require the expertise and the will of the CPS officials to target this type of money laundering.

In order to effectively combat economic crime, a multi-agency approach is required and the CPS plays a significant part in this regard through the NECC.³⁸⁴ The CPS believes that a co-ordinated approach both with domestic and international partners is necessary to successfully tackle organised crime in England.³⁸⁵

6.4.9 Conclusion

The CPS is one of the prosecuting authorities in England besides the SFO and the FCA.³⁸⁶ It prosecutes all forms of crime, including money laundering. In dealing with money-laundering cases, the CPS receives cases from law enforcement agencies, the NCA and HMRC for prosecution. The CPS has not reported any successful prosecution of any case of TBML in trade-finance instruments. However, it is probable that the prosecution of TBML in trade-finance transactions is likely to be under its broad function of prosecuting money laundering in general. The CPS also indirectly contribute in the fight against TBML through its participation in various platforms where AML initiatives that may target TBML are taken such as the NECC.³⁸⁷ With specialised training for both law enforcement agencies and the CPS, TBML-related cases may be investigated effectively and subsequently prosecuted with moderate rates of success.

6.4.10 The Serious Fraud Office (SFO)

The SFO was established in 1988 through the Criminal Justice Act, 1987.³⁸⁸ The SFO is part of the English criminal justice system, which investigates and prosecutes high-

³⁸³ Ibid.

³⁸⁴ Ibid.

³⁸⁵ Ibid.

³⁸⁶ See para 6.4.8 above. See also para 6.4.10 and para 6.5.2 below.

³⁸⁷ See para 6.4.8 above.

³⁸⁸ See s 1 of the Criminal Justice Act, 1987. See also Mark Pieth & Gemma Aiolfi (eds) *A Comparative Guide to Anti-Money Laundering: A Critical Analysis of Systems in Singapore, Switzerland, the UK and the USA* (2004) (hereinafter 'Pieth & Aiolfi *Anti-Money Laundering*') 275; HM Treasury (2020) *National Risk Assessment Report* 19.

level fraud, bribery, and corruption in response to the Lord Roskill Report.³⁸⁹ Its operations are supervised by the Attorney General's office.³⁹⁰ Under the South African AML regime, the SAPS is the closest law enforcement authority to the SFO in terms of its mandate.³⁹¹

The SFO investigates suspected cases of economic crimes, which it reasonably believes may harm the public, the economy or the reputation and integrity of England as an international financial centre.³⁹² This broad objective may include the SFO's role in combatting TBML in trade-finance instruments indirectly, which also has the potential to harm a country's economy if left unchecked.³⁹³

In addition to its twin roles of investigating and prosecuting crimes, the SFO also aims to recover the proceeds of crime through its Proceeds of Crime and International Assistance Division.³⁹⁴ The idea behind the recovery of the proceeds of crime is to prevent criminals from benefiting from their illicit activities and to compensate the victims of crime. Similar to money laundering in general, TBML through trade-finance instruments results in the proceeds of crime being diluted with legitimate economies. Thus, using its recovery powers, the SFO may also contribute to the confiscation of such proceeds and discourage criminals from engaging in TBML. To carry out the recovery process, the SFO relies on powers bestowed upon it through the Proceeds of Crime Act 2002 and Criminal Justice Act 1987.³⁹⁵ Such powers involve seeking confiscation orders against those convicted of crime, enforcing such orders and obtaining compensation orders for the victims of crime.³⁹⁶ The SFO also has powers to obtain orders for civil forfeiture in the High Court against property constituting the

³⁸⁹ The Lord Roskill Report is a product of the Fraud Trials Committee which was established by the English government in 1983 to find ways of fighting complex cases of fraud. The report was published in 1986 and one of its major recommendation was the establishment of a specialised organisation for the investigation and prosecution of fraud cases, see Pieth & Aiolfi *Anti-Money Laundering* 275; HM Treasury (2020) *National Risk Assessment Report* 21-22. See also <https://www.sfo.gov.uk/about-us/> [Accessed on 25 May 2022].

³⁹⁰ See Pieth & Aiolfi *Anti-Money Laundering* 275.

³⁹¹ See Ch 5 para 5.4.8 above. See also Ch 7 para 7.4.10 below and Ch 8 para 8.4.8 below for similar law enforcement authorities in the other comparative jurisdictions.

³⁹² See <https://www.sfo.gov.uk/about-us/> [Accessed on 25 May 2022].

³⁹³ See Ch 2 para 2.5 et seq above for the general consequences of TBML to a country's economy.

³⁹⁴ See HM Treasury (2020) *National Risk Assessment Report* 19.

³⁹⁵ *Idem* at 21-22. See also s 2A (2) and (3) of the POCAE and s 1 (3) and (4) of the Criminal Justice Act 1987.

³⁹⁶ See HM Treasury (2020) *National Risk Assessment Report* 21-22.

proceeds of criminal activities, even if a criminal conviction is absent.³⁹⁷ In carrying out its role in the recovery of the proceeds of crime, the SFO relies on mutual legal assistance from other jurisdictions across the world.³⁹⁸

The SFO also collaborates with other law enforcement authorities such as the NCA's Economic Crime Command, the HMRC, and the FCA to tackle the challenge of serious organised crime in England.³⁹⁹ Together with other appropriate agencies such as, the FCA, and the HMRC, the SFO is also a member of the National Economic Crime Centre.⁴⁰⁰

6.4.11 Conclusion

The SFO is a fraud investigation and prosecuting entity in England.⁴⁰¹ It collaborates with other AML authorities such as the NCA and HMRC.⁴⁰² Besides the CPS and the FCA, it also has prosecutorial powers on matters that border on fraud.⁴⁰³ Being a fraud-combatting organisation, the SFO has significance in the control of money laundering, especially TBML through trade-finance instruments. Generally, TBML relies on fraudulent documents and yet fraud is a predicate offence for money laundering in England.⁴⁰⁴ The role of the SFO in mutual legal assistance places it at the centre of combatting TBML in trade-finance instruments in that it may be used to recover proceeds of money laundering related to TBML activities. Being a member of the NECC, the SFO is also part to the concept of information sharing which is relevant in the combatting of TBML in trade-finance transactions.⁴⁰⁵

6.4.12 His Majesty's Revenue and Customs (HMRC)

HMRC is the authority responsible for supervising dealers in high-value goods and a variety of other businesses in England, such as estate agents, trusts or service-

³⁹⁷ See <https://www.sfo.gov.uk/about-us/> [Accessed on 25 May 2022].

³⁹⁸ See HM Treasury (2020) *National Risk Assessment Report* 21-22.

³⁹⁹ See <https://www.sfo.gov.uk/about-us/> [Accessed on 25 May 2022].

⁴⁰⁰ Ibid.

⁴⁰¹ See para 6.4.10 above.

⁴⁰² See para 6.4.3, para 6.4.4 above and para 6.2.12 below.

⁴⁰³ See again para 6.4.10 above.

⁴⁰⁴ See para 6.3.2.4 above and Ch 2 para 2.3 et seq above.

⁴⁰⁵ See again para 6.4.10 above.

providing companies not under the purview of the FCA or a professional body.⁴⁰⁶ It has the authority to demand that records or information be produced, as well as to summon anyone to come and answer questions.⁴⁰⁷ HMRC also has authority to suspend or cancel a firm's registration or issue sanctions for non-compliance with its supervisory guidelines.⁴⁰⁸ Under the South African AML regime, the revenue and customs authority closer to HMRC is the SARS.⁴⁰⁹

In terms of operational structure, HMRC functions through two main divisions namely, the Fraud Investigation Service and the Risk and Intelligence Service.⁴¹⁰ First, the Fraud Investigation Service carries out civil and criminal investigations into tax offences such as tax fraud and evasion.⁴¹¹ These are also primary offences for money laundering, including TBML in trade-finance instruments. Thus, under the MLRs, HMRC is responsible for money-laundering control in its revenue-collection activities.⁴¹² The WCO and the Egmont Group have both noted the significant role that customs authorities play in combatting TBML in their respective countries.⁴¹³ Therefore, as a member of the WCO, HMRC has an obligation to curb TBML through trade-finance instruments in England. To stamp its authority, HMRC can also press charges against entities under its supervision for breaching the AML provisions under the POCAE and the MLRs.⁴¹⁴

Secondly, the Risk and Intelligence Service is responsible for the collection of information, the development of intelligence, and the provision of strategic and tactical understanding of tax-related money-laundering concerns.⁴¹⁵ It then distributes this information to other local and international tax and customs authorities, as well as law enforcement partners, provided the necessary disclosure criteria have been met.⁴¹⁶

⁴⁰⁶ See reg 7(1) (c) (i)–(vii) of the MLRs 2017. See FATF (2018) *UK Mutual Evaluation Report* 25.

⁴⁰⁷ See HM Treasury (2020) *National Risk Assessment Report* 15-16.

⁴⁰⁸ *Ibid.*

⁴⁰⁹ See Ch 5 para 5.4.10 above. See also Ch 7 para 7.4.12 below and Ch 8 para 8.4.10 below for similar customs authorities with AML roles to play in the other comparative jurisdictions.

⁴¹⁰ See HM Treasury (2020) *National Risk Assessment Report* 15-16.

⁴¹¹ *Ibid.*

⁴¹² See reg 7(1)(c) of the MLRs 2017; HM Treasury (2020) *National Risk Assessment Report* 15-16.

⁴¹³ See Ch 4 para 4.4.3 and 4.4.4 respectively, above.

⁴¹⁴ See reg 76 of the MLRs 2017. See also HM Treasury (2020) *National Risk Assessment Report* 15-16.

⁴¹⁵ See HM Treasury (2020) *National Risk Assessment Report* 19-20.

⁴¹⁶ *Ibid.*

Besides the JMLSG *Sectoral Guidance Notes*, HMRC also publishes guidance notes for institutions under its AML supervision. The guidance notes are similar to the ones published by the JMLSG in many respects.⁴¹⁷

In the NCA's *SARs in Action Magazine*, HMRC notes that it is developing an action plan aimed at minimising the threat of TBML in its operations.⁴¹⁸ The action plan will be achieved through three strategies. First through training staff about TBML and how HMRC's processes are likely to be affected by this problem.⁴¹⁹ Secondly, by engaging domestic and international stakeholders.⁴²⁰ This would likely mean engaging other revenue authorities across the world and the WCO on TBML-related matters. Thirdly, collaborating with the public and private sector organisations in sharing information on how to combat TBML. In pursuit of this latter strategy, the HMRC is planning to host a summit on TBML in the 2023/2024 period for its partners to increase awareness about TBML.⁴²¹

6.4.13 Conclusion

HMRC is the revenue-collecting authority in England.⁴²² It is the AML supervisory body for businesses not under the purview of the FCA.⁴²³ The revenue authority has two important units responsible for fighting tax-related offences, namely the Fraud Investigation Service and the Risk and Intelligence Service.⁴²⁴ These units could be useful in the combatting of TBML through trade-finance transactions if HMRC directs its efforts towards the challenge.

In conducting its activities, HMRC collaborates with the NCA and other supervisory bodies in England to combat money laundering. Its role is significant in fighting TBML in trade-finance instruments in that the organisation is responsible for revenue and customs, which are some of the affected elements in TBML operations.⁴²⁵ The FATF

⁴¹⁷ See Simpson & Powell 'Practical Implementation of Regulations and Rules' 138.

⁴¹⁸ See Leader (Issue 17-October 2022) *SARs in Action Magazine* 14.

⁴¹⁹ Ibid.

⁴²⁰ Ibid.

⁴²¹ Ibid.

⁴²² See para 6.4.12 above.

⁴²³ See again para 6.4.12 above.

⁴²⁴ See again para 6.4.12 above.

⁴²⁵ See again Ch 2 para 2.3 et seq above.

and the WCO have both indicated that tax and customs authorities have a role to play against TBML in their respective jurisdictions.⁴²⁶ Thus, HMRC's investigative functions into tax-related offences feed directly into its role of combatting TBML in trade-finance transactions.

6.5 SOME INITIATIVES BY THE FINANCIAL-SECTOR BODIES AGAINST TBML

6.5.1 General

Certain institutions in the financial sector of England have significant roles to play in combatting TBML in trade-finance transactions. Such institutions include the Financial Conduct Authority,⁴²⁷ and the Joint Money Laundering Steering Group,⁴²⁸ whose roles compliment those of other bodies such as the NCA,⁴²⁹ and HMRC.⁴³⁰ I have selected these institutions for discussion under this part of study due to their relevance in the combatting of TBML in trade-finance instruments.

6.5.2 The Financial Conduct Authority (FCA)

The FCA was established in April 2013 and replaced the Financial Services Authority.⁴³¹ The FCA regulates the conduct of, and prudentially supervises financial institutions in England.⁴³² Its equivalent regulatory authority under the South African AML regime is the SARB's Prudential Authority.⁴³³ Besides the CPS and the SFO, the FCA also has authority to prosecute certain specified criminal offences in England for violating AML laws.⁴³⁴ It also sets specific standards for businesses in the financial sector.⁴³⁵ The FCA believes that financial markets need to be fair and it strives to provide consumers with adequate protection against unfair dealing with financial

⁴²⁶ See Ch 4 para 4.4.3 above.

⁴²⁷ See para 6.5.2 below.

⁴²⁸ See para 6.5.4 below.

⁴²⁹ See again para 6.4.2 above.

⁴³⁰ See again para 6.4.12 above.

⁴³¹ See s 1 A (1) of the Financial Services Act, 2012; Cox *Handbook of AML* 83. See <https://www.fca.org.uk/about/the-fca> [Accessed on 27 May 2022].

⁴³² See Cox *Handbook of AML* 83; <https://www.fca.org.uk/about/the-fca> [Accessed on 27 May 2022]. See also reg 7(1) (a) (i)–(iii) (vii) of the MLRs 2017. See FATF (2018) *UK Mutual Evaluation Report* 25; HM Treasury (2020) *National Risk Assessment Report* 16.

⁴³³ See Ch 5 para 5.5.2 above. See also Ch 7 para 7.5.2 and 7.5.4 below and Ch 8 para 8.5.2 below for similar banking-sector regulatory authorities in the other comparative jurisdictions.

⁴³⁴ See ss 401 and 402 of the FSMA 2000. See also HM Treasury (2020) *National Risk Assessment Report* 20 and para 6.4.8 above.

⁴³⁵ See Cox *Handbook of AML* 83; <https://www.fca.org.uk/about/the-fca> [Accessed on 27 May 2022].

institutions.⁴³⁶ It also works alongside the Prudential Regulation Authority (PRA), which is the prudential regulator of banks and other financial institutions.⁴³⁷ As the conduct regulator, the FCA is primarily responsible for financial-crime issues, including money laundering.⁴³⁸

The Financial Services and Markets Act 2000 (FSMA) and the Financial Services Act, 2012, define the mandate of the FCA.⁴³⁹ It also derives supervisory powers from the MLRs, which are specific to AML regulation.⁴⁴⁰ In line with its powers, as a designated supervisory authority, the FCA has consistently pursued financial institutions for money-laundering violations.⁴⁴¹ The FCA must act reasonably in carrying out its general functions under the FSMA in order to advance one or more of its operational objectives.⁴⁴²

One of the FCA's objectives is the 'integrity objective, which aims to safeguard and strengthen the soundness of England's financial system.'⁴⁴³ The integrity objective intends to guarantee that the financial system is not abused through money-laundering activities.⁴⁴⁴ To achieve this the FCA is required under the MLRs to consider the importance of taking action to limit the extent to which financial institutions may be used for financial-crime purposes.⁴⁴⁵ Under the FCA and PRA's Memorandum of Agreement, the PRA is required to notify the FCA of any evidence that it believes may materially affect the FCA's financial-crime enforcement function.⁴⁴⁶

The FCA is alive to the issue of TBML in trade-finance instruments. Its industry guidance note of 2013 titled *Banks' Control of Financial-Crime Risks in Trade Finance*

⁴³⁶ See <https://www.fca.org.uk/about/the-fca> [Accessed on 27 May 2022].

⁴³⁷ See Srivastava 'UK Law and Practice' 63; <https://www.fca.org.uk/about/the-fca> [Accessed on 27 May 2022].

⁴³⁸ See Srivastava 'UK Law and Practice' 104.

⁴³⁹ See Part 1A of the Financial Services Act 2012 generally. See also HM Treasury (2020) *National Risk Assessment Report* 16; FATF (2018) *UK Mutual Evaluation Report* 30.

⁴⁴⁰ See reg 7(a) of the MLRs 2017. See also FATF (2018) *UK Mutual Evaluation Report* 30.

⁴⁴¹ See reg 76 of the MLRs 2017. See also Leong (2007) 10 *JMLC* 140 at 142; Cox *Handbook of AML* 92; Chhina (2016) 19 *JMLC* 158 at 161; and Srivastava 'UK Law and Practice' 118.

⁴⁴² See Simpson & Powell 'Practical Implementation of Regulations and Rules' 142.

⁴⁴³ See s 1 B (3)(b) of the Financial Services Act, 2012. See also Cox *Handbook of AML* 84; Srivastava 'UK Law and Practice' 63.

⁴⁴⁴ See s 1 D (2) and 1H (3)(c) of the Financial Services Act, 2012. See also Cox *Handbook of AML* 84; Srivastava 'UK Law and Practice' 63-64.

⁴⁴⁵ See reg 104 of the MLRs 2017.

⁴⁴⁶ See s 3D and 3E of the Financial Services Act, 2012 generally.

(*Financial-Crime Risks Report*) examined the level of preparedness of English banks against TBML in trade-finance instruments.⁴⁴⁷ The *Financial-Crime Risks Report* mainly explores two trade-finance instruments and their vulnerability to TBML. These are the documentary credits and the documentary collections.⁴⁴⁸ The FCA notes that banks engaged in trade-finance transactions could be affected by TBML if they do not have appropriate AML systems and controls in place.⁴⁴⁹

One of the major findings of the FCA in the *Financial-Crime Risks Report* is that a few banks in England have carried out a specific risk assessment of TBML in their trade-finance transactions.⁴⁵⁰ In addition, the FCA notes that banks are more prepared to deal with the issue of sanctions rather than TBML in trade-finance instruments.⁴⁵¹ It is also a further finding of the FCA in the *Financial-Crime Risks Report* that almost half of the banks surveyed in England lacked a defined protocol for handling TBML in trade-finance transactions.⁴⁵² Consequently, such banks fail to implement satisfactory controls to identify suspicious transactions indicating the occurrence of TBML.⁴⁵³ The study also found out that both trading and compliance staff within various banks lacked understanding of TBML through trade-finance instruments.⁴⁵⁴ In conclusion, the FCA *Financial-Crime Risks Report* outlines examples of good and poor practices in managing the risks of TBML in trade-finance transactions.⁴⁵⁵ The FCA also adds a list of red-flag indicators for TBML and encourages banks to use the indicators in checking for potential TBML in trade-finance transactions.⁴⁵⁶ It puts the TBML red-flag indicators into four categories namely, customer, document, payment, and transaction red flags. The FCA, however, advises that the list of red flags is not exhaustive and is intended to guide banks in managing the risk of TBML in their trade-finance services.⁴⁵⁷

⁴⁴⁷ See FCA (2013) *Financial-Crime Risks Report* generally. See also Srivastava 'UK Law and Practice' 120; Simpson & Powell 'Practical Implementation of Regulations and Rules' 138.

⁴⁴⁸ See FCA (2013) *Financial-Crime Risks Report* 45-47.

⁴⁴⁹ *Idem* at 4. See also Simpson & Powell 'Practical Implementation of Regulations and Rules' 138; Menz (2019) 22 *JMLC* 614 at 617.

⁴⁵⁰ See FCA (2013) *Financial-Crime Risks Report* 4. See also Menz (2019) 22 *JMLC* 614 at 617.

⁴⁵¹ See FCA (2013) *Financial-Crime Risks Report* 4. See also Menz (2019) 22 *JMLC* 614 at 618.

⁴⁵² See FCA (2013) *Financial-Crime Risks Report* 5. See also Menz (2019) 22 *JMLC* 614 at 617.

⁴⁵³ See FCA (2013) *Financial-Crime Risks Report* 5.

⁴⁵⁴ See Menz (2019) 22 *JMLC* 614 at 618.

⁴⁵⁵ See FCA (2013) *Financial-Crime Risks Report* 42-45.

⁴⁵⁶ *Idem* at 45-48.

⁴⁵⁷ *Ibid.*

6.5.3 Conclusion

The FCA is an AML supervisory authority for banks in England.⁴⁵⁸ Besides the CPS and the SFO, the FCA also investigates and prosecutes money-laundering cases in England.⁴⁵⁹ The organisation imposes fines and penalties on financial institutions for violations of AML regulations. The FCA also publishes AML industry guidance reports for its members. In this regard, it has published the *Financial-Crime Risks Report* to assist banks in implementing their AML obligations under the MLRs in the context of TBML in trade-finance instruments.⁴⁶⁰ The FCA is also a member of the JMLIT and the NECC where it participates in the exchange of information relevant to the combatting of TBML through trade-finance transactions.⁴⁶¹

6.5.4 The Joint Money-Laundering Steering Group (JMLSG)

The JMLSG is a private-sector organisation, which consists of English trade organisations within the financial services sector.⁴⁶² UK Finance, which is formerly the British Bankers Association, chairs it.⁴⁶³ There is no equivalent organisation to the JMLSG under the South African AML regime.⁴⁶⁴

The objective of the JMLSG is to provide practical guidance in the interpretation of MLRs.⁴⁶⁵ It undertakes this through issuance of a sectoral guidance. HM Treasury may approve any guidance issued by an AML supervisory authority or other relevant

⁴⁵⁸ See para 6.5.2 above.

⁴⁵⁹ See para 6.4.8 and para 6.4.10 above.

⁴⁶⁰ See again para 6.5.2 above.

⁴⁶¹ See again para 6.5.2 above.

⁴⁶² See Cox *Handbook of AML* 93; Waleed Alhosani *Anti-Money Laundering: A Comparative and Critical Analysis of the UK and UAE's Financial Intelligence Units* (2016) (hereinafter 'Alhosani *Anti-Money Laundering*') 222. These members are Association of British Insurers; the Association of British Credit Unions Limited; Association for Financial Markets in Europe; Association of Foreign Banks; British Venture Capital Association; Building Societies Association; Electronic Money Association; European Venues and Intermediaries Association; Finance & Leasing Association; The Investment Association; Loan Market Association; The Personal Investment Management and Financial Advice Association; The Investing and Savings Alliance and UK Finance, see www.jmlsg.org.uk [Accessed on 24 October 2022].

⁴⁶³ See Cox *Handbook of AML* 93; Leong (2007) 10 *JMLC* 140 at 144. For a discussion of UK Finance and its AML role in the context of TBML in trade-finance instruments, see para 6.5.6 below.

⁴⁶⁴ See Ch 5 above generally.

⁴⁶⁵ See Leong (2007) 10 *JMLC* 140 at 144.

institution in line with the provisions of the POCAE and the MLRs.⁴⁶⁶ The most long-standing and approved guidance aimed at the financial sector is the one issued by the JMLSG.⁴⁶⁷ This guidance was first issued in 1990 and has been amended and updated several times since then.⁴⁶⁸ The JMLSG guidance is meant for those institutions under the regulation of the FCA and its members who are not necessarily regulated by the FCA.⁴⁶⁹ Financial institutions which are neither under the purview of the FCA nor the JMLSG may also find value in the guidance as good industry practice.⁴⁷⁰

The JMLSG guidance has four purposes. First, it outlines the AML requirements for the financial sector in England.⁴⁷¹ Secondly, it interprets AML laws such as the POCAE and the MLRs and gives direction on how to implement these laws.⁴⁷² When deciding whether a financial institution has complied with the requirements of the MLRs, the court may consider any relevant guidance from a supervisory or regulatory authority such as the JMLSG's guidance.⁴⁷³

Thirdly, the guidance encourages the use of risk-based, proportionate measures, which constitute acceptable industry practice in AML operations.⁴⁷⁴ Fourthly, the JMLSG guidance assist financial institutions in creating and putting into place AML procedures and controls that are specific to their business.⁴⁷⁵

The JMLSG guidance is not legally binding, but the POCAE requires a court to take into consideration compliance with industry guidance in the determination of whether

⁴⁶⁶ See *Cox Handbook of AML* 93; Srivastava 'UK Law and Practice' 65. See also reg 19(5) of the MLRs 2017.

⁴⁶⁷ See Alhosani *Anti-Money Laundering* 222; JMLSG (2020) *Sectoral Guidance* para 14.

⁴⁶⁸ See Leong (2007) 10 *JMLC* 140 at 144; Alhosani *Anti-Money Laundering* 222; Srivastava 'UK Law and Practice' 65. See also www.jmlsg.org.uk [Accessed on 2 June 2022].

⁴⁶⁹ See Alhosani *Anti-Money Laundering* 222; JMLSG (2020) *Sectoral Guidance* para 14.

⁴⁷⁰ See Alhosani *Anti-Money Laundering* 222; Simpson & Powell 'Practical Implementation of Regulations and Rules' 139; and JMLSG (2020) *Sectoral Guidance* para 15.

⁴⁷¹ See *Cox Handbook of AML* 93; Simpson & Powell 'Practical Implementation of Regulations and Rules' 139; and JMLSG (2020) *Sectoral Guidance* para 2.

⁴⁷² See Leong (2007) 10 *JMLC* 140 at 142; Alhosani *Anti-Money Laundering* 222; Simpson & Powell 'Practical Implementation of Regulations and Rules' 139; and JMLSG (2020) *Sectoral Guidance* para 2.

⁴⁷³ See reg 86(2) (b) of the MLRs 2017. See also Srivastava 'UK Law and Practice' 115 and para 6.5.4 below.

⁴⁷⁴ See JMLSG (2020) *Sectoral Guidance* para 2.

⁴⁷⁵ See Leong (2007) 10 *JMLC* 140 at 144; Alhosani *Anti-Money Laundering* 222; and JMLSG (2020) *Sectoral Guidance* para 2.

or not a regulated institution has complied with the AML laws.⁴⁷⁶ In that regard, a financial institution's failure to comply with the JMLSG guidance, is not a breach of the MLRs.⁴⁷⁷ However, a financial institution must prove that it has largely complied with the MLRs through following the JMLSG guidance as part of the proof.⁴⁷⁸ The JMLSG guidance allows some form of flexibility in implementing its recommendations, which should be according to the particular circumstances of each financial institution.⁴⁷⁹

Significant to the issue under investigation in this study, is the fact that the JMLSG issued a guidance report to banks aimed at assisting financial institutions to detect TBML in documentary credits and documentary collections.⁴⁸⁰ Under Part II, section 15 of the guidance report, the JMLSG addresses the risk of TBML in trade-finance instruments.⁴⁸¹ The JMLSG notes that the major TBML risk in using trade-finance instruments is that documents may falsely be generated to justify the movements of illegal funds across jurisdictions.⁴⁸²

The JMLSG recommends a few best industry practices against TBML in trade-finance transactions for financial institutions. The organisation recommends the adoption of enhanced due diligence in all transactions that display higher-risk characteristics of TBML than normal business as per the customer's transaction history.⁴⁸³ The JMLSG further recommends even checking for outside public resources such as the ICC's IMB for warning signs that may be used to screen transactions for TBML.⁴⁸⁴ It is important to design the enhanced due diligence system in ways that help a financial institution to understand the type of the transaction, legitimacy of the payment involved and the appropriateness of the transaction structure.⁴⁸⁵ Furthermore, the JMLSG recommends that financial institutions train staff on TBML issues to raise awareness and alertness

⁴⁷⁶ See Cox *Handbook of AML* 93; Leong (2007) 10 *JMLC* 140 at 144; and JMLSG (2020) *Sectoral Guidance* para 27. See also s 330(8) of the POCAE.

⁴⁷⁷ Srivastava 'UK Law and Practice' 65.

⁴⁷⁸ See reg 86(2)(b) of the MLRs 2017. See also Cox *Handbook of AML* 93; Srivastava 'UK Law and Practice' 65.

⁴⁷⁹ See Simpson & Powell 'Practical Implementation of Regulations and Rules' 140; JMLSG (2020) *Sectoral Guidance* para 3.

⁴⁸⁰ See JMLSG (2020) *Sectoral Guidance* 153 para 15.5.

⁴⁸¹ *Idem* at 153 et seq.

⁴⁸² *Ibid.* See also Ch 3 para 3.3 et seq above.

⁴⁸³ See JMLSG (2020) *Sectoral Guidance* 163. See also para 6.3.3.4 above.

⁴⁸⁴ See JMLSG (2020) *Sectoral Guidance* 163. See also Ch 4 para 4.4.2.4.1 above.

⁴⁸⁵ See JMLSG (2020) *Sectoral Guidance* 163. See again para 6.3.3.4 above.

for such risks in trade-finance transactions.⁴⁸⁶ The training should be directed at staff who are directly involved in trade-finance transactions.⁴⁸⁷ The training may also use TBML red-flag indicators from the FATF to help staff better understand the nature and variety of risks of TBML.⁴⁸⁸

6.5.5 Conclusion

The JMLSG is a private sector organisation, which enjoys statutory recognition under English laws.⁴⁸⁹ It issues industry-guidance reports for its members who are predominantly financial institutions. The JMLSG guidance reports must be taken into consideration by courts when deciding whether a financial institution has followed the provisions of the MLRs and the POCAE in England.⁴⁹⁰ One of its major contributions against TBML is the issuance of a guidance report for money-laundering control in the trade-finance sector.⁴⁹¹ Through the guidance, the JMLSG proposes industry best practices that financial institutions may use in mitigating the risk of TBML in trade-finance instruments. The JMLSG guidance note also assists banks on how to apply the MLRs and the POCAE in trade-finance transactions where TBML may be a threat.⁴⁹² These are important contributions against TBML in trade-finance transactions in a country where the AML legislation is silent on how to handle such a problem.

6.5.6 UK Finance

UK Finance is a collective organisation for the banking and finance industry in England.⁴⁹³ The body represents roughly three hundred industry firms in the country. UK Finance seeks to enhance competitiveness, facilitate innovation, and give support to customers in the finance industry.⁴⁹⁴ The organisation carries out research, offers policy expertise and advocates for its members in the finance industry.⁴⁹⁵ The closest

⁴⁸⁶ See JMLSG (2020) *Sectoral Guidance* 165. See para 6.3.3.7 above.

⁴⁸⁷ See JMLSG (2020) *Sectoral Guidance* 165. See again para 6.3.3.7 above.

⁴⁸⁸ See JMLSG (2020) *Sectoral Guidance* 165. See also Ch 4 para 4.3.2 et seq above.

⁴⁸⁹ See para 6.5.4 above.

⁴⁹⁰ See again para 6.5.4 above.

⁴⁹¹ See again para 6.5.4 above.

⁴⁹² See again para 6.5.4 above.

⁴⁹³ See www.ukfinance.org.uk [Accessed on 27 May 2022].

⁴⁹⁴ Ibid.

⁴⁹⁵ Ibid.

organisation that resembles UK Finance under the South African AML regime is the BASA.⁴⁹⁶

UK Finance is a product of a merger of July 2017 between itself, the British Bankers' Association⁴⁹⁷ and other organisations.⁴⁹⁸ The organisation has many objectives, one of which is the combatting of money laundering.⁴⁹⁹ UK Finance seeks to promote transparency in England's financial-services sector by carrying out three functions.⁵⁰⁰ First, it leads the financial sector industry to collectively fight money laundering, and corruption in England.⁵⁰¹ Secondly, UK Finance protects customers and its members from all forms of fraud.⁵⁰² Thirdly, it makes it its responsibility to raise awareness of the social cost and impact of financial crime, including TBML in England.⁵⁰³

UK Finance also acts as an industry authoritative voice in order to influence change at regulatory and political levels both in England and globally.⁵⁰⁴ Through its Information and Intelligence Unit, UK Finance operates a central information-sharing hub for fraud and other forms of economic crimes for the benefit of the financial sector in England.⁵⁰⁵ The organisation offers support to public-private AML initiatives in England through representing its membership on the JMLIT platform.⁵⁰⁶ It also influences legislative reforms in the country such as amendments to the MLRs in 2017.⁵⁰⁷

In partnership with the Home Office, HM Treasury, and other stakeholders, UK Finance published the national *Economic Crime Plan* in 2019.⁵⁰⁸ The *Economic Crime Plan* represents a shared vision among the participant stakeholders to defend England

⁴⁹⁶ See Ch 5 para 5.5.4 above. See also Ch 7 para 7.5.6 below and Ch 8 para 8.5.4 below for similar associations in the other comparative jurisdictions.

⁴⁹⁷ The British Bankers' Association was established in 1919 and it was a major trade association for the banking and financial services industry, see Pieth & Aiolfi Anti-Money Laundering 276.

⁴⁹⁸ The other organisations are Asset Based Finance Association, the Council of Mortgage Lenders, Financial Fraud Action UK, Payments UK and the UK Cards Association.

⁴⁹⁹ See Pieth & Aiolfi Anti-Money Laundering 276.

⁵⁰⁰ See www.ukfinance.org.uk [Accessed on 27 May 2022].

⁵⁰¹ Ibid.

⁵⁰² Ibid.

⁵⁰³ Ibid.

⁵⁰⁴ Ibid.

⁵⁰⁵ Ibid.

⁵⁰⁶ Ibid.

⁵⁰⁷ Ibid.

⁵⁰⁸ See HM Treasury (2020) *National Risk Assessment Report* 22.

against organised economic crime.⁵⁰⁹ The plan also aspires to protect the integrity of England's economy and promote legitimate-business activities.⁵¹⁰ The *Economic Crime Plan* is an action response to the FATF's recommendations in the 2018 mutual evaluation of England.⁵¹¹ Although the *Economic Crime Plan* does not directly address TBML in trade-finance instruments, it is a broad plan that could possibly be employed against complex financial crimes in general, including TBML in trade-finance transactions.

Generally, UK Finance is aware of the threat of TBML in trade-finance instruments to England's financial sector. It has, therefore, directly and indirectly contributed to efforts aimed at minimising the impact of TBML in the country. As part of its contribution, UK Finance is a member of the JMLSG, which has published a guidance note on managing the risk of TBML in trade-finance transactions.⁵¹² It has also been actively raising awareness about TBML through offering training on TBML-related topics.⁵¹³ In the production of the *Financial-Crime Risks Report*, UK Finance was consulted by the FCA.⁵¹⁴ Thus, it recommended to the FCA strategies on how to combat TBML in trade-finance instruments that are practical for the banking industry.⁵¹⁵

6.5.7 Conclusion

UK Finance is a significant organisation for the banking and finance industry in England.⁵¹⁶ It is a relevant player in the fight against TBML in trade-finance instruments through being a link between regulators and private-sector interests. Its ability to lobby and represent banking-sector interests is important in influencing certain positions taken by the regulator against financial institutions.⁵¹⁷ Its membership, in both the JMLIT and the JMLSG, is important in influencing changes desired by its constituency in the combatting of TBML in trade-finance instruments.⁵¹⁸ UK Finance has already contributed to the research findings of the FCA on TBML

⁵⁰⁹ Ibid.

⁵¹⁰ Ibid.

⁵¹¹ See HM Treasury (2020) *National Risk Assessment Report* 22.

⁵¹² See para 6.5.4 above.

⁵¹³ See www.ukfinance.org.uk [Accessed on 27 May 2022].

⁵¹⁴ See FCA (2013) *Financial-Crime Risks Report* 8 para 21.

⁵¹⁵ See Menz (2019) 22 *JMLC* 614 at 618.

⁵¹⁶ See para 6.5.6 above.

⁵¹⁷ See again para 6.5.6 above.

⁵¹⁸ See again para 6.5.6 above.

control in trade-finance transactions.⁵¹⁹ Given its strategic position in the banking and finance sector, it has the capacity to produce a position paper of its own on how to deal with the challenge of TBML in trade-finance instruments under English AML laws.

6.6 CONCLUSION

England has a robust AML system, which is generally in line with the FATF's *Recommendations*. In its 2018 *Mutual Evaluation Report*, the FAFT concludes that the country is quite aware of the money-laundering risks, which affect it.⁵²⁰ The evaluation report, however, does not address the challenge of TBML generally or TBML in trade-finance instruments in particular. This means there is still a need for the English AML authorities to improve on the aspect of TBML control.

Through the POCAE, England provides for the crime of money laundering. This piece of AML legislation does not specifically address types of money laundering, including TBML through trade-finance transactions.⁵²¹ However, the provision is broad enough to address even the challenge of TBML in trade-finance instruments. This is a good move in that complex and emerging forms of money laundering, including TBML, need not be combatted using new AML legislation where the current one can suffice. All that is required is to find ways of interpreting and guiding banks on how they can factor in TBML in trade-finance transactions under the laws.

In England, financial institutions are equally vital to the combatting of money laundering as they are in South Africa. They implement provisions of the MLRs and the POCAE. The MLRs largely provide for the preventive measures banks should adopt in dealing with money laundering.⁵²² These AML measures do not specifically address the problem of TBML in trade-finance instruments. This shortcoming is addressed by the FCA and the JMLSG. The two organisations provide guidance on how to apply the AML measures in the context of TBML in trade-finance transactions. The MLRs stipulate that courts should take into consideration industry guidance practices when deciding whether a financial institution has complied with the

⁵¹⁹ See again para 6.5.6 above.

⁵²⁰ See para 6.2 and 6.3 above.

⁵²¹ See again para 6.3 above.

⁵²² See para 6.3.4 above.

provisions of the law in combatting money laundering. Thus, both the JMLSG and the FCA have published industry guidance reports for their members directed at TBML in trade-finance instruments.⁵²³ In the absence of a specific recommendation from the FATF on TBML, the JMLSG and the FCA guidance reports on TBML in trade-finance transactions are a good practice, which is worthy emulation. The guidance reports fill in gaps that are missing in most jurisdictions regarding the proper way of dealing with TBML in trade-finance instruments. They provide guidance on how to use current AML legislation, which was designed, originally, for money laundering in general on emerging situations such as TBML in trade-finance instruments.

A robust AML institutional regime is necessary in the combatting of TBML in trade-finance instruments. England has a network of institutions dedicated towards the combatting of money laundering.⁵²⁴ Most of these institutions such as the FCA, CPS and the SFO have both investigating and prosecuting authorities on various crimes, including money laundering. Thus, England does not have a singular authority with prosecutorial powers. Although this may lead to duplication of responsibilities, it has the potential of increasing the effectiveness of investigations and prosecution of specialised crimes such as TBML in trade-finance instruments. The approach may result in law enforcement institutions becoming specialised and more efficient through dealing with similar matters repeatedly.

Effective information sharing is at the centre of England's AML regime. The country has a strong information-sharing strategy through various platforms aimed at achieving a coordinated response against money laundering in general. Through the JMLIT, law enforcement agencies, regulators, and financial institutions in England, converge and share AML information and strategies.⁵²⁵ The JMLIT has been commented by the FATF as a best example to use in the combatting of money laundering, including TBML in trade-finance instruments. Through its specialised expert groups, especially the TBML expert group, the JMLIT is able to research on trends and methods currently employed by organised crime groups in committing

⁵²³ See again para 6.3.4 above.

⁵²⁴ See para 6.4 et seq above.

⁵²⁵ See para 6.4.6 above.

TBML.⁵²⁶ The JMLIT model has since been replicated in many jurisdictions, including in South Africa, with different levels of success.⁵²⁷

The English AML regime has significant lessons for many jurisdictions, including South Africa, on how to deal with TBML in trade-finance transactions. In the comparative chapter, some of the learning points for South Africa will be highlighted on a relevant section-by-section discussion.⁵²⁸ This will become easier after a consolidated review of other jurisdictions in this study namely, the US and Singapore, which come immediately after this chapter, respectively.

⁵²⁶ See again para 6.4.6 above.

⁵²⁷ See para 5.4.4 above.

⁵²⁸ See Ch 9 below generally.

CHAPTER 7: THE CONTROL OF TBML IN TRADE-FINANCE INSTRUMENTS UNDER US LAW

7.1 GENERAL

In chapter 6 above, I discussed the English AML regime.¹ I also examined its possible application to the risk of TBML in trade-finance instruments.² The intention was to establish if the English AML regime had anything to offer to the South African AML regime insofar as the control of TBML in trade-finance instruments is concerned.³

This chapter analyses the US AML regime in order to assess the extent to which it could also be applied to TBML in trade-finance instruments.⁴ Furthermore, the intention is to establish if there are any points of departure, which could be adopted and applied in the context of South Africa.⁵ The chapter, therefore, commences with an overview of the status of TBML in the US.⁶ It then progresses to review the US AML legislation and its coverage of the offence of money laundering.⁷ The intention is to establish whether the US AML legislation adequately respond to the problem of TBML. Such a response can then be borrowed and adapted for the South African AML regime. The chapter further discusses the institutional response of US AML institutions to the challenge of TBML.⁸ In this regard, specific contributions against TBML, if any, of various institutions in the US are explored and analysed.

7.2 OVERVIEW OF THE THREAT OF TBML IN THE US

Despite having numerous AML laws and regulations, the US is still threatened by the problem of money laundering.⁹ This is partly because organised crime groups seem to be always ahead of law enforcement authorities in finding new ways of laundering dirty money. Thus, money-laundering methods keep revolving thereby rendering

¹ See Ch 6 above generally.

² See again Ch 6 above generally. See also Ch 3 para 3.3 et seq above.

³ See Ch 6 para 6.3 et seq above. See also Ch 5 above generally and Ch 3 para 3.3 et seq above.

⁴ See again Ch 3 para 3.3 et seq above.

⁵ See again Ch 5 above generally. See also Ch 9 and 10 below generally.

⁶ See para 7.2 below.

⁷ See para 7.3.2 et seq below.

⁸ See para 7.4 et seq below.

⁹ See Purkey (2010) 22 *Fla J Int'l L* 111 at 137; US Treasury (2022) *National Money Laundering Risk Assessment Report* 21.

current AML laws ineffective.¹⁰ This phenomenon also affects South Africa thereby necessitating the need to keep abreast of the developments in the global AML initiatives.¹¹ Both domestic and foreign proceeds of crime are usually laundered through the US, especially at the integration stage.¹² Many factors make the US attractive to organised crime groups for money-laundering purposes. Four of these factors can be mentioned. First, due to its advanced status, criminals are drawn to the US's financial system in order to take advantage of its interbank linkages and cross-border networks.¹³ Secondly, the dominance of the US in global commerce generates huge amounts of funds that pass through the US banking system.¹⁴ This makes it vulnerable to exploitation for money laundering.¹⁵ Thirdly, the global use and widespread dependence on the US dollar as a reserve currency also makes it appealing to professional money launderers wishing to transfer illegal funds internationally.¹⁶ Fourthly, the US has a complex regulatory regime composed of multiple supervisors both at the federal and state level. This creates problems in the implementation and supervision of AML requirements in the financial sector.¹⁷

The US government is aware of the increased threat of TBML to its economy and national security.¹⁸ Through the Bureau of International Narcotics and Law Enforcement Affairs,¹⁹ it identified TBML as a distinct money-laundering typology for

¹⁰ See Ch 2 para 2.2 et seq above for a general discussion of money laundering and the evolving nature of its methods.

¹¹ For a discussion of the South African AML regime, see Ch 5 para 5.2 above.

¹² See FATF (2016) *Anti-Money Laundering and Counter-Terrorist Financing Measures — United States*, Fourth Round Mutual Evaluation Report (hereinafter 'FATF (2016) *US Mutual Evaluation Report*') 18.

¹³ See Jerome P Tomas & William V Roppolo 'United States of America' in: Arun Srivastava, Mark Simpson & Richard Powell (eds) *International Law Guide to Money Laundering Law and Practice* (2019) (hereinafter Tomas & Roppolo 'United States of America') 1443; FATF (2016) *US Mutual Evaluation Report* 119.

¹⁴ See FATF (2016) *US Mutual Evaluation Report* 17-18; US Treasury (2022) *National Money Laundering Risk Assessment Report* 32-35.

¹⁵ See FATF (2016) *US Mutual Evaluation Report* 17-18; US Treasury (2022) *National Money Laundering Risk Assessment Report* 32-35.

¹⁶ See US Treasury (2022) *National Money Laundering Risk Assessment Report* 32-35; FATF (2016) *US Mutual Evaluation Report* 17-18.

¹⁷ See FATF (2016) *US Mutual Evaluation Report* 119. See also Saperstein, Sant & Ng 'The Failure of Anti-Money Laundering Regulation: Where is the Cost-Benefit Analysis?' (2015) 91 *Notre Dame L Rev Online* 1-10.

¹⁸ See Zdanowicz (2009) 5 *Review of Law & Economics* 855 at 857; McSkimming (2010) 15 *Deakin L Rev* 37 at 52; and Delston & Walls (2012) 44 *Case W Res Int'l L* 737 at 738. See also Miller *et al* *TBML: Overview and Policy Issues* 1.

¹⁹ The Bureau of International Narcotics and Law Enforcement Affairs is US state agency created in 1978 responsible for combatting drug trafficking and reducing the impact of international crime in the US, see <https://www.state.gov> [Accessed on 16 July 2023].

the first time in 2007 and designated it as a 'priority threat'.²⁰ In February 2010, the US financial intelligence unit, the Financial Crimes Enforcement Network (FinCEN), issued an advisory to the financial sector on the status of TBML in the context of BMPE.²¹ In that advisory, FinCEN noted that it has received more than 17 000 suspicious activity reports related to potential TBML in the US.²² In the 2015 national money-laundering risk assessment, the US Treasury also identifies TBML as one of the most challenging forms of money laundering to investigate.²³ Furthermore, in its 2018 and 2022 national money-laundering risk assessments, the US Treasury recognises TBML as posing a significant form of financial-crime risk in the US.²⁴ The money-laundering risk assessments also highlight the difficulties faced by US agencies in combatting TBML. For example, in the 2018 *National Money-Laundering Risk Assessment Report*, the US Treasury discovers that sometimes merchants would receive drug money as payment in exchange for trade items without reporting the transactions as suspicious to relevant authorities.²⁵ This complicates the investigation process since such businesses would not be subject to reporting obligations under the US AML legislation.

In its 2019 national drug threat assessment, the DEA²⁶ identifies the increased involvement of Chinese criminal groups in TBML worldwide, including in the US.²⁷ The DEA notes that these Chinese criminal groups use TBML schemes to repatriate money from the sale of illegal drugs in the US.²⁸ It is not clear whether such groups use trade-finance instruments in the schemes or not. Besides the Chinese illegal schemes, some TBML operations involve the creation of shell companies, which are then used to issue fraudulent invoices for consulting or provision of other professional

²⁰ See McSkimming (2010) 15 *Deakin L Rev* 37 at 52.

²¹ See Miller *et al* *TBML: Overview and Policy Issues* 1; USGAO (2019) *Countering Illicit Finance and Trade: US Efforts to Combat Trade-Based Money Laundering Report* 7.

²² See FinCEN (2010) *Advisory on TBML* 3 fn 12. See also Miller *et al* *TBML: Overview and Policy Issues* 1; USGAO (2019) *US Efforts to Combat TBML Report* 7.

²³ See Miller *et al* *TBML: Overview and Policy Issues* 1.

²⁴ USGAO (2020) *TBML: U S Government Has Worked with Partners to Combat the Threat, but Could Strengthen Its Efforts Report* 17.

²⁵ *Idem* at 29.

²⁶ The DEA is the US federal law enforcement agency, established in 1973 and responsible for enforcing laws on controlled substances in the US, see <https://www.dea.gov> [Accessed on 16 July 2023].

²⁷ USGAO (2020) *TBML Report* 14.

²⁸ *Ibid.*

services.²⁹ Such invoices are then used to justify the international transfer of funds as payments from the US to other countries.³⁰ These DEA findings, however, do not focus on TBML in trade-finance transactions. They only focus on the issue of TBML in its general or broad sense.³¹ In any case, it demonstrates the US government's awareness of the existence of the problem.

7.3 US AML LEGAL FRAMEWORK FOR TBML

7.3.1 General

The US is the first country in the world to emphasise on the need to combat money laundering.³² Its AML system is, therefore, mature and well developed.³³ The US has a federal government. Its legal authority is between three branches, namely, the District of Columbia, the federal government and the governments of the fifty states.³⁴ The federal government has the ability under the US Constitution to legislate on various matters of national significance such as interstate and international commerce.³⁵ Federal law supersedes state laws that conflict with it and covers issues that are deemed essential by the federal government such as banking and money laundering.³⁶ Since the combatting of money laundering is considered a significant national issue, most US money-laundering cases and pieces of legislation are at the federal level.³⁷ Thus, this chapter discusses the US AML regime from a federal law point of view.

²⁹ For general techniques used in various TBML schemes, see Ch 2 para 2.3.4 et seq and para 2.4.9 above.

³⁰ See USGAO (2020) *TBML Report* 17. See again Ch 2 para 2.3.4 et seq and para 2.4.9 above.

³¹ For the discussion of the concept of TBML in its general or broad sense, see Ch 2 para 2.3 et seq above.

³² See Reuter & Truman *Chasing Dirty Money: The Fight against Money Laundering* (2004) 49; Madinger *Money Laundering* 23; and Elwood Earl Sanders Jr & George Edward Sanders (2004) 'The Effect of the USA Patriot Act on the Money Laundering and Currency Transaction Laws' (2004) 4 *Richmond Journal of Global Law and Business* 47-88 at 53.

³³ See Cassara *Next Frontier* 202; FATF (2016) *US Mutual Evaluation Report* 23.

³⁴ See Scheb II & Sharma *An Introduction to the American Legal System* 4 ed (2015) 57; FATF (2016) *US Mutual Evaluation Report* 17.

³⁵ See Article I clause 8 of the US Constitution. See also Daniel H April & Angelo M Grasso 'Money Laundering' (2001) 38 *Annual Survey of White Collar Crime American Criminal Law Review* 1051-1080 at 1053; *Heart of Atlanta Motel v United States* 379 US 241 (1964); Scheb II & Sharma *The American Legal System* 57; and FATF (2016) *US Mutual Evaluation Report* 17.

³⁶ See Article VI clause 2 of the US Constitution. See also Kaplan *An Introduction to the American Legal System, Government and Constitution* (2015) 28; FATF (2016) *US Mutual Evaluation Report* 17.

³⁷ See Reuter & Truman *Chasing Dirty Money* 54; FATF (2016) *US Mutual Evaluation Report* 23. See also *Barnett Bank of Marion County, NA v Nelson* (517 US 25 (1996)).

The US has built a strict regulatory framework in order to combat the risk of money laundering.³⁸ Through regulatory and institutional approaches, the US has devoted a substantial amount of resources towards the fighting of TBML.³⁹ The Currency and Foreign Transactions Reporting Act of 1970 which is also known as the Bank Secrecy Act (BSA)⁴⁰ as amended by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act),⁴¹ and detailed sector-specific implementing regulations, form the foundation of the US AML regime.⁴² TBML through trade-finance instruments is tackled under the BSA and the MLCA of 1986,⁴³ among other relevant US AML laws.⁴⁴ The BSA requires banks to collect and retain records of customer transactions, to verify customers' identities at the time of account opening, maintain AML programmes and report suspicious transactions, among other things.⁴⁵ The prosecution of offences involving money laundering, including TBML in trade-finance transactions is mainly done under the MLCA of 1986.⁴⁶

7.3.2 Overview of AML Legislation in the US

7.3.2.1 General

The US AML framework is disjointed, with various statutes and regulations containing provisions that relate to money-laundering offences.⁴⁷ Thus, the AML system is made up of two sets of legislation, namely, the criminal AML legislation and the BSA and its accompanying regulations.⁴⁸ Generally, the criminal AML legislation is intended to

³⁸ See Tomas & Roppolo 'United States of America' 1443.

³⁹ See McSkimming (2010) 15 *Deakin L Rev* 37 at 52.

⁴⁰ See para 7.3.2.2 below, for a brief discussion of this Act.

⁴¹ See para 7.3.2.4 below, for a brief discussion of this Act.

⁴² See FATF (2016) *US Mutual Evaluation Report* 31.

⁴³ See para 7.3.2.3 below.

⁴⁴ See USGAO (2020) *TBML Report* 9.

⁴⁵ Ibid. For an expansive discussion of the US preventive AML measures, see para 7.3.4 et seq below.

⁴⁶ See USGAO (2020) *TBML Report* 10. For a brief review of the MLCA and the offence of money laundering in the US, see para 7.3.2.3 below.

⁴⁷ See Tomas & Roppolo 'United States of America' 1458. For example, the Bank Secrecy Act of 1970, the Money Laundering Control Act of 1986, the US PATRIOT Act of 2001, and the Anti-Money Laundering Control Act of 2020, all partly deal with money-laundering issues in the US in different but complimentary ways, see para 7.3.2.2 et seq below.

⁴⁸ See Adam S Coto 'Customer Due Diligence: FinCEN and the Beneficial Ownership Requirement for Legal Entity Customers' (2016) 20 *North Carolina Banking Institute* 145-166 at 145; Tomas & Roppolo 'United States of America' 1458.

prevent transactions involving the proceeds of illegal activities.⁴⁹ Everyone is subject to such legislation in the US and it covers a wide range of activities.⁵⁰ Consequently, where trade-finance transactions are used to facilitate TBML schemes, the criminal AML legislation can be applied against them. The BSA and its accompanying regulations are intended to prevent money laundering by placing a variety of responsibilities for reporting and keeping records on financial institutions.⁵¹ These pieces of legislation are briefly discussed below.

7.3.2.2 *Currency and Foreign Transactions Reporting Act of 1970*

The Currency and Foreign Transactions Reporting Act, additionally referred to as the Bank Secrecy Act (BSA), was enacted in 1970.⁵² It is the primary US AML law.⁵³ Its implementation is mainly done through regulations issued by FinCEN although there are also self-effecting provisions in the Act.⁵⁴ The BSA was originally enacted in order to prevent criminals from abusing financial institutions through laundering drug money.⁵⁵ Thus, its original focus was on the combatting of drug trafficking and drug-related offences in the US. This is the general phenomenon across most jurisdictions in the world, including in South Africa,⁵⁶ England,⁵⁷ and Singapore,⁵⁸ which are also considered in this study.

⁴⁹ See OCC *Money Laundering* 4; Purkey (2010) 22 *Fla J Int'l L* 111 at 137. The term 'proceeds' was defined in *United States v Santos* 128 S. Ct. 2020 (2008) where the Court held that it constituted net profits rather than gross receipts of illicit proceeds.

⁵⁰ See Tomas & Roppolo 'United States of America' 1458.

⁵¹ Ibid. See also para 7.3.2.2 below.

⁵² See Reynolds 'The New US Anti-Money Laundering Offensive: Will it Prove Successful?' (2002) 9 *Cross Cultural Management: An International Journal* 3-31 at 7; Madinger *Money Laundering* 24; Ernest L Simons IV 'Anti-Money Laundering Compliance: Only Mega Banks Need Apply' (2013) 17 *North Carolina Banking Institute* 249-274 at 252; Cassara *Next Frontier* 2; Maria A de Dios 'The Sixth Pillar of Anti-Money Laundering Compliance: Balancing Effective Enforcement with Financial Privacy' (2016) 10 *Brooklyn Journal of Corporate, Financial & Commercial Law* 495-520 at 497; and USGAO (2021) *Countering Illicit Finance and Trade: Better Information Sharing and Collaboration Needed to Combat Trade-Based Money Laundering Report* 5-6.

⁵³ See Andres Rueda 'International Money Laundering Law Enforcement & the USA PATRIOT Act of 2001' (2001) 10 *Michigan State University-Detroit College of Law's Journal of International Law* 141-204 at 146; Cassara *Next Frontier* 2; and Tomas & Roppolo 'United States of America' 1466.

⁵⁴ See Tomas & Roppolo 'United States of America' 1466.

⁵⁵ See Reynolds (2002) 9 *Cross Cultural Management* 3 at 7; OCC *Money Laundering* 4.

⁵⁶ See Ch 5 para 5.3.2 above.

⁵⁷ See Ch 6 para 6.3.2 above.

⁵⁸ See Ch 8 para 8.3.2 below.

The BSA indirectly attacks the offence of money laundering because it does not criminalise the activity.⁵⁹ The Act and its implementing regulations establish sector-specific standards for CDD, internal controls, record-keeping duties, and suspicious activity reporting.⁶⁰ Thus, the BSA's aim is the creation of a paper trail to aid in criminal investigations of drug offences and cash smuggling.⁶¹ It should be noted that at the time of passing the BSA, organised crime groups mainly engaged in cash-based criminal activities, which left not much of a paper trail. Therefore, the US Congress intended to correct this by enacting the BSA.⁶² The defining characteristic of the original provisions of the Act was the need to report transactions of huge amounts of drug money at the placement phase.⁶³ This enabled the US government to identify the origins, quantities and movements of funds through the US financial system.⁶⁴ In *California Bankers Association v Schultz*⁶⁵ the court explained the purpose of the BSA by noting that the US Congress intended the statute to ferret out criminal activities.⁶⁶ This purpose may equally be relevant in the preventing of TBML in trade-finance transactions, thereby making the BSA applicable to such situations.

Since its passage in 1970, the BSA has evolved from its original objective of combatting drug trafficking and bulk cash smuggling in and out of the US to a broader purpose.⁶⁷ Currently, the scope of the BSA has widened to require that financial institutions file reports of any transaction deemed suspicious and identify customers.⁶⁸ This expanded scope could also bring TBML in trade-finance transactions under the

⁵⁹ See Madinger *Money Laundering* 24. It should be noted that money laundering was criminalised for the first time in the US in 1986, see also para 7.3.2.3 below.

⁶⁰ See Eric J Gouvin 'Bringing Out the Big Guns: the USA PATRIOT Act, Money Laundering, and the War on Terrorism' (2003) 55 *Baylor Law Review* 955-990 at 963; Madinger *Money Laundering* 24; FATF (2016) *US Mutual Evaluation Report* 31; and Jonathan A Lopez, Courtney J Linn, Edward Eisert & Lauren Muldoon 'Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisors: Practicalities and Implications of FinCEN's Proposed New Rule' (2016) 17 *Journal of Investment Compliance* 54-60 at 54. See also para 7.3.4 et seq below.

⁶¹ See OCC *Money Laundering: A Banker's Guide to Avoiding Problems* (2002) 4; Madinger *Money Laundering* 24; and Tomas & Roppolo 'United States of America' 1458-9.

⁶² See Rueda (2001) 10 *Mich St U Det C L J Int'l L* 141 at 146.

⁶³ See Tomas & Roppolo 'United States of America' 1458.

⁶⁴ *Ibid.*

⁶⁵ 416 US 21 (1974).

⁶⁶ See also Madinger *Money Laundering* 24; Mark B Skerry 'Financial Counterintelligence: How Changes to the US Anti-Money Laundering Regime Can Assist US Counterintelligence Efforts' (2013) 53 *Santa Clara Law Review* 205-238 at 223.

⁶⁷ See Cassara *Next Frontier* 2; Tomas & Roppolo 'United States of America' 1467.

⁶⁸ See ss 5313-5316 of the BSA. See also Skerry (2013) 53 *Santa Clara L Rev* 205 at 223; Tomas & Roppolo 'United States of America' 1467.

purview of the Act. The USA PATRIOT Act of 2001 substantially amends the BSA by imposing certain new obligations on banks and other financial institutions.⁶⁹ Consequently, several important revisions to the BSA come from Title III of the USA PATRIOT Act.⁷⁰ The BSA was further enhanced in January 2021 with the passing of the Anti-Money Laundering Act of 2020, which, among other things, strengthens the US Treasury's AML programmes and sets new beneficial reporting requirements.⁷¹

7.3.2.3 Money Laundering Control Act of 1986 (MLCA)

To augment the BSA, the US Congress enacted the MLCA in 1986.⁷² For the first time in US history, the MLCA made money laundering illegal.⁷³ Before the passage of the MLCA, money laundering was not regarded as a crime in the US.⁷⁴ The US Congress realised that money laundering was increasingly becoming central to the operations of organised crime groups and decided to pass a new law in the form of the MLCA, which catered for that phenomenon.⁷⁵

The MLCA gives US law enforcement officials and prosecutors an essential legal weapon to combat money laundering. It also makes important revisions to the BSA-reporting obligations and enhances penalties for money laundering.⁷⁶ Two essential provisions were added to the BSA by the MLCA. First, it extended the BSA's requirements for reporting. Second, for the first time, money laundering was made illegal by introducing the concept of 'specific unlawful activities'.⁷⁷ The MLCA also

⁶⁹ For such new AML obligations, see para 7.3.2.4 below.

⁷⁰ See Tomas & Roppolo 'United States of America' 1467. See also para 7.3.2.4 below.

⁷¹ See USGAO (2021) *Countering Illicit Finance Report* 5-6. See also para 7.3.2.5 below.

⁷² The Act is codified in Title 18 US Code.

⁷³ See ss 1956 and 1957 of the MLCA. See also Jimmy Yicheng Huang 'Effectiveness of US Anti-Money Laundering Regulations and HSBC Case Study' (2015) 18 *Journal of Money Laundering Control* 525-532 at 526; Cassara *Next Frontier* 202; Tomas & Roppolo 'United States of America' 1458-9.

⁷⁴ See Shawn Turner 'US Anti-Money Laundering Regulations: An Economic Approach to Cyberlaundering' (2004) 54 *Case Western Reserve Law Review* 1389-1414 at 1405; Madinger *Money Laundering* 23. See also para 7.3.2.2 above.

⁷⁵ See Juan Carlos Estrada 'The AML Arms Race: How Artificial Intelligence and Machine Learning Will Combat Money Laundering' (2021) 16 *Rutgers Business Law Review* 383-408 at 387; Madinger *Money Laundering* 23. The term 'money laundering' itself was first used by the court in the early 1980s in *US v \$4, 255,625.39* (1982) 551 F Sup, see Ch 2 para 2.2 et seq above.

⁷⁶ See April & Grasso (2001) 38 *Am Crim L Rev* 1051 at 1054; Estrada (2021) 16 *Rutgers Bus L J* 383 at 387; Cassara *Next Frontier* 202.

⁷⁷ See s 1956(C)(1) of the MLCA. See also OCC *Money Laundering* 4. In the South African and English jurisdictions 'specified unlawful activities' are known as predicate offences, see Ch 5 and Ch 6 above generally.

prohibits evasion of the BSA requirements by imposing criminal liability on individuals or entities, which intentionally aid money laundering or structuring activities in order to avoid reporting them.⁷⁸ The Act also requires financial institutions to create and preserve reasonable procedures to assure and monitor compliance with the BSA's reporting and record-keeping obligations.⁷⁹ Although the MLCA does not specifically address TBML in trade-finance transactions, its provisions may equally apply in such circumstances. In a broad sense, money laundering under the Act may also cover TBML in trade-finance instruments since the Act does not exclude any specific types of money laundering, including TBML.⁸⁰ The MLCA was followed over the years by further legislation that enhanced the US AML regime. These include the USA PATRIOT Act and the AMLA.⁸¹

7.3.2.4 The USA PATRIOT Act of 2001

The USA PATRIOT Act was signed into law by the US president on 26 October 2001 and it amends the BSA in various substantial ways.⁸² The major objective of the Act is the combatting of terrorism.⁸³ The Act, however, also provides for AML measures for financial institutions in the US. Thus, it imposes obligations on financial institutions, to be wary of certain areas of primary money-laundering concern.⁸⁴ To this end, the USA

⁷⁸ See OCC *Money Laundering* 4; FFIEC (2014) *Bank Secrecy Act/Anti-Money Laundering Examination Manual* 3. See also *United States v. Garcia-Emanuel*, 14 F.3d 1469, 1475-76 (10th Cir.1994) where defendant structured the financial transaction to avoid attention by depositing illegal funds in legitimate bank accounts of third parties.

⁷⁹ See FFIEC (2014) *Bank Secrecy Act/Anti-Money Laundering Examination Manual* 3. See also para 7.3.4.2 below.

⁸⁰ For a brief discussion of the MLCA's possible coverage of TBML in trade-finance instruments, see para 7.3.2.7 below.

⁸¹ Such other further pieces of AML legislation are the Anti-Drug Abuse Act of 1988, the Annunzio-Wylie Anti-Money Laundering Act of 1992, the Money Laundering Suppression Act of 1994, the Money Laundering and Financial Crimes Strategy Act of 1998 and the USA PATRIOT Act of 2001, see Cassara *Next Frontier* 202. See also para 7.3.2.4 and para 7.3.2.5 below.

⁸² See OCC *Money Laundering* 6; Rueda (2001) 10 *Mich St U Det C L J Int'l L* 141 at 149; David R Sahr & Daniel Morales 'US Anti-Money Laundering Legislation' (2002) 8 *Law and Business Review of the Americas* 583-602 at 585; and Alicia L Rause 'USA PATRIOT Act: Anti-Money Laundering and Terrorist Financing Legislation in US and Europe Since September 11th' (2003) 11 *University of Miami International & Comparative Law Review* 173-186 at 173.

⁸³ See OCC *Money Laundering* 6; Rueda (2001) 10 *Mich St U Det C L J Int'l L* 141 at 149; Sahr & Morales (2002) 8 *Law & Bus Rev Am* 583 at 584; Kevin L Shepherd 'The USA PATRIOT Act: The Complexities of Imposing Anti-Money Laundering Obligations on the Real Estate Industry' (2004) 39 *Real Property, Probate and Trust Journal* 403-438 at 405.

⁸⁴ See Gouvin (2003) 55 *Baylor L Rev* 955 at 970; Nicole M Healy & Judith A Lee 'Ad hoc Task Force on Professional Responsibilities Regarding Money Laundering: PATRIOT Act and Gatekeeper Update (2003) 37 *International Lawyer* 631-640 at 631; OCC *Money Laundering* 6; Sahr & Morales (2002) 8 *Law & Bus Rev Am* 583 at 584.

PATRIOT Act requires, *inter alia*, financial institutions to conduct due diligence, including enhanced due diligence on foreign correspondent and private banking accounts and to enhance information sharing between financial institutions and the government.⁸⁵ Thus, the Act augments the BSA framework by strengthening customer-identification procedures and prohibiting financial institutions from conducting business with foreign shell companies.⁸⁶

The USA PATRIOT Act also allows for the application of exceptional measures against certain jurisdictions, financial institutions or foreign transactions that pose the greatest threat for money laundering to the US.⁸⁷ The Act further amends reporting requirements for suspicious transactions.⁸⁸ It also provides for the establishment of AML programmes by financial institutions.⁸⁹ It is submitted that although the USA PATRIOT Act does not mention or address TBML in trade-finance transactions specifically, its provisions are relevant to the problem. For example, the CDD measures and the prohibition of banks from conducting business with shell companies under the Act are essential in preventing TBML in trade-finance transactions. Shell companies are usually used to generate fraudulent invoices, which are often used in TBML schemes.⁹⁰

7.3.2.5 Anti-Money Laundering Act of 2020 (AMLA)

The US Congress approved the AMLA in 2021.⁹¹ Among other things, the AMLA aims to improve the coordination and sharing of information among AML agencies in the

⁸⁵ See s 314 of the USA PATRIOT Act; Healy & Lee (2003) 37 *Int'l L* 631 at 632; OCC *Money Laundering* 6; Coto (2016) 20 *N C Banking Inst* 145 at 146; FATF (2016) *US Mutual Evaluation Report* 31; and Tomas & Roppolo 'United States of America' 1479. See also para 7.3.4.6 below.

⁸⁶ See ss 312 and 313 of the USA PATRIOT Act. See also OCC *Money Laundering* 6; Sahr & Morales (2002) 8 *Law & Bus Rev Am* 583 at 588; Rause (2003) 11 *U Miami Int'l & Comp L Rev* 173 at 173.

⁸⁷ See s 311 of the USA PATRIOT Act. See also Rause (2003) 11 *U Miami Int'l & Comp L Rev* 173 at 174; Sanders & Sanders (2004) 4 *Rich J Global L & Bus* 47 at 63; and Tomas & Roppolo 'United States of America' 1479.

⁸⁸ See s 351 of the USA PATRIOT Act.

⁸⁹ See s 352 and 359; Rueda (2001) 10 *Mich St U Det C L J Int'l L* 141 at 151; Shepherd (2004) 39 *Real Prop Prob & Tr J* 403 at 409; Tomas & Roppolo 'United States of America' 1479. See also para 7.3.4.2 below.

⁹⁰ For a discussion of the use of shell companies in TBML schemes in conjunction with tax havens, see Ch 2 para 2.4.9 above.

⁹¹ See Division F of the William M. (Mac) Thornberry National Defence Authorization Act for Fiscal Year 2021 which it amended. The AMLA came into force on 1 January 2021, see FinCEN 'The Anti-Money Laundering Act of 2020' <https://www.fincen.gov> [Accessed on 10 October 2023].

US.⁹² The Act seeks to improve the sharing of information between and/or among regulators, banking institutions and US federal law enforcement agencies.⁹³ In pursuit of this goal, the AMLA establishes FinCEN Exchange.⁹⁴ It is submitted that the requirement to enhance information sharing among AML institutions is a key component in the combatting of TBML in trade-finance transactions. Information sharing ensures agility in AML responses by institutions and law enforcement agencies.

The AMLA also aims to modernise the US AML laws so that the government and private sector players are able to adequately respond to new and emerging money laundering threats.⁹⁵ Furthermore, the AMLA seeks to encourage the adoption of new technology by financial institutions in order to effectively combat money laundering in the US.⁹⁶ It also entrenches the fact that AML policies, procedures and controls within financial institutions must be risk-based.⁹⁷ The AMLA also establishes uniform-reporting obligations for the sharing of beneficial-ownership information.⁹⁸ The requirement for beneficial-ownership information is intended to improve transparency and discourage the use of shell companies to launder criminally derived funds.⁹⁹ To that end, the AMLA establishes a secure but non-public database of beneficial ownership information at FinCEN.¹⁰⁰

The AMLA also further strengthens the AML capabilities of FinCEN as the US financial intelligence unit.¹⁰¹ In this regard, the US Congress envisages that FinCEN must

⁹² See s 6002(1) of the AMLA. See also Rosen & Miller *Financial Crimes Enforcement Network (FinCEN): Anti-Money Laundering Act of 2020 Implementation and Beyond* (2022) 13.

⁹³ See s 6002(1) of the AMLA. See also Rosen & Miller *Anti-Money Laundering Act of 2020 Implementation and Beyond* 13.

⁹⁴ For the role of the FinCEN Exchange, see para 7.4.6 below.

⁹⁵ See s 6002(2) of the AMLA; Jacquelyn B Lewis 'Money Finds a Way: Increasing AML Regulation Garners Diminishing Returns and Increases Demand for Dark Financing' (2022) 55 *Vanderbilt Journal of Transactional Law* 529-557 at 544; Marc-Alain Galeazzi, Barbara Mendelson & Malka Levitin 'The Anti-Money Laundering Act of 2020' (2021) 22 *Journal of Investment Compliance* 253-259 at 253. An example, of a private-public partnership created pursuant to the AMLA is the FinCEN Exchange, see para 7.4.6 below.

⁹⁶ See s 6002(3) of the AMLA. See also Galeazzi, Mendelson & Levitin (2021) 22 *JOIC* 253 at 253.

⁹⁷ See s 6002(4) of the AMLA. See also para 7.3.4.4 below.

⁹⁸ See s 6002(5) of the AMLA.

⁹⁹ See s 6002(5) (A)(B) of the AMLA.

¹⁰⁰ See s 6002(6) of the AMLA.

¹⁰¹ See s 6102(a) of the AMLA.

continue to safeguard the US financial system from money-laundering activities through being able to collect, analyse and disseminate financial intelligence.¹⁰²

Significant to this study, the AMLA expressly mentions TBML in a US statute for the first time. The US Treasury is mandated by the AMLA to conduct a study together with other relevant stakeholders such as the private sector, academia, interested trade experts and federal authorities on TBML.¹⁰³ Such study may be contracted to third parties who can independently conduct it on behalf of the US Treasury.¹⁰⁴ The findings of such a study on TBML would then be submitted to the US Congress with proposed strategies on how to combat TBML in the US.¹⁰⁵ To date, no such a study has been undertaken pursuant to the AMLA requirement. However, this is a step in the right direction on the part of the US government insofar as demonstrating political will to combat TBML is concerned. Although the commitment is still expressed in legislative form, without implementation, the express mention seems to be a clear sign of the willingness of the US government to combat TBML. It should be noted that the US' concept of TBML under the Act is broad and is not restricted to trade-finance transactions as envisaged under this study.¹⁰⁶ This study examines TBML in trade-finance instruments while the AMLA broadly addresses TBML in various sectors of the economy it may affect. This may possibly cover trade-finance transactions although the AMLA does not specifically states so. Nonetheless, the mere acknowledgement of the problem itself under legislation is a commendable feature from the US Congress.

7.3.2.6 *The Crime of Money Laundering and Scope for TBML*

The money-laundering offences under the US legislation are provided for under two sections of the MLCA, namely sections 1956 and 1957.¹⁰⁷ These provisions are briefly discussed below.

¹⁰² See s 6102(a) (1) of the AMLA. See also para 7.4.2 below.

¹⁰³ See s 6506(a) (1) of the AMLA. See also Rosen & Miller *Anti-Money Laundering Act of 2020 Implementation and Beyond* 17.

¹⁰⁴ See s 6506(a) (2) of the AMLA.

¹⁰⁵ See s 6506(b) (A) (B) of the AMLA.

¹⁰⁶ For a discussion of the jurisprudence of TBML broadly, see Ch 2 passim above. For the scope of this study, see Ch 1 para 1.8 above.

¹⁰⁷ See April & Grasso (2001) 38 *Am Crim L Rev* 1051 at 1054.

7.3.2.6.1 The Money-Laundering Offence under Section 1956

Section 1956 of the MLCA defines money laundering as the conduct of a financial transaction¹⁰⁸ involving the ‘proceeds of an unlawful activity’¹⁰⁹ where the transaction is intended to hide the origin of illegally obtained funds.¹¹⁰ The MLCA defines the term ‘proceeds’ as meaning any “property derived from or obtained or retained, directly or indirectly through some form of unlawful activity, including the gross receipts of such activity”.¹¹¹ Furthermore, the Act forbids purposefully carrying out or attempting to carry out a financial transaction using the proceeds of a specified illegal activity or with the goal of facilitating the commission of specified unlawful activity.¹¹² It should be noted that this first subsection of section 1956 applies to domestic-financial activities.¹¹³

Under the second subsection of the MLCA, the Act introduces a money-laundering offence for cross-border money transfer or monetary instruments.¹¹⁴ In this instance, money laundering occurs when one of the two circumstances is satisfied while transferring funds into or out of the US.¹¹⁵ First, the funds must have been transferred with the intention of promoting a specific unlawful activity.¹¹⁶ Secondly, the funds must have been transferred when the bank is aware that they originated from a specific

¹⁰⁸ A ‘transaction’ means a deposit, a withdrawal or transfer of funds between accounts, the exchange of currency, an extension of credit, the purchase or sale of any shares or other transfer through a financial institution, see s 1956(c)(3) of the MLCA; Tomas & Roppolo ‘United States of America’ 1460.

¹⁰⁹ This is different from criminally derived property as provided for under s 1957 of the MLCA. The list of specified unlawful activities was originally intended to cover funds from drug-related offences, but is now expansive to include several non-drug related crimes, see April & Grasso (2001) 38 *Am Crim L Rev* 1051 at 1064.

¹¹⁰ See s 1956(a)(1) of the MLCA; April & Grasso (2001) 38 *Am Crim L Rev* 1051 at 1054; Turner (2004) 39 *Case W Res L Rev* 1389 at 1405; Madinger *Money Laundering* 25. For a discussion of the concept of money laundering generally, see Ch 2 para 2.2 et seq above.

¹¹¹ See s 1956 (c)(1) of the MLCA. See also Madinger *Money Laundering* 25. In *United States v One 1997 Mercedes E420*, 175 F3d 1129, 1132 (9th Cir. 1999) (the court held cars purchased with criminally-derived money to be ‘proceeds’. Also in *United States v Diaz*, 190 F.3d 1247, 1257 (11th Cir.1999) (the court held the house purchased using illegal drug funds to be ‘proceeds’.

¹¹² See s 1956(a)(1) of the MLCA. See also Turner (2004) 39 *Case W Res L Rev* 1389 at 1405; Tomas & Roppolo ‘United States of America’ 1459-60.

¹¹³ See Tomas & Roppolo ‘United States of America’ 1459-60; Sean Jettner ‘Money Laundering’ (2023) 60 *American Criminal Law Review* 1071-1092 at 1073.

¹¹⁴ Examples of such monetary instruments are cheques, money orders, and travellers’ cheques, see s 1956(a)(2) of the MLCA. See also April & Grasso (2001) 38 *Am Crim L Rev* 1051 at 1061; Turner (2004) 39 *Case W Res L Rev* 1389 at 1405.

¹¹⁵ See Tomas & Roppolo ‘United States of America’ 1460; Jettner (2023) 60 *Am Crim L Rev* 1071 at 1074.

¹¹⁶ See Tomas & Roppolo ‘United States of America’ 1460; Jettner (2023) 60 *Am Crim L Rev* 1071 at 1074.

unlawful activity with the aim of concealing their criminal nature or evade a transaction-reporting requirement under federal law.¹¹⁷

To convict a money launderer under section 1956 of the MLCA, the existence of intention and knowledge is essential depending on the offence.¹¹⁸ Participation in a money-laundering activity through negligence is not punished.¹¹⁹ It is also a requirement under section 1956 that funds involved in a financial transaction are from a specific unlawful activity at the time of undertaking the transaction.¹²⁰

7.3.2.6.2 The Money-Laundering Offence under Section 1957

Section 1957 of the MLCA makes it illegal to engage in a financial transaction with funds obtained from criminal activities.¹²¹ The provision criminalises monetary transactions involving more than USD\$10 000 emanating from a specific unlawful activity if the individual knew that the funds were 'criminally derived property'.¹²² 'Criminally derived property' is defined as "any property constituting or derived from proceeds obtained from a criminal offence".¹²³ Section 1957 of the MLCA, therefore, criminalises the knowing receipt of the proceeds of crime.¹²⁴

¹¹⁷ See Madinger *Money Laundering* 25; Tomas & Roppolo 'United States of America' 1460. In *United States v Torres-Vazquez* 731 F.3d 41, 45-46 (1st Cir. 2013) the court held that the design to hide may be proved through direct or circumstantial evidence; Thus, in *United States v Thayer*, 204 F.3d 1352, 1354-55 (11th Cir. 2000) the court found that the defendant tried to conceal source of illegally-derived funds by funnelling them through different fictitious business accounts.

¹¹⁸ See ss 1956(a)(1) and 1956(a)(2)(B)(ii) of the MLCA; Madinger *Money Laundering* 27; and Tomas & Roppolo 'United States of America' 1465.

¹¹⁹ See Tomas & Roppolo 'United States of America' 1465. It should be noted that to secure a conviction the federal government needs not trace the proceeds involved back to a particular offence, see *United States v Smith*, 223 F.3d 554, 576 (7th Cir. 2000).

¹²⁰ See Turner (2004) 54 *Case W Res L Rev* 1389 at 1405; Madinger *Money Laundering* 33.

¹²¹ See s 1957 of the MLCA generally. See also Turner (2004) 54 *Case W Res L Rev* 1389 at 1405; McBride 'Money Laundering' (2020) 57 *American Criminal Law Review* 1045-1072 at 1047.

¹²² See s 1957(a) of the MLCA; *United States v Prince*, 214 F.3d 740, 749-50 (6th Cir. 2000) which held that constructive control of criminally-derived property, as opposed to actual control, is enough to prove a violation of s1957 of the MLCA. See also Turner (2004) 39 *Case W Res L Rev* 1389 at 1406; Estrada (2021) 16 *Rutgers Bus L J* 383 at 387-88; Madinger *Money Laundering* 34; Tomas & Roppolo 'United States of America' 1461; and Jettner 'Money Laundering' (2023) 60 *American Criminal Law Review* 1071-1092 at 1076.

¹²³ See s 1957(f)(2) of the MLCA. In *United States V Savage*, 67 F.3d 1435, 1442 (9th Cir. 1995) the court held that criminally-derived property under s1957 of the MLCA is equivalent to 'proceeds' under other money-laundering statutes.

¹²⁴ See Estrada (2021) 16 *Rutgers Bus L J* 383 at 389; Madinger *Money Laundering* 34; Jettner (2023) 60 *Am Crim L Rev* 1071 at 1076. In *United States v Wynn*, 61 F.3d 921, 927 (DC Cir 1995) section 1957 of the MLCA was held to prohibit a wider range of activities than money 'laundering, in the traditional sense. Thus, in *United States v Allen*, 129 F.3d 1159, 1165 (10th Cir. 1997) the court interpreted section 1957 as having the breadth that reaches almost any bank transaction carried out by the defendant.

In order to be convicted under section 1957 of the MLCA, at least USD\$10 000 of the transaction funds must be traced back to some kind of a specific unlawful activity.¹²⁵ Where such funds are already part of the legitimate funds in a bank account, the prosecution should demonstrate that a portion of those funds constitute benefits derived from a specific unlawful activity.¹²⁶

In addition to the basic money-laundering offence established by section 1957(a) of the MLCA, section 1957(b) makes it illegal to structure funds in order to evade the reporting obligation under the MLCA of any funds exceeding the prescribed threshold.¹²⁷ 'Structuring' is a money-laundering method that includes dividing large amounts of cash or money into smaller amounts in order to avoid detection by banks.¹²⁸ It came to be criminalised in the US after realising that money launderers resorted to this technique to avoid reporting requirements under the BSA.¹²⁹

7.3.2.7 Scope of the MLCA for TBML in Trade-Finance Instruments

The US Congress has not enacted any specific legislation to combat TBML in trade-finance instruments. The only legislation that expressly mentions TBML is the AMLA.¹³⁰ It does so with a view to studying and understanding TBML better.¹³¹ Even in this case, the focus is not on TBML in trade-finance transactions. However, in the absence of specific legislation defining the offence of TBML, the US relies on the BSA and the MLCA to combat this type of money laundering.¹³² It is submitted that the nature of the offence of money laundering under both section 1956 and 1957 is broad enough to cover TBML in trade-finance transactions.¹³³ The money-laundering offences under the MLCA cover virtually any form of specified unlawful activity. Thus, as long as the value being transferred under a trade-finance transaction is a product of a specified unlawful activity, then the MLCA will apply to such transaction. This is a

¹²⁵ See Turner (2004) 39 *Case W Res L Rev* 1389 at 1406; Madinger *Money Laundering* 34; and Estrada (2021) 16 *Rutgers Bus L J* 383 at 389.

¹²⁶ See Madinger *Money Laundering* 34; Estrada (2021) 16 *Rutgers Bus L J* 383 at 389.

¹²⁷ See *United States v Prince* 214 F 3d 740 (6th Cir 2000). See also Turner (2004) 39 *Case W Res L Rev* 1389 at 1405; Estrada (2021) 16 *Rutgers Bus L J* 383 at 390.

¹²⁸ See Madinger *Money Laundering* at 330. See also *United States v Farese* 248 F 3d 1056 (11th Cir 2001) where small denomination bills were exchanged for larger denomination bills in order to reduce the volume of the currency thereby making it easier to conceal the transaction.

¹²⁹ See Madinger *Money Laundering* 34.

¹³⁰ See para 7.3.2.5 above.

¹³¹ See again para 7.3.2.5 above.

¹³² See para 7.3.2.2 and 7.3.2.3 respectively above.

¹³³ See para 7.3.2.6 above.

move in the right direction in that it dispenses with the need to pass further legislation specifically addressed to the challenge of TBML in trade-finance transactions. It should be noted that the offence of TBML can be committed using any property of value originating from a specified unlawful activity.¹³⁴ This could potentially include the use or abuse of trade-finance instruments such as documentary credits, collections and even demand guarantees as instrumentalities of crime.¹³⁵ The wide and unlimited nature of the number of specified unlawful activity makes the offence of money laundering under the US AML laws all encompassing to include even TBML in trade-finance transactions.¹³⁶

7.3.3 Conclusion

The US government is aware of the threat of TBML in trade-finance transactions. Therefore, it has passed AML laws, which could be applied to curb the problem.¹³⁷ Using the AML laws for traditional money laundering, the US Congress has seen no need to amend its current laws to specifically address TBML in trade-finance instruments. Thus, the offence of money laundering under the MLCA and the reporting obligations under the BSA and the USA PATRIOT Act may equally apply to the challenge of TBML in trade-finance transactions.¹³⁸ The offence of money laundering under the MLCA is broadly defined to include almost any situation that may result in the laundering of illegal funds, including through TBML in trade-finance transactions.¹³⁹ The US has also gone further to pass legislation that mention TBML in specific terms under the AMLA.¹⁴⁰ This is a step in the right direction aimed at understanding the mechanics of TBML in detail. The AMLA, however, does not guide banks and other financial institutions on how to deal with TBML in trade-finance instruments. Such guidance is found in complementary best practices from the US financial regulators, which are to be discussed below in this chapter.¹⁴¹

¹³⁴ See Ch 2 para 2.3 et seq above for the discussion of TBML and its techniques.

¹³⁵ See Ch 3 para 3.3 et seq above for a discussion of the use and possible abuse of selected trade-finance instruments under this study.

¹³⁶ See para 7.3.2.6 above.

¹³⁷ See para 7.2 and 7.3 above.

¹³⁸ See again para 7.3.2 et seq above.

¹³⁹ See para 7.3.2.6 above. See also Ch 2 para 2.2 and para 2.3 et seq above.

¹⁴⁰ See para 7.3.2.5 above.

¹⁴¹ See, for example, best practice guidance for TBML control in trade-finance transactions from the FinCEN and the FFIEC in para 7.4.2 and para 7.5.4 respectively below.

7.3.4 Preventive AML Obligations for Banks¹⁴² in the US

7.3.4.1 General

The US AML preventive measures are largely provided for under the BSA and its implementing regulations.¹⁴³ The Federal Financial Institutions Examination Council's (FFIEC)¹⁴⁴ *Bank Secrecy Act/Anti-Money Laundering Examination Manual (AML Manual)* sheds light on the BSA provisions to assist financial institutions on how to interpret and implement the provisions. Therefore, much of the BSA provisions on bank AML obligations are explained from the point of view of the FFIEC guidance in the *AML Manual*.¹⁴⁵ The US AML framework mainly consists of the requirements for an AML governance;¹⁴⁶ the RBA;¹⁴⁷ the CDD measures;¹⁴⁸ reporting of suspicious transactions;¹⁴⁹ record keeping;¹⁵⁰ and; the need to train staff.¹⁵¹ These are standard requirements in any country's AML regime as per the FATF's recommendations.¹⁵² The requirements are briefly discussed below in order to establish the extent to which they may help in mitigating the risk of TBML in trade-finance instruments.¹⁵³

7.3.4.2 AML Governance and Oversight

A robust programme for AML compliance is necessary to reduce the money-laundering risk exposure to financial institutions.¹⁵⁴ Thus, a bank doing business in the US is required to have an AML compliance programme, which is proportionate to its risk profile.¹⁵⁵ The purpose of the AML compliance programme is to try and meet the

¹⁴² The terms 'financial institution' or 'financial institutions' are used interchangeably in this thesis for 'bank' or 'banks' vice versa. For other terminologies used in this thesis generally, see Ch 1 para 1.11 above.

¹⁴³ See Huang (2015) 18 *JMLC* 525 at 525; Coto (2016) 20 *N C Banking Inst* 145 at 146.

¹⁴⁴ For the nature and role of the FFIEC, see para 7.5.4 below.

¹⁴⁵ The development of the FFIEC *AML Manual* is a collaborative effort of the federal and state banking agencies and the FinCEN, and is intended to ensure that there is consistency in the application of the BSA/AML requirements.

¹⁴⁶ See para 7.3.4.2 below.

¹⁴⁷ See para 7.3.4.4 below.

¹⁴⁸ See para 7.3.4.6 below.

¹⁴⁹ See para 7.3.4.10 below.

¹⁵⁰ See para 7.3.4.8 below.

¹⁵¹ See para 7.3.4.12 below.

¹⁵² See Ch 4 para 4.3.2 above for the FATF AML role and its Recommendations.

¹⁵³ See para 7.3.4.2 et seq below.

¹⁵⁴ See OCC *Money Laundering* 3; Russel J Bruemmer & Eluah M Alper 'AML: Corporate Governance Issue' (2013) 130 *Banking Law Journal* 867-890 at 871; and De Dios (2016) 10 *Brook. J Corp Fin & Com L* 495 at 505.

¹⁵⁵ See s 5318(h) of the BSA and s 352(a) of the USA PATRIOT Act; FFIEC (2014) *BSA/AML Manual* 28; Lopez et al (2016) 17 *JOIC* 54 at 54; and Tomas & Roppolo 'United States of America' 1473.

requirements of the BSA.¹⁵⁶ Besides the purpose of regulatory compliance, the AML programme is also necessary to protect financial institutions from being used by criminal organisations to facilitate illegal transactions. The AML compliance programme must be written and be approved by the bank's board of directors.¹⁵⁷ The bank's AML control system is under the board of directors' authority, which it exercises through senior management.¹⁵⁸ The management of the bank should, therefore, create a culture of compliance with the AML programme.¹⁵⁹ This is necessary to set the tone at the top for the lower levels of staff to follow.

According to the FFIEC, the AML compliance programme should have, at least, three elements. First, it should have internal controls designed to ensure ongoing AML compliance.¹⁶⁰ The internal controls should identify the bank's operations, which are likely to be abused through money laundering.¹⁶¹ The identification should focus on the bank's products or services, its customers and jurisdictions likely to be exploited by organised crime groups through money-laundering activities.¹⁶² The FFIEC requires the internal controls to be risk-based in their approach.¹⁶³ It is also further recommended by the FFIEC that a Customer Identification Programme (CIP) be incorporated as part of the AML compliance programme.¹⁶⁴ Thus, the programme should, for example, have account-opening procedures and a provision for the monitoring and reporting of suspicious transactions.¹⁶⁵

See also Simons IV (2013) 17 *N C Banking Inst* 249 at 273, who is of the view that compliance programmes will be costly for smaller financial institutions and only big banks with resources may adequately create compliance programmes which can pass regulatory scrutiny.

¹⁵⁶ See s 352(a) of the USA PATRIOT Act; FFIEC (2014) *BSA/AML Manual* 28; Lopez *et al* (2016) 17 *JOIC* 54 at 55; Tomas & Roppolo 'United States of America' 1473.

¹⁵⁷ See s 5318(h) of the BSA. See also Bruemmer & Alper (2013) 130 *Banking L J* 867 at 880; FFIEC (2014) *BSA/AML Manual* 28; and Tomas & Roppolo 'United States of America' 1473.

¹⁵⁸ See Bruemmer & Alper (2013) 130 *Banking L J* 867 at 871; FFIEC (2014) *BSA/AML Manual* 29; and Tomas & Roppolo 'United States of America' 1473.

¹⁵⁹ See Bruemmer & Alper (2013) 130 *Banking L J* 867 at 880; FFIEC (2014) *BSA/AML Manual* 29; and Tomas & Roppolo 'United States of America' 1473.

¹⁶⁰ See FFIEC (2014) *BSA/AML Manual* 29.

¹⁶¹ Ibid. See also Tomas & Roppolo 'United States of America' 1473.

¹⁶² See FFIEC (2014) *BSA/AML Manual* 29.

¹⁶³ See FFIEC (2014) *BSA/AML Manual* 29. For the application of the RBA, see para 7.3.4.4 below.

¹⁶⁴ See s 5318(h) of the BSA. See also Skerry (2013) 53 *Santa Clara L Rev* 205 at 223; FFIEC (2014) *BSA/AML Manual* 29.

¹⁶⁵ See OCC *Money Laundering* 3. For a broader discussion of the obligation to report suspicious transaction reports, see 7.3.4.10 below.

Secondly, the AML programme should have an auditing mechanism to ensure that it complies with the BSA.¹⁶⁶ This should be complimented by having a designated compliance officer responsible for ensuring that the programme complies with the BSA.¹⁶⁷ The compliance officer is expected to coordinate and monitor compliance of the programme with the BSA on a continuous basis.¹⁶⁸

Thirdly, the programme should have provision for AML training for the banking staff.¹⁶⁹ Ideally, AML training should be offered to all bank staff whose responsibilities need an understanding of the BSA. The AML training ought to be customised to the individual staff's specific duties within the bank.¹⁷⁰

7.3.4.3 Scope of the AML Governance for TBML in Trade-Finance Instruments

There is guidance to US financial institutions on how they can focus the AML governance framework on the issue of TBML in trade-finance transactions. The guidance comes from the FFIEC, which addresses the application of the AML governance framework to TBML in trade-finance instruments.¹⁷¹ It does this through a specific section under the *AML Manual* devoted to TBML in trade-finance transactions.¹⁷²

In that *AML Manual*, the FFIEC notes that the AML compliance programme should speak to the issue of documentary review under trade-finance transactions.¹⁷³ It further notes that the policies and procedures under the AML programme should specifically address money-laundering activities under trade-finance transactions. The programme should also indicate how the bank should report suspicious activities emanating from trade-finance transactions.¹⁷⁴ Furthermore, the internal controls should also allow for a thorough review of trade documentation to enable the bank to

¹⁶⁶ See s 5318(h) of the BSA. See also FFIEC (2014) *BSA/AML Manual* 29; Tomas & Roppolo 'United States of America' 1473.

¹⁶⁷ See s 5318(h) of the BSA. See also FFIEC (2014) *BSA/AML Manual* 29; Tomas & Roppolo 'United States of America' 1473.

¹⁶⁸ FFIEC (2014) *BSA/AML Manual* 32.

¹⁶⁹ See s 5318(h) of the BSA. See also FFIEC (2014) *BSA/AML Manual* 29; Tomas & Roppolo 'United States of America' 1473.

¹⁷⁰ See s 5318(h) of the BSA; FFIEC (2014) *BSA/AML Manual* 33. For a broader discussion of the financial institution's AML obligation to train staff, see 7.3.4.13 below.

¹⁷¹ See para 7.3.4.2 above.

¹⁷² See FFIEC (2014) *BSA/AML Manual* 270.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

monitor suspicious activities in trade-finance transactions based on the role the bank plays.¹⁷⁵ It is submitted that this guidance from the FFIEC is likely to help financial institutions in the US manage the risk of TBML in the provision of trade-finance services to their customers. It could also help them design AML programmes responsive to the challenge of TBML should it be encountered in trade-finance transactions.

7.3.4.4 The Risk-Based Approach (RBA)

A bank that understands its risk profile is able to apply proportionate risk-management processes to its AML programme.¹⁷⁶ Financial institutions in the US are required by FinCEN and the FFIEC to adopt an RBA when managing the risk of money laundering.¹⁷⁷ This means that they are free to decide on the methods they deem appropriate in assessing money-laundering risk exposures to their operations based on their risk profiles.¹⁷⁸

FinCEN has not prescribed any strict standard on how banks should assess their money-laundering risks using the RBA.¹⁷⁹ The FFIEC, however, offers some rough guidance to financial institutions when conducting money-laundering risk assessments. It does this through its *AML Manual* where it devotes a whole section to the aspect of money-laundering risk assessments.¹⁸⁰ Among other things, the FFIEC recommends that risk-management principles, which financial institutions use in traditional operational areas, should be adapted for assessing compliance with the AML risk.¹⁸¹

On conducting the money-laundering risk assessments, the FFIEC recommends that, at a minimum, a bank should follow two steps. First, it should strive to identify specific-risk categories such as customers, transactions, products, geographic location and

¹⁷⁵ Ibid.

¹⁷⁶ See FFIEC (2014) *BSA/AML Manual* 18; Cory Howard 'The Applicability of the BSA/AML Regulatory Regime to Indirect Lending Business Models' (2017) 19 *Transactions: The Tennessee Journal of Business Law* 45-78 at 48.

¹⁷⁷ See Bruemmer & Alper (2013) 130 *Banking L J* 867 at 875; FATF (2016) *US Mutual Evaluation Report* 176.

¹⁷⁸ See Bruemmer & Alper (2013) 130 *Banking L J* 867 at 875.

¹⁷⁹ See FFIEC (2014) *BSA/AML Manual* 18.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

entities that are relevant to the bank's operations.¹⁸² In other words, this strategy is not universally applicable. Each bank has specific-risk categories applicable to its size and operations. Secondly, the bank should then carry out a more detailed analysis of the information identified in the first step to assess and improve its understanding of the money-laundering risks within the specific risk categories.¹⁸³ Thus, per each risk category, for example, customers, a bank has to deepen its analysis to establish ways through which customers may be a weak point for money laundering.

Depending on the specific characteristics of each risk category, the money-laundering risk exposure to a bank may not be the same.¹⁸⁴ Different factors, for example, geographic location, the volume, and number of financial transactions, and the nature of the banker-customer relationship in a specific scenario, may need to be taken into account when conducting money-laundering risk assessment.¹⁸⁵ On geographic location, financial institutions may need to evaluate risks associated with transacting with customers from or whose transactions involve certain jurisdictions.¹⁸⁶ It should be noted, however, that the risk of geographic location alone is not conclusive in determining a customer's or a transaction's level of money-laundering risk.¹⁸⁷ There is a need to take into account other factors like the classification of a jurisdiction, by the Secretary of the US Treasury, to be of primary money-laundering concern.¹⁸⁸ Further factors include taking note of those jurisdictions being monitored by the FATF for deficiencies in their AML regimes.¹⁸⁹

The manner in which the bank interacts with its customers, for instance, remote or face-to-face, may also need to be considered. Under product and services, the FFIEC indicates that these may pose an elevated money-laundering risk based on the type of service or product the customer seeks.¹⁹⁰ Some products may have an element of

¹⁸² See OCC *Money Laundering* 14-16; FFIEC (2014) *BSA/AML Manual* 18.

¹⁸³ See Bruemmer & Alper (2013) 130 *Banking L J* 867 at 875; FFIEC (2014) *BSA/AML Manual* 18.

¹⁸⁴ See FFIEC (2014) *BSA/AML Manual* 19.

¹⁸⁵ *Ibid.*

¹⁸⁶ OCC *Money Laundering* 16-17. For a detailed discussion of jurisdictions as contributory factors to the risk of TBML generally, see Ch 2 para 2.3.4 above.

¹⁸⁷ See FFIEC (2014) *BSA/AML Manual* 21.

¹⁸⁸ See OCC *Money Laundering* 16-17; FFIEC (2014) *BSA/AML Manual* 21.

¹⁸⁹ See OCC *Money Laundering* 16-17; FFIEC (2014) *BSA/AML Manual* 24. Regarding the AML role of the FATF generally, see Ch 4 para 4.3.2 above.

¹⁹⁰ See FFIEC (2014) *BSA/AML Manual* 19.

anonymity or require handling volumes of transactions with high dollar equivalents.¹⁹¹ Examples of such products or services include trade finance, correspondent accounts, and services through third-party payment process, among others.¹⁹²

Customers, as a risk category, also pose a significant money-laundering threat. It should be noted that any type of customer account is capable of being abused for money-laundering purposes.¹⁹³ However, certain customers and entities may pose a significant and higher risk specific to them.¹⁹⁴ In assessing money-laundering risks posed by customers, financial institutions are encouraged by the FFIEC to consider other variables as well. Such variables may include services being sought by the customer and the geographic location where they are transacting from or domiciled.¹⁹⁵

7.3.4.5 Scope of the RBA for TBML in Trade-Finance Instruments

The requirement to assess the risk of money laundering by financial institutions under the BSA does not address TBML in trade-finance in specific terms.¹⁹⁶ Although TBML in trade-finance transactions is not directly addressed, it can be argued that the scope of the RBA can equally cover this type of money laundering. For example, the directions by the FFIEC to consider products or services in the assessment of money-laundering risk may also cover the provision of trade-finance services.¹⁹⁷ Thus, where a bank is providing a service involving a documentary credit, it has to consider the possibility of this service being manipulated for TBML by professional money launderers in the process.

In addition, the provision of trade-finance transactions can cover multiple jurisdictions, which may be of high money-laundering risk.¹⁹⁸ Thus, the requirement to consider

¹⁹¹ See OCC *Money Laundering* 14; Bruemmer & Alper (2013) 130 *Banking L J* 867 at 875.

¹⁹² See FFIEC (2014) *BSA/AML Manual* 20. For a discussion of the risk of TBML in selected trade-finance instruments under this study, see Ch 3 para 3.3 et seq above.

¹⁹³ OCC *Money Laundering* 16.

¹⁹⁴ See FFIEC (2014) *BSA/AML Manual* 20.

¹⁹⁵ Ibid. For a brief discussion of the CDD measures required for banks under the BSA, see para 7.3.4.6 below.

¹⁹⁶ See para 7.3.4.4 above.

¹⁹⁷ See again para 7.3.4.4 above.

¹⁹⁸ See Ch 3 para 3.3 et seq above. From time to time, the FATF declares certain countries to be high-risk jurisdictions for money laundering. As of 24 February 2023, there are 25 jurisdictions under FATF's increased monitoring for money laundering, including South Africa, see www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/Increased-monitoring-february-2023.html [Accessed on 30 May 2023].

high-risk jurisdictions, customers and services may equally apply to TBML in trade-finance instruments.¹⁹⁹ The Wolfsberg Group, the BAFT and even the ICC, have, among other international organisations, identified the abuse of trade-finance instruments through TBML involving multiple jurisdictions.²⁰⁰ Thus, the application of the RBA in the assessment of money laundering in general, should factor in trade-finance transactions in order to capture the threat of TBML in trade-finance instruments. In any case, the RBA by nature is flexible enough to allow the assessment and control of any money-laundering risk, including the risk of TBML in trade-finance instruments. Thus, the presence of the approach under the US AML regime is a positive step, which could be used to the advantage of banks in assessing all forms of risk within their processes, including the risk of TBML.

7.3.4.6 *The Obligation to Conduct Customer Due Diligence (CDD)*²⁰¹

Knowing customers through proper identification processes is the first step to understanding customer behaviour that may indicate suspicious money-laundering activities.²⁰² Therefore, a financial institution's CDD programme is its most effective defence mechanism against the problem of money laundering.²⁰³

The BSA implementing regulations require financial institutions to adopt and maintain a written CIP.²⁰⁴ The CIP is at the centre of a bank's CDD measures against money laundering.²⁰⁵ The BSA does not obligate banks to maintain a one-size fits all type of CIP. Each bank should have a CIP that is suited to the size and nature of its

¹⁹⁹ See again para 7.3.4.4 above. For a detailed discussion of high-risk jurisdictions as contributory factors to the risk of TBML generally, see again Ch 2 para 2.3.4 above.

²⁰⁰ See again Ch 3 para 3.3 et seq. For a discussion of the AML roles of these and other international organisations against TBML, see Ch 4 para 4.3 et seq above.

²⁰¹ The CDD measures are part of the KYC process in South Africa, England and Singapore. They are necessary for financial institutions to know who they are dealing with in order to prevent money laundering, see Ch 5 para 5.3.4.6 above; Ch 6 para 6.3.4.6 above; and Ch 8 para 8.3.4.6 below.

²⁰² See OCC *Money Laundering* 9; Bruemmer & Alper (2013) 130 *Banking L J* 867 at 872; Skerry (2013) 53 *Santa Clara L Rev* 205 at 220; and Christopher J Wilkes 'Case for Reforming the Anti-Money Laundering Regulatory Regime: How Financial Institutions' Criminal Reporting Duties Have Created an Unfunded Private Police Force' (2020) 95 *Indiana Law Journal* 649-682 at 657.

²⁰³ See s 5318(I) of the BSA. See also OCC *Money Laundering* 9; Reuter & Truman *Chasing Dirty Money* 46; De Dios (2016) 10 *Brook J Corp Fin & Com L* 495 at 497; Howard (2017) 19 *Transactions: Tenn J Bus L* 45 at 52.

²⁰⁴ See s 5318(I) of the BSA. See also OCC *Money Laundering* 9; Skerry (2013) 53 *Santa Clara L Rev* 205 at 223; De Dios (2016) 10 *Brook J Corp Fin & Com L* 495 at 502; and Tomas & Roppolo 'United States of America' 1476.

²⁰⁵ See De Dios (2016) 10 *Brook J Corp Fin & Com L* 495 at 502.

operations.²⁰⁶ The CIP must be compliant with the BSA and must be incorporated into the AML compliance programme of the bank.²⁰⁷

Besides being appropriate to the bank's business, the CIP should have risk-based methods for identifying customers.²⁰⁸ It should also have procedures for documenting and retaining information collected by the bank according to its CIP.²⁰⁹ Each CIP should generally have procedures on bank-account opening, including information of customer details needed.²¹⁰ Furthermore, the CIP should also make provision for procedures to resolve circumstances where the bank is unable to conduct verification of the customer's identity. This should also include guidance on when the bank may not open a customer's bank account.²¹¹

7.3.4.7 Scope of the CDD Measures for TBML in Trade-Finance Instruments

The requirement under the BSA for financial institutions to apply CDD measures and to have a CIP for money laundering does not specifically address TBML in trade-finance transactions. However, it has been argued by Zdanowicz that current CDD measures under the BSA can be applied in trade-finance transactions to curb possible TBML.²¹² In this regard, the FFIEC provides specific guidance on how financial institutions can apply the CDD requirements under the BSA to trade-finance transactions that may be abused through TBML.²¹³ It encourages banks to undertake a comprehensive assessment of the customer before facilitating any trade-financing transaction.²¹⁴ This entails appreciating the nature of trade-finance documentation involved in the transaction.²¹⁵ To adequately apply the CDD measures in the trade-

²⁰⁶ See Bruemmer & Alper (2013)130 *Banking L J* 867 at 872; Tomas & Roppolo 'United States of America' 1477. Regarding the RBA in managing money-laundering risks by a financial institution, see para 7.3.4.4 above.

²⁰⁷ See De Dios (2016) 10 *Brook. J Corp Fin & Com L* 495 at 501; Howard (2017) 19 *Transactions: Tenn J Bus L* 45 at 52. See also para 7.3.4.2 above.

²⁰⁸ See Skerry (2013) 53 *Santa Clara L Rev* 205 at 223. See also para 7.3.4.4 above.

²⁰⁹ See s 5318(l) of the BSA. See also Tomas & Roppolo 'United States of America' 1476; Wilkes (2020) 95 *Ind L J* 649 at 657.

²¹⁰ See Bruemmer & Alper (2013)130 *Banking L J* 867 at 872; Tomas & Roppolo 'United States of America' 1477.

²¹¹ See Tomas & Roppolo 'United States of America' 1478; Wilkes (2020) 95 *Ind L J* 649 at 657.

²¹² See Zdanowicz (2009) 5 *Review of Law & Economics* 855 at 870. See also Lewis (2022) 55 *Vand J Transnat'l L* 529 at 533 who argues that a cursory or basic CDD may not uncover TBML due to its complexity and that financial institutions may need to employ enhanced CDD to unravel the fraud in trade-finance transactions affected by TBML.

²¹³ See FFIEC (2014) *BSA/AML Manual* 268.

²¹⁴ *Idem* at 269. See also para 7.3.4.6 above.

²¹⁵ See FFIEC (2014) *BSA/AML Manual* 269.

finance context, the FFIEC further encourages financial institutions to use the AML standards and guidance principles from the FATF, APG and the Wolfsberg Group.²¹⁶ This is a sound recommendation considering that these organisations have made substantial contributions on how to mitigate the risk of TBML in trade-finance transactions.²¹⁷

Depending on the role of the bank in a trade-finance transaction, the FFIEC advises that varying degrees of CDD measures may need to be taken.²¹⁸ For instance, where the bank is the issuing bank in a typical documentary credit transaction, it should conduct comprehensive CDD on the applicant of the credit.²¹⁹ Such a process should involve getting adequate information about the customer, their business, beneficiaries and their sources of funding.²²⁰

The CDD process, therefore, should involve rigorous background checks especially where a combination of other risk factors are involved.²²¹ Such factors may include the use of shell companies and the involvement of multiple parties. The FFIEC notes that financial institutions should be aware that shell companies might be used to facilitate a TBML scheme in trade-finance transactions.²²² The use of such entities hides the identities of participants in a trade-finance transaction thereby increasing the risk of TBML.²²³ On the involvement of multiple parties, the FFIEC cautions that a transaction involving a documentary credit, for example, may also complicate the CDD process due to the number of parties involved.²²⁴ In such situations, the FFIEC advises that a heightened CDD procedure is necessary to fully appreciate the underlying business of the customer.²²⁵

²¹⁶ Ibid. For these principles and other best practice guidance from international organisations on the control of TBML, see Ch 4 para 4.3 et seq above.

²¹⁷ See again Ch 4 para 4.3 et seq above.

²¹⁸ See FFIEC (2014) *BSA/AML Manual* 269.

²¹⁹ Ibid.

²²⁰ Ibid.

²²¹ Ibid. See also para 7.3.4.6 above.

²²² See FFIEC (2014) *BSA/AML Manual* 268. See also Ch 2 para 2.4.9 above for Tax havens and the risk of TBML.

²²³ See FFIEC (2014) *BSA/AML Manual* 268. See again Ch 2 para 2.4.9 above.

²²⁴ See FFIEC (2014) *BSA/AML Manual* 268.

²²⁵ Idem at 269.

7.3.4.8 The Obligation to Keep Records

The obligation to keep records of financial transactions seems basic yet it is significant in the combatting of money laundering. The obligation enables financial institutions to maintain a paper trail of financial transactions, which is useful in the conducting of money-laundering investigations.²²⁶ The keeping of records by banks also provide the evidence, which is necessary in the prosecution of money-laundering offences and other financial crimes.²²⁷ Thus, financial institutions in the US are required under the BSA regulations to maintain records of transactions they have carried out on behalf of their customers.²²⁸ The records of the transactions they carried out have to be original or copies of the relevant documents.²²⁹

Financial institutions must maintain three kinds of records in accordance with the BSA standards. First, they must keep any records of extension of credit exceeding USD\$10 000.²³⁰ This also extends to any record of request, advice or instruction received or given regarding any transaction resulting in the transfer of currency or other monetary instruments, funds or credit exceeding USD\$10 000 to or from the US.²³¹ The transaction need not only be in cash because it could be a transfer, credit or monetary instrument.²³² Secondly, financial institutions must keep records of each advice, request or instruction given to another financial institution resulting in the transfer of funds exceeding USD\$10 000 to or out of the US.²³³ Thirdly, they must keep records of originators and beneficiaries of customers who are non-established.²³⁴ Where the originator of a transaction is not a customer well known to the financial institution, the BSA regulations require that additional documentation be obtained.²³⁵ For every payment order that a bank receives as a beneficiary's bank, it must obtain further documentation, where the beneficiary is not a current customer.²³⁶ All records related

²²⁶ See FFIEC (2014) *BSA/AML Manual* 3; Wilkes (2020) 95 *Ind L J* 649 at 657.

²²⁷ See FFIEC (2014) *BSA/AML Manual* 3.

²²⁸ See Tomas & Roppolo 'United States of America' 1471; Wilkes (2020) 95 *Ind L J* 649 at 657.

²²⁹ See 31 CFR 1010.410 (b). See also Tomas & Roppolo 'United States of America' 1471.

²³⁰ See 31 CFR 1010.410 (a). See also Tomas & Roppolo 'United States of America' 1471.

²³¹ See 31 CFR 1010.410 (b). See also Turner (2004) 54 *Case W Res L Rev* 1389 at 1402.

²³² See 31 CFR 1010.410 (c). See also Tomas & Roppolo 'United States of America' 1471.

²³³ See 31 CFR 1010.410 (c). See also Tomas & Roppolo 'United States of America' 1471.

²³⁴ See Tomas & Roppolo 'United States of America' 1472; 31 CFR 1020.410.

²³⁵ See 31 CFR 1010.410 (a)(2).

²³⁶ See 31 CFR 1010.410 (a)(3). See also Tomas & Roppolo 'United States of America' 1472.

to transactions must be maintained for at least five years.²³⁷ However, after the account is closed, records pertaining to the customer's identification must be retained for five years by the financial institution.²³⁸ It should be noted that either a US Treasury Order or a law enforcement investigation might cause some of the records to be retained for more than five years depending on the circumstances.²³⁹

7.3.4.9 Scope of the Record Keeping Duty for TBML in Trade-Finance Instruments

The banks' duty to keep records under the BSA does not refer to specific types of transactions, including trade-finance transactions. In this regard, there is no express obligation under any US obligation to keep records specific to TBML in trade-finance transactions.²⁴⁰ I, however, submit that the overall obligation to keep records under the BSA may equally apply to those records pertaining to suspected cases of TBML in trade-finance instruments.²⁴¹ This is because the obligation seems to be wide enough to encompass almost any transaction that passes through the bank, including trade-finance transactions where TBML may be suspected.²⁴² Depending on the levels of money-laundering threats to the bank's trade-finance transactions, a bank is free to keep records about any transaction, including where TBML is involved.²⁴³

The obligation to keep records in the context of TBML in trade-finance instruments may also be linked to the duty of reporting suspicious transactions.²⁴⁴ In this regard, where a bank has previously made reports to FinCEN about suspected cases of TBML, chances may be high that corresponding records of such reportage were kept as per the requirement under the BSA.²⁴⁵

Moreover, the requirement to keep records also apply to situations where financial institutions have to retain information about the beneficiaries of their customers.²⁴⁶ Thus, in a documentary credit transaction, for example, a bank would be expected by

²³⁷ See 31 CFR 1010.410 (d).

²³⁸ See FFIEC BSA/AML Infobase 2023 'Appendix P: BSA Record Retention Requirements-FFIEC BSA/AML' <https://bsaaml.ffiec.gov> [Accessed on 9 September 2023].

²³⁹ Ibid.

²⁴⁰ See para 7.3.4.8 above.

²⁴¹ See again para 7.3.4.8 above.

²⁴² See again para 7.3.4.8 above.

²⁴³ See again para 7.3.4.8 above.

²⁴⁴ For a discussion of this duty, see para 7.3.4.10 below.

²⁴⁵ See para 7.3.4.10 below.

²⁴⁶ See para 7.3.4.8 above.

the FFIEC to keep records about the beneficiary of the credit. This is a step in the right direction in the prevention of TBML in trade-finance instruments. It ensures that comprehensive AML records of transactions are kept for future use, even though for a limited period of five years.

7.3.4.10 The Obligation to Report Suspicious Transactions

Suspicious activity reports²⁴⁷ are valuable to law enforcement agencies when conducting investigations on possible money-laundering activities.²⁴⁸ The BSA requires financial institutions to file reports of any suspicious transaction they have identified with FinCEN.²⁴⁹ The idea of a suspicious activity report in the US was first mooted in April 1996.²⁵⁰ It was modelled after the pre-existing European system for reporting questionable transactions.²⁵¹ A financial institution is required to report a suspicious activity if a transaction seems suspicious or is not consistent with normal account activity.²⁵²

The BSA requires that a bank generates a suspicious activity report where a transaction exceeds USD\$5 000 and there is suspicion of any of the following four circumstances. First, that the transaction constitutes funds derived illegally or intended to disguise funds or assets obtained from an illegal activity.²⁵³ Secondly, the transaction is structured in ways designed to bypass the BSA requirements.²⁵⁴ Thirdly, the transaction suggests that it is not the kind of transaction the customer would often

²⁴⁷ Suspicious activity reports are also known as 'suspicious transaction reports' or 'suspicious transaction and unusual reports' in other jurisdictions, see Ch 5 para 5.3.4 et seq; Ch 6 para 6.3.4 et seq above; and Ch 8 para 8.3.4 et seq below.

²⁴⁸ See Reuter & Truman *Chasing Dirty Money* 54; Cassara *Next Frontier* 199; Mohammed Ahmad Naheem 'TBML Suspicious Activity Reports — A Financial Intelligence Unit Perspective' (2018) 25 *Journal of Financial Crime* 721-733 at 723; Wilkes (2020) 95 *Ind L J* 649 at 655.

²⁴⁹ See s 5318(g) of the BSA; OCC *Money Laundering* 12; Madinger *Money Laundering* 61; Skerry (2013) 53 *Santa Clara L Rev* 205 at 224; De Dios (2016) 10 *Brook. J Corp Fin & Com L* 495 at 506; and Tomas & Roppolo 'United States of America' 1474. For the role of the FinCEN as the US financial intelligence unit, see para 7.4.2 below.

²⁵⁰ See FFIEC (2014) *BSA/AML Manual* 3; Cassara *Next Frontier* 199.

²⁵¹ See Cassara *Next Frontier* 199. In South Africa, suspicious activity reports are also known as suspicious transaction reports, see Ch 5 para 5.3.4 et seq above.

²⁵² See FFIEC (2014) *BSA/AML Manual* 3; Cassara *Next Frontier* 199; Lopez *et al* (2016) 17 *JOIC* 54 at 55; Skerry (2013) 53 *Santa Clara L Rev* 205 at 222; Wilkes (2020) 95 *Ind L J* 649 at 655.

²⁵³ See 31 CFR 1020.320. See also Bruemmer & Alper (2013) 130 *Banking L J* 867 at 872; De Dios (2016) 10 *Brook. J Corp Fin & Com L* 495 at 506; Wilkes (2020) 95 *Ind L J* 649 at 656.

²⁵⁴ See s 5324 of the MLCA; 31 CFR 1022.320-1023.320. See also *Ratzlaf v United States* 1994 WL 4189; Wilkes (2020) 95 *Ind L J* 649 at 656.

conduct, that it lacks a legitimate business objective, or that it is not clearly legal.²⁵⁵ Fourthly, the transaction uses the bank to facilitate criminal activities.²⁵⁶

Besides the identifying information, suspicious activity reports in the US feature a narrative space allowing those who file them to highlight their observations and the reasons for considering a transaction as suspicious.²⁵⁷ As to what constitutes 'suspicious' in a transaction, that is left to the discretion of the filer of the report.²⁵⁸ The majority of suspicious activity reports filed with FinCEN relate to suspected cases of money laundering and structured transactions.²⁵⁹ Financial institutions that process trade-finance transactions are also required to file suspicious activity reports with FinCEN, if such transactions show any red flags of potential TBML.²⁶⁰ It should be noted, however, that no single transactional activity may be a clear indication of the presence of TBML.²⁶¹ Thus, FinCEN recommends that banks should evaluate red-flag indicators of potential TBML in conjunction with other factors that may reflect money-laundering activity.²⁶²

It has been noted by the US Government Accountability Office (USGAO)²⁶³ that financial institutions file relatively less suspicious activity reports related to TBML with FinCEN than they do for money laundering in general.²⁶⁴ Such suspicious activity reports do not even specifically address the issue of TBML in trade-finance instruments.²⁶⁵ For example, it is possible for a bank to file a suspicious activity report for an unusual wire transfer, which is related to TBML without even being aware of the TBML aspect of the transaction.²⁶⁶ In addition, financial institutions may file suspicious

²⁵⁵ See 31 CFR 1024.320-1025.320. See also Wilkes (2020) 95 *Ind L J* 649 at 656.

²⁵⁶ See 31 CFR 1026.320. See also Tomas & Roppolo 'United States of America' 1475; and Wilkes (2020) 95 *Ind L J* 649 at 656.

²⁵⁷ See Cassara *Next Frontier* 199; Skerry (2013) 53 *Santa Clara L Rev* 205 at 225; Howard (2017) 19 *Transactions: Tenn J Bus L* 45 at 53.

²⁵⁸ See Madinger *Money Laundering* 61.

²⁵⁹ See Reuter & Truman *Chasing Dirty Money* 106; Madinger *Money Laundering* 61; Howard (2017) 19 *Transactions: Tenn J Bus L* 45 at 54.

²⁶⁰ See s 5318(g) of the BSA.

²⁶¹ See US Government Accountability Office (USGAO) (2021) *Countering Illicit Finance Report* 8.

²⁶² See USGAO (2021) *Countering Illicit Finance Report* 8.

²⁶³ The USGAO is an independent government agency within the US legislative branch which provides fact-based and timely information to Congress, US government agencies and the public with a view to minimising overspending of taxpayers' money by the US government, see www.gao.gov [Accessed on 10 October 2023].

²⁶⁴ See USGAO (2021) *Countering Illicit Finance Report* 18.

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*

activity reports being triggered by fraudulent documents facilitating TBML without knowing it while being motivated by the fraudulent nature of the documents.²⁶⁷

7.3.4.11 Scope of the Duty to Report for TBML in Trade-Finance Instruments

The filing of suspicious activity reports is a useful process in the combatting of TBML in trade-finance transactions.²⁶⁸ Although the BSA does not directly address the filing of suspicious transaction reports in trade-finance transactions, there is much guidance for banks in this regard by the FFIEC.²⁶⁹ The FFIEC cautions banks to be aware of the TBML techniques that organised crime groups usually employ.²⁷⁰ It also warns that banks need to be alert to the fact that fraudulent documents may be employed in transactions.²⁷¹

The FFIEC further advises that, where possible, financial institutions should review trade-finance documentation not only for compliance with the terms of the trade-finance instrument, but also for irregularities that may indicate TBML.²⁷² Thus, banks should look out for red-flag indicators that may be reflective of suspicious TBML activities.²⁷³ To accurately identify suspicious transaction activities in a trade-finance transaction, the FFIEC encourages financial institutions to strive to rely on authentic documents.²⁷⁴ Thus, when reviewing documents under a trade-finance transaction, financial institutions should even rely on third-party sources to independently verify and authenticate supplied documents.²⁷⁵ Examples of such third parties include official US or foreign government official sources.²⁷⁶

Anomalies that may be indicative of TBML may be found in any document within the trade-finance transaction. Such documents may be shipping documents, invoices or some fraudulent import or export licence.²⁷⁷ Sometimes there may be discrepancies

²⁶⁷ Ibid.

²⁶⁸ See Cassara *Next Frontier* 2.

²⁶⁹ See para 7.3.4.10 above. See also FFIEC (2014) *BSA/AML Manual* 268.

²⁷⁰ See FFIEC (2014) *BSA/AML Manual* 268. See also Ch 2 para 2.3.4 et seq above and Ch 3 para 3.3 et seq above.

²⁷¹ See FFIEC (2014) *BSA/AML Manual* 268. See again Ch 2 para 2.3.4 et seq above.

²⁷² See FFIEC (2014) *BSA/AML Manual* 269.

²⁷³ Ibid.

²⁷⁴ Ibid.

²⁷⁵ Ibid.

²⁷⁶ Ibid.

²⁷⁷ Ibid.

in the documents themselves.²⁷⁸ The FFIEC notes that the presence of discrepancies in trade-finance documents or an occasional suspicious transaction may not necessarily call for the filing of a report with FinCEN.²⁷⁹ Where there is a need to file a suspicious activity report triggered by a trade-finance transaction, the bank is not expected to halt the transaction altogether. However, such stoppage may be necessary where the transaction also violates the sanction lists of the US Office of Foreign Asset Control (OFAC).²⁸⁰

In reviewing documents for potential TBML in trade-finance transactions, the FFIEC also encourages financial institutions to employ the services of the Society for Worldwide Interbank Financial Telecommunication (SWIFT).²⁸¹ In this regard, they should monitor the names appearing in the SWIFT messages to establish if they also appear on the OFAC sanctions list. Although this may not out rightly indicate money-laundering activities, it may create leads for deeper investigations that may reveal TBML in trade-finance transactions.²⁸²

The bank's role in a typical trade-finance transaction, for example, in documentary credits, also plays a part in determining the extent of its monitoring exercise.²⁸³ Thus, in transaction monitoring and review, the bank should be guided by the complexity of its size and its trade-finance portfolio. The FFIEC warns that unless the behaviour of the customer or the documentation under the transaction, appear to be patently unusual, the bank should not unduly delay in processing the transaction.²⁸⁴ This is in recognition of the need to have smooth business operations that are concluded timeously.

Furthermore, in monitoring transactions for suspicious TBML activities, the bank should pay particular attention to certain aspects of the transaction. Such aspects include the items being shipped, the jurisdictions involved in the trade and the

²⁷⁸ Ibid.

²⁷⁹ Ibid.

²⁸⁰ Ibid.

²⁸¹ Ibid. See also Tax Justice Network 'SWIFT: The Next Frontier in Countering Dirty Money' <https://taxjustice.net> [Accessed on 9 September 2023]. Collin, Cook and Soramaki (2016) 'The Impact of Anti-Money Laundering Regulation on Payment Flows Evidence from SWIFT Data' *Centre for Global Development Working Paper* 445.

²⁸² See FFIEC (2014) *BSA/AML Manual* 269.

²⁸³ Idem at 270.

²⁸⁴ Idem at 271.

presence of common techniques used in TBML operations.²⁸⁵ Red flags should be raised when goods being shipped do not match the customer's defined company profile.²⁸⁶ Additionally, where customers are engaged in a transaction involving high-risk or non-cooperative jurisdictions, the bank should heighten its scrutiny.²⁸⁷ Other red-flag indicators mentioned by the FFIEC are the presence of complex transactions and the directing of payment proceeds to an unrelated third party.²⁸⁸ These, however, can also occur in pure legitimate transactions. Therefore, those who review trade-finance transactions for possible TBML need to be trained and extra alert so as not to unnecessarily stifle business operations.

Consistent amendments of the instructions under a trade-finance instrument like a documentary credit may also be indicative of the suspicion of TBML.²⁸⁹ It should be noted, however, that it is not an offence to amend a transaction being financed by a trade-finance instrument.²⁹⁰ On the contrary, where such amendments are significant and lack reasonable justification the FFIEC recommends that the transaction be flagged down for potential financial-crime activities.²⁹¹

7.3.4.12 *Obligation to Train Staff on Money-Laundering Issues*

Staff training is an essential component of a bank's AML compliance programme.²⁹² The BSA requires that a bank's AML compliance programme should have internal controls that partly deal with the issue of training of staff.²⁹³ The main goal of this kind of training need to be the educating of bank staff about their obligations under the BSA and the bank's AML programme.²⁹⁴

In its *AML Manual*, the FFIEC recommends that staff training covers the operations of the bank, for example, in international banking or trade-finance transactions.²⁹⁵ It is

²⁸⁵ Idem at 270. See also Ch 2 para 2.3.4 et seq above.

²⁸⁶ See FFIEC (2014) *BSA/AML Manual* 270. See also para 7.3.4.10 above.

²⁸⁷ See FFIEC (2014) *BSA/AML Manual* 270. See also para 7.3.4.6 above.

²⁸⁸ See FFIEC (2014) *BSA/AML Manual* 270. See also Ch 3 para 3.3 et seq and Ch 4 para 4.3 et seq above.

²⁸⁹ See again Ch 3 para 3.3 et seq above.

²⁹⁰ See again Ch 3 para 3.3 et seq above.

²⁹¹ See FFIEC (2014) *BSA/AML Manual* 270. See also Ch 4 para 4.3.2 et seq and para 4.4.5 et seq above.

²⁹² See FFIEC (2014) *BSA/AML Manual* 30. See also para 7.3.4.2 above.

²⁹³ See FFIEC (2014) *BSA/AML Manual* 30. See again para 7.3.4.2 above.

²⁹⁴ See FFIEC (2014) *BSA/AML Manual* 30.

²⁹⁵ Idem at 33.

also good practice encouraged by the FFIEC, that training of staff be continuous and incorporate new developments in AML and the BSA.²⁹⁶ Particular money-laundering typologies and suspicious activities should be given as examples to relevant departments of the bank in training sessions.²⁹⁷ Thus, individual business lines of the bank should be taken into account when conducting staff training.²⁹⁸

7.3.4.13 Scope of the Staff Training Duty for TBML in Trade-Finance Instruments

There is a general duty under the BSA to train staff on money-laundering issues.²⁹⁹ The duty does not specifically oblige financial institutions to train staff on TBML in trade-finance transactions. However, in its *AML Manual*, the FFIEC specifically recommends that training on TBML be offered to bank staff engaged in trade-finance transactions.³⁰⁰ In any case, banks seem to be free to include training on TBML if, through their risk assessments, they discover that trade-finance transactions are likely to be impacted upon by this type of money laundering.³⁰¹

The requirement for an AML compliance programme, also calls for a provision relating to training of staff. It states that the training be a component of every bank's AML programme.³⁰² The training should also be commensurate with the products and services of the bank.³⁰³ Consequently, where a bank provides trade-finance services, impliedly it may need to train staff on money-laundering risks associated with the trade-finance sector.³⁰⁴ In any case, the extent to which a bank may train staff about TBML depends on the level of capacity and expertise of its compliance officers on the subject.

7.3.5 Conclusion

The US AML measures do not specifically guide financial institutions on how to deal with TBML in trade-finance instruments.³⁰⁵ The little guidance available comes from

²⁹⁶ Ibid.

²⁹⁷ Ibid.

²⁹⁸ Idem at 37.

²⁹⁹ See para 7.3.4.12 above.

³⁰⁰ See again para 7.3.4.12 above.

³⁰¹ See again para 7.3.4.12 above.

³⁰² See para 7.3.4.2 above.

³⁰³ See again para 7.3.4.2 above.

³⁰⁴ See again para 7.3.4.12 above.

³⁰⁵ See para 7.3.4 et seq above.

the FFIEC *AML Manual* on CDD and suspicious transaction reporting.³⁰⁶ The AML obligations for banks are generic in that they are for money laundering in general. Thus, to apply them for the control of TBML in trade-finance transactions one has to be indirect and innovative.³⁰⁷ This is not surprising considering that the US generally adopts a wider approach towards the problem of TBML without necessarily restricting it to the banking sector. This partly explains the little to no guidance on how to deal with TBML in trade-finance instruments. Consequently, the US AML response to the problem of TBML is generally widespread in various institutions that are beyond the banking sector.³⁰⁸

To its credit, the FFIEC encourages financial institutions to make use of the guidelines from the FATF and the Wolfsberg Group, which have largely addressed the risk of TBML in trade-finance instruments.³⁰⁹ In the absence of clear guidance specifically addressing TBML in trade-finance transactions, banks have to come up with their own strategies on how to deal with the problem if they encounter it in their operations.

7.4 INSTITUTIONAL AML FRAMEWORK FOR TBML IN TRADE FINANCE

7.4.1 General

The institutional AML framework of the US is complex. It has several institutions, at both federal and state level, involved in the handling of AML intelligence, investigations, regulation and the pursuit of money-laundering offenders.³¹⁰ Each institution has a distinct mandate that contributes to the broader US response to the challenge of money laundering. The most notable of these institutions are briefly discussed below with a view to establishing how they can contribute or have contributed towards the combatting of TBML in trade-finance instruments in the US.

³⁰⁶ See para 7.3.4.7 above and para 7.3.4.11 above.

³⁰⁷ See again para 7.3.4 et seq above.

³⁰⁸ See para 7.4 et seq below.

³⁰⁹ See again Ch 3 para 3.3 et seq and Ch 4 para 4.3 et seq above.

³¹⁰ See FATF (2016) *US Mutual Evaluation Report* 23.

7.4.2 The Financial Crimes Enforcement Network (FinCEN)

FinCEN is the primary authority responsible for AML regulation in the US.³¹¹ It was created by the US Treasury in 1990.³¹² It administers and enforces the BSA in addition to its role as the US FIU.³¹³ The AML institution equivalent to FinCEN under the South African AML framework is the FIC.³¹⁴ FinCEN is a division of the US Treasury and is part of the Egmont Group.³¹⁵ As the BSA administrator, FinCEN issues regulations and guidance notes to financial institutions.³¹⁶ Besides administering the BSA, FinCEN also coordinates federal regulatory agencies in their AML roles.³¹⁷ In this regard, FinCEN relies on these agencies to evaluate US banks' compliance with the BSA in money-laundering control.³¹⁸

As the FIU, the goal of FinCEN is to protect the US financial system from organised-crime activities, including money laundering.³¹⁹ Pursuant to that role, it provides support to law enforcement authorities through identifying and relaying or receiving financial crime intelligence to or from them.³²⁰ The law enforcement authorities can directly access filed suspicious activity reports within FinCEN database.³²¹ FinCEN also works with its counterpart FIUs in the Egmont Group to share strategic information on the combatting of money laundering, including on fighting TBML in trade-finance

³¹¹ See s 5311 et seq of the BSA and s 310 of the MLCA. See also Reynolds (2002) 9 *Cross Cultural Management* 3 at 9.

³¹² See Reynolds (2002) 9 *Cross Cultural Management* 3 at 8; Skerry (2013) 53 *Santa Clara L Rev* 205 at 224.

³¹³ See Reynolds (2002) 9 *Cross Cultural Management* 3 at 8; Sanders & Sanders (2004) 4 *Rich J Global L & Bus* 47 at 62; FATF (2016) *US Mutual Evaluation Report* 27; Mohammed Ahmad Naheem 'Is Tackling Trade-Based Money Laundering (TBML) Through Stricter Reporting Regulation the Most Effective Response?' (2018) 21 *Journal of Money Laundering Control* 345-357 at 346.

³¹⁴ See Ch 5 para 5.4.2 above. See also Ch 6 para 6.4.2 above and Ch 8 para 8.4.2 below for similar FIUs in the other comparative jurisdictions.

³¹⁵ The Egmont Group was founded in 1996 with FinCEN as a founding member, see Ch 4 para 4.4.4 above. See also FFIEC (2014) *BSA/AML Manual* 5; Miller *et al TBML: Overview and Policy Issues* 11; and Joseph E Silvia 'The Fifth Pillar and FinCEN's New Rules on Customer Due Diligence' (2017) 134 *Banking L J* 57-66 at 58.

³¹⁶ See FFIEC (2014) *BSA/AML Manual* 5; Naheem (2018) 21 *JMLC* 345 at 346.

³¹⁷ See Naheem (2018) 21 *JMLC* 345 at 346; USGAO (2020) *TBML Report* 11. See also para 7.5.2 and para 7.5.4 below.

³¹⁸ See FFIEC (2014) *BSA/AML Manual* 5; USGAO (2019) *US Efforts to Combat TBML Report* 10.

³¹⁹ See Cassara *Next Frontier* 201; De Dios (2016) 10 *Brook. J Corp Fin & Com L* 495 at 507; FATF (2016) *US Mutual Evaluation Report* 23; and Silvia (2017) 134 *Banking L J* 57 at 57.

³²⁰ See FFIEC (2014) *BSA/AML Manual* 5; Miller *et al TBML: Overview and Policy Issues* 11; and Silvia (2017) 134 *Banking L J* 57 at 57.

³²¹ See Sanders & Sanders (2004) 4 *Rich J Global L & Bus* 47 at 62; Skerry (2013) 53 *Santa Clara L Rev* 205 at 224; and FATF (2016) *US Mutual Evaluation Report* 37.

transactions.³²² It is also central to the operations of various AML authorities in the US such as FinCEN Exchange,³²³ the Bank Secrecy Act Advisory Group (BSAAG),³²⁴ the Federal Bureau of Investigations (FBI),³²⁵ and the FFIEC,³²⁶ whose roles are relevant to the control of TBML.

As already noted, FinCEN is central to the US efforts in combatting TBML.³²⁷ It first raised its awareness of TBML in a November 1997 advisory, which was followed, by a similar advisory on BMPE in June 1999.³²⁸ The advisory, however, was not specific to the challenge of TBML in trade-finance transactions. In February 2010 FinCEN issued a further advisory titled *Advisory to Financial Institutions on Filing Suspicious Activity Reports Regarding TBML* (FinCEN (2010) *Advisory on TBML*) which is based on the investigations conducted by law enforcement authorities in trading activities between the US and South American countries.³²⁹ The advisory also describes basic techniques used in TBML operations and their related red flags.³³⁰

Although the *Advisory on TBML* is about TBML, it is not specific to trade-finance instruments. It offers guidance to financial institutions on how to file suspicious activity reports with specific reference to TBML. It directs institutions filing the reports to include either the abbreviation 'TBML' or 'BMPE' in the suspicious activity report.³³¹ Consequently, FinCEN receives suspicious activity reports specific to TBML schemes in the US.³³² Although these reports are not conclusive or absolute proof of illegal activities, they may indicate potential occurrence of TBML.³³³ FinCEN notes that TBML

³²² See Sanders & Sanders (2004) 4 *Rich J Global L & Bus* 47 at 62; USGAO (2020) *TBML Report* 41. See also Ch 4 para 4.4.4 above.

³²³ For the role of FinCEN Exchange and its relevance in preventing TBML, see para 7.4.6 below.

³²⁴ For the BSAAG's role in money-laundering control and its contributions against TBML, see para 7.4.4 below.

³²⁵ For a discussion of the FBI's contributions against TBML, see para 7.4.10 below.

³²⁶ For a detailed examination of the FFIEC's role and its contribution against TBML, see para 7.5.4 below.

³²⁷ See Miller *et al TBML: Overview and Policy Issues* 11.

³²⁸ Ibid. See also FFIEC (2014) *BSA/AML Manual* 270 et seq. As regards the operation of the BMPE, see Ch 2 para 2.3.5 et seq above.

³²⁹ See FinCEN (2010) *Advisory on TBML* generally. See also Miller *et al TBML: Overview and Policy Issues* 11.

³³⁰ See FinCEN (2010) *Advisory on TBML* 1-6. See also Ch 2 para 2.3.4 et seq above.

³³¹ See FinCEN (2010) *Advisory on TBML* 6. See also Miller *et al TBML: Overview and Policy Issues* 11.

³³² For example, in 2010 FinCEN received SARs related to TBML with a USD\$276billion transaction value for the period between January 2004 and May 2009. FinCEN also received SARs related to TBML amounting to 7044 from 2014 to 2018, see USGAO (2020) *TBML Report* 21.

³³³ See USGAO (2020) *TBML Report* 21.

activities in the US could be higher than what is evident in the filed suspicious activity reports. This could be because such reports might be reported under different categories not necessarily labelled 'TBML'.³³⁴ This may also include TBML in trade-finance instruments although FinCEN does not delineate between TBML in general and TBML in trade-finance transactions in particular. The only specific reference to the problem of TBML in trade-finance transactions came from the FFIEC in 2014 where FinCEN is a contributory authority.³³⁵

In trying to curb TBML activities in certain identified locations, FinCEN also issues what are known as Geographic Targeting Orders (GTO).³³⁶ A GTO is a tool, which imposes time-limited requirements on financial institutions in a particular geographic location, to keep records and report any suspicious criminal activity to law enforcement authorities.³³⁷ It is issued under the BSA.³³⁸ Although such orders have been issued before, they were mainly aimed at TBML through BMPE activities rather than trade-finance instruments.³³⁹ The idea of GTOs is a good one and is worth replicating by other jurisdictions, including South Africa. In this regard, it should be emulated by the FIC under the South African AML regime to target any sector-specific threats of TBML. Consequently, this may assist the FIC to establish the scale of TBML in the trade-finance sector and create a basis for formulating appropriate AML responses.

Besides the foregoing initiatives, FinCEN is also involved in other AML efforts aimed at controlling TBML in the US. In April 2013, FinCEN and other US law enforcement agencies sanctioned the Halawi Exchange and Rmeiti Exchange for involving themselves in TBML schemes through the purchase of used vehicles in the US for

³³⁴ Ibid.

³³⁵ See Miller *et al* *TBML: Overview and Policy Issues* 11. See also FFIEC (2014) *BSA/AML Manual* 270 et seq. On the contribution of the FFIEC to the control of TBML and its other members, including the FinCEN, see para 7.5.4 below.

³³⁶ See Naheem (2018) 21 *JMLC* 345 at 347; Miller *et al* *TBML: Overview and Policy Issues* 11. For example, in 2014 FinCEN issued a GTO against TBML concerns by law enforcement agencies wherein additional reporting and record keeping obligations were imposed on financial institutions and businesses in the Los Angeles Fashion District, see USGAO (2019) *US Efforts to Combat TBML Report* 19.

³³⁷ See Miller *et al* *TBML: Overview and Policy Issues* 12.

³³⁸ See Naheem (2018) 21 *JMLC* 345 at 347.

³³⁹ See Miller *et al* *TBML: Overview and Policy Issues* 12; USGAO (2019) *US Efforts to Combat TBML Report* 19.

resale in West Africa.³⁴⁰ Although the exercise was not specific to trade-finance transactions, it demonstrates the alertness of the FIU to the problem of TBML. FinCEN is also at the centre of raising awareness on the issue of TBML. In 2018 and 2019, it organised conferences on TBML, with various US competent authorities such as the Internal Revenue Service-Criminal Investigation, the Customs and Border Protection and Homeland Security Investigations, attending. The conferences tackled various issues related to TBML such as vulnerabilities of different US economic sectors to TBML.³⁴¹

7.4.3 Conclusion

FinCEN is the US FIU responsible for AML activities in the country. It collects and analyses financial intelligence from financial institutions and forward it to law enforcement authorities for further investigations.³⁴² It is central to the combatting of money laundering, including TBML through trade-finance transactions.³⁴³ FinCEN has made direct contributions towards the combatting of TBML in the US, which are worth emulating under the South African regime. It has issued advisory notices directed at TBML although these are not specific to the trade-finance sector. It has also issued GTOs aimed at increasing reporting requirements directed at TBML.³⁴⁴ However, it has not yet issued a GTO specific to TBML in trade-finance instruments.

FinCEN has also required financial institutions to file suspicious activity reports specifically directed at TBML. This is a significant contribution from FinCEN considering that most jurisdictions rarely file suspicious transactions specifically speaking to the challenge of TBML. However, FinCEN has not made any guidance practice of its own directed at assisting banks on how to deal with TBML in trade-finance instruments. Its appreciation of TBML is from a broad perspective, covering banks and institutions beyond the banking sector.³⁴⁵

³⁴⁰ See s 311 of the USA PATRIOT Act of 2001. See also Miller *et al* *TBML: Overview and Policy Issues* 13. Other US AML agencies involved the operation were the FBI and the US Customs and Border Patrol, see FATF (2016) *US Mutual Evaluation Report* 92.

³⁴¹ See USGAO (2020) *TBML Report* 25.

³⁴² See para 7.4.2 above.

³⁴³ See again para 7.4.2 above.

³⁴⁴ See again para 7.4.2 above.

³⁴⁵ See again para 7.4.2 above.

FinCEN is a member of the FFIEC, which has drafted the *AML Manual* with a particular section directed at combatting TBML in trade-finance transactions.³⁴⁶ This is an indirect contribution to the efforts aimed at dealing with TBML in trade-finance transactions. FinCEN is also part of the BSAAG and FinCEN Exchange, which are predominantly information-sharing platforms for the combatting of money laundering, including TBML in trade-finance instruments.³⁴⁷

7.4.4 Bank Secrecy Act Advisory Group (BSAAG)

The US Treasury established the BSAAG in terms of the Annunzio-Wylie Anti-Money Laundering Act of 1992.³⁴⁸ The purpose of the BSAAG is to prevent money laundering in the banking sector. It is another platform to exchange financial intelligence between the regulator, law enforcement authorities and financial institutions.³⁴⁹

The BSAAG has representation across various sectors, including the banking and law enforcement sectors.³⁵⁰ It consists of representatives from the federal agencies, financial institutions and other interested persons.³⁵¹ The group is the vehicle or platform through which FinCEN receives feedback on the reporting requirements under the BSA.³⁵² FinCEN also takes the opportunity provided through the BSAAG to inform private sector representatives on how it uses the feedback provided by stakeholders.³⁵³ The director of FinCEN chairs the BSAAG and is responsible for ensuring that relevant issues are tabled before the BSAAG for discussion and analysis.³⁵⁴

The BSAAG has two separate working groups, one for addressing compliance issues of financial institutions against the BSA and another for brainstorming ways through which the financial sector could prevent financial crimes, including money

³⁴⁶ See para 7.5.4 below.

³⁴⁷ See para 7.4.4 and para 7.4.6 below.

³⁴⁸ See s 1564(a)-(b) of the Wylie-Annunzio Act.

³⁴⁹ See FATF (2016) *US Mutual Evaluation Report* 46.

³⁵⁰ Ibid.

³⁵¹ See <https://www.federalregister.gov> [Accessed on 15 November 2022].

³⁵² See para 7.4.2 above.

³⁵³ See <https://www.federalregister.gov> [Accessed on 15 November 2022]. See also para 7.4.2 above.

³⁵⁴ See <https://www.federalregister.gov> [Accessed on 15 November 2022].

laundering.³⁵⁵ However, none of these working groups focuses on the problem of TBML in trade-finance instruments.

Each year the BSAAG has two plenary meetings to consider money-laundering risks, get feedback from industry on the usage of suspicious activity reports and enquire on areas that need guidance from the group.³⁵⁶ In addition to the plenary meetings, FinCEN created a unit within the BSAAG in May 2015, which is made up of law enforcement agencies, financial institutions, federal regulators and itself.³⁵⁷ The unit is aimed at identifying industry-wide threats of money laundering and other emerging money-laundering risks within the US financial sector.³⁵⁸ Such emerging risks may include the risk of TBML in trade-finance transactions although the unit has not published any work in this regard. Through the BSAAG, FinCEN communicates the findings of the unit in the plenary meetings and discussions to the broader financial-sector stakeholders.³⁵⁹

7.4.5 Conclusion

The BSAAG is one of the other platforms through which FinCEN gets feedback from its stakeholders, including the banking sector, about money-laundering issues.³⁶⁰ The group has not dealt with any specific case of TBML or TBML in trade-finance instruments.³⁶¹ However, its mandate is wide enough to cover many issues, including TBML in trade-finance transactions. The composition of the BSAAG is big enough to include almost every entity likely to be affected by TBML activities, including financial institutions offering trade-finance services. Through its working groups, the BSAAG has the capacity to focus its operations on how TBML in trade-finance transactions could be prevented in the financial sector.³⁶²

³⁵⁵ See The BSAAG Charter 2; www.fincen.gov [Accessed on 15 November 2022].

³⁵⁶ See FATF (2016) *US Mutual Evaluation Report* 46.

³⁵⁷ Ibid.

³⁵⁸ Ibid.

³⁵⁹ Ibid.

³⁶⁰ See para 7.4.4 above.

³⁶¹ See again para 7.4.4 above.

³⁶² See again para 7.4.4 above.

7.4.6 FinCEN Exchange

In 2017, FinCEN mooted the idea of FinCEN Exchange to enhance the exchange of information between itself, law enforcement agencies and financial institutions.³⁶³ FinCEN Exchange is the US equivalent of similar institutions created across different jurisdictions on the recommendation of the FATF beginning in England in 2015.³⁶⁴ The idea of creating such institution was formalised through the AMLA, which established FinCEN Exchange in 2020.³⁶⁵ FinCEN Exchange facilitates voluntary public-private information sharing between and/or among law enforcement agencies, financial institutions and FinCEN.³⁶⁶ Sharing of information between these players is intended to effectively and efficiently combat money laundering, through innovation and technological advances.³⁶⁷

In April 2018, FinCEN Exchange convened a strategy-mapping meeting on TBML in San Antonio, Texas.³⁶⁸ The information that FinCEN received through FinCEN Exchange has assisted FinCEN in exposing TBML networks threatening the US economy.³⁶⁹ To evaluate the performance of FinCEN Exchange, FinCEN is required by the AMLA to submit reports to the US Senate detailing the exchange's progress in the public-private partnership.³⁷⁰ It should be noted that FinCEN Exchange is relatively new and has not made substantial contributions towards the combatting of TBML or TBML in trade-finance instruments. FinCEN Exchange presents a good platform besides the BSAAG, to exchange information on TBML in trade-finance transactions between financial institutions and the regulator.

7.4.7 Conclusion

Information sharing is central to the combatting of TBML in trade-finance transactions. FinCEN Exchange is a new addition to the US's institutional response to the challenge

³⁶³ See USGAO (2020) *TBML Report* 23.

³⁶⁴ For the South African equivalent called SAMLIT, see para 5.4.4 above; for England there is JMLIT, see para 6.4.6 above and for Singapore there is the ACIP, see para 8.4.4 below.

³⁶⁵ See s 6103(d)(1) of the AMLA.

³⁶⁶ See s 6103(d)(2) of the AMLA.

³⁶⁷ See s 6103(2)(A) of the AMLA.

³⁶⁸ See USGAO (2020) *TBML Report* 23.

³⁶⁹ Ibid.

³⁷⁰ See s 6103(2)(A) of the AMLA.

of money laundering.³⁷¹ It is the product of FinCEN and brings together financial institutions and law enforcement authorities to deliberate over financial crime challenges, including money laundering.³⁷² Although FinCEN Exchange has not published a position paper on TBML in trade-finance transactions, the rationale behind its creation and its structure are suitable for combatting such kind of financial crimes. FinCEN Exchange has the capacity and the necessary structure to focus its efforts on TBML in trade-finance instruments should it desire to do so.

7.4.8 US Attorney General's Offices

The US Attorney General's Office and the Asset Recovery and Money Laundering Criminal Division are the two divisions that handle money-laundering prosecutions in the US.³⁷³ Both divisions are under the Department of Justice where the former prosecutes criminal matters in general while the latter attends to specialist cases of money laundering.³⁷⁴ Under the South African AML regime, the NPA is the equivalent prosecutorial body to the US Attorney General's Office.³⁷⁵ The Asset Recovery and Money Laundering Division also deals with asset forfeitures linked to the money-laundering cases it investigates.³⁷⁶ It also provides AML training to federal and state prosecutors and law enforcement agencies.³⁷⁷

It should be noted that the US Attorney General's Office prosecutes criminal cases mainly at the district level. Where it lacks expertise, it refers the matter to the Asset Recovery and Money Laundering Division.³⁷⁸ According to the USGAO, the Asset Recovery Division also prosecutes TBML.³⁷⁹ The USGAO does not, however, provide evidence of such cases having been prosecuted before. This could be due to lack of classification of cases as falling under the category of TBML. It would seem that the Asset Recovery and Money Laundering Division could already be prosecuting TBML under its general scope of dealing with money laundering since it does not keep

³⁷¹ See para 7.4.6 above.

³⁷² See again para 7.4.6 above.

³⁷³ See FATF (2016) *US Mutual Evaluation Report* 26.

³⁷⁴ *Ibid.*

³⁷⁵ See Ch 5 para 5.4.6 above. See also Ch 6 para 6.4.8 above and Ch 8 para 8.4.6 below for similar prosecutorial authorities in the other comparative jurisdictions.

³⁷⁶ See FATF (2016) *US Mutual Evaluation Report* 26-27.

³⁷⁷ *Ibid.*

³⁷⁸ *Idem* at 237.

³⁷⁹ See USGAO (2020) *TBML Report* 10-11.

records specifically indicating cases of TBML. The FATF and the APG have noted, in one of their studies on TBML that most jurisdictions do not keep specific statistics on TBML cases they have prosecuted.³⁸⁰ Where records of cases prosecuted are being kept, these refer to money laundering in general. This could be the case with the US Attorney General's Office and the Asset Recovery and Money Laundering Division.

7.4.9 Conclusion

The US has two divisions devoted to the prosecution of money-laundering offences, the Attorney General Office and the Asset Recovery and Money Laundering Division.³⁸¹ Being in charge of prosecution in the US, the Attorney General's Office pursues all crimes in addition to cases involving money laundering. However, where the matter is complex, the prosecution is largely conducted by the Asset Recovery and Money Laundering Division.³⁸² The USGAO has indicated that the overall duty of the Asset Recovery and Money Laundering Division to prosecute money laundering includes prosecuting TBML. However, it has not provided statistics of such cases having been prosecuted before. The FATF and the APG have at one point discovered that many countries do not separate money laundering and TBML in their records of prosecuted cases. This could also be the case in the US.

7.4.10 Federal Bureau of Investigation (FBI)

The FBI is the primary law enforcement authority for investigating federal crimes and money laundering in the US.³⁸³ It falls under the Department of Justice.³⁸⁴ Its investigative programmes focus on high-risk and complex financial crimes, including money laundering.³⁸⁵ The SAPS under the South African AML regime is the equivalent law enforcement authority to the FBI.³⁸⁶

³⁸⁰ See Ch 4 para 4.3.4 above.

³⁸¹ See para 7.4.8 above.

³⁸² See again para 7.4.8 above.

³⁸³ See FATF (2016) *US Mutual Evaluation Report* 25.

³⁸⁴ See USGAO (2020) *TBML Report* 10-11.

³⁸⁵ See FATF (2016) *US Mutual Evaluation Report* 84.

³⁸⁶ See Ch 5 para 5.4.8 above. See also Ch 6 para 6.4.10 and 6.4.4 above and Ch 8 para 8.4.8 below for similar law enforcement authorities in the other comparative jurisdictions.

The FBI uses various tools at its disposal to disrupt money laundering. These include collaborations with domestic and international law enforcement agencies.³⁸⁷ Further strategies that the FBI employ include the use of Working Groups and Task Forces. Within the FBI, the Money Laundering Forfeiture and Bank Fraud Unit is the specialist branch devoted to the combatting of money laundering.³⁸⁸ Any financial-crime case, with some elements of money laundering, is the responsibility of the Money Laundering Forfeiture and Bank Fraud Unit. The unit works closely with the Asset Recovery and Money Laundering Division of the Department of Justice.³⁸⁹

In its operations, the FBI also relies on the suspicious activity reports filed with FinCEN, pursuant to the BSA requirements.³⁹⁰ It conducts a data analysis of such suspicious activity reports to initiate new investigations or to support ongoing ones. The FBI has created a BSA Alert System, which allows officers to search details of their suspects such as names, telephone numbers or even date of birth.³⁹¹

Furthermore, the FBI also participates in various interagency task operations intended for combatting organised crime, including money laundering. For example, it is a member of the Organised Crime Drug Enforcement Task Force to which other federal agencies such as the Homeland Security Investigations, Immigration and Customs Enforcement (HSI-ICE) are also part.³⁹² The taskforce aims to identify and disrupt drug trafficking and other forms of organised crimes.

At the international level, the FBI is part of the US Treasury team to the FATF and the Five Eyes Law Enforcement Group's Money Laundering Working Group.³⁹³ The

³⁸⁷ See Steven M D'Antuono 'Combatting Money Laundering and other Forms of Illicit Finance: Regulator and Law Enforcement Perspectives on Reform' Statement before the Senate Banking Housing and Urban Affairs Committee Washington DC (November 29, 2018) www.fbi.gov/news [Accessed on 17 November 2022].

³⁸⁸ See D'Antuono 'Combatting Money Laundering' www.fbi.gov/news [Accessed on 17 November 2022].

³⁸⁹ Ibid. See also para 7.4.8 above.

³⁹⁰ See D'Antuono 'Combatting Money Laundering' www.fbi.gov/news [Accessed on 17 November 2022]. See also para 7.4.2 above.

³⁹¹ See D'Antuono 'Combatting Money Laundering' www.fbi.gov/news [Accessed on 17 November 2022].

³⁹² Ibid.

³⁹³ Ibid.

purpose of the group is to prevent money-laundering activities and to disrupt the capability of organised-crime group networks affecting its member countries.³⁹⁴

The FBI recognises TBML as a form of money laundering that has the potential to threaten the US economy.³⁹⁵ The organisation was central in the uncovering of a TBML scheme by Rmeiti and Halawi Exchange. These two financial service providers engaged in TBML through the purchase and resale of used vehicles from the US to West Africa using illicit funds from narcotics trafficking.³⁹⁶ As part of its intelligence-gathering exercise the FBI also analyses suspicious activity reports relating to TBML filed with FinCEN.³⁹⁷ The organisation, however, has no report of its own dealing with TBML in trade-finance instruments. Its interaction with TBML in trade-finance transactions could only be implied from its analysis of suspicious activity reports filed with FinCEN.

7.4.11 Conclusion

The FBI is the primary federal investigative authority for criminal offences in the US. It also investigates money-laundering cases in conjunction with intelligence gathered from other US competent authorities such as FinCEN.³⁹⁸ The FBI is aware of the threat of TBML to the US economy.³⁹⁹ It has led investigations before, leading to the discovery of TBML cases at the international level. Such cases, however, do not speak to the issue of TBML in trade-finance transactions. It would seem that the FBI's already awareness of the existence of TBML is a step in the right direction, which could be deployed in the trade-finance sector.

The FBI is also active in various organisations where it collaborates with other US competent authorities in the combatting of money laundering.⁴⁰⁰ It is part to the

³⁹⁴ The group has members from the Australian Federal Police, Australian Criminal Intelligence Commission (Australia), New Zealand Police (New Zealand), the Royal Canadian Mounted Police (Canada), the National Crime Agency (UK) and the DEA, the IRS-CI, HIS-ICE and the FBI (US).

³⁹⁵ See Steven M D'Antuono 'Combatting Money Laundering' www.fbi.gov/news [Accessed on 17 November 2022].

³⁹⁶ See FATF (2016) *US Mutual Evaluation Report* 94.

³⁹⁷ See Steven M D'Antuono 'Combatting Money Laundering and other Forms of Illicit Finance' www.fbi.gov/news [Accessed on 17 November 2022].

³⁹⁸ See para 7.4.10 above and para 7.4.2 above.

³⁹⁹ See again para 7.4.10 above.

⁴⁰⁰ See again para 7.4.10 above.

operations of FinCEN, FinCEN Exchange, the BSAAAG and the US Attorney General's Office.⁴⁰¹ These organisations offer various platforms upon which the problem of TBML in trade-finance transactions could be deliberated and resolved. The FBI could also use its expertise in analysing suspicious activity reports filed with FinCEN to focus on TBML in trade-finance transactions.

7.4.12 Homeland Security Investigations, Immigration and Customs Enforcement (HSI-ICE)

The ICE was created in 2003 and is the customs authority in the US.⁴⁰² It is the product of a merger of former US Customs Service and the Immigration of Naturalisation Service.⁴⁰³ It enforces federal laws against breaches in US customs, trade and immigration.⁴⁰⁴ A directorate branch within the ICE called the HSI, investigates financial crimes, including TBML.⁴⁰⁵ The closest institution under the South African AML regime that resembles the HSI-ICE is the SARS.⁴⁰⁶

The most significant response to the problem of TBML in the US at policy level is the establishment of TTUs by the HSI-ICE.⁴⁰⁷ The TTUs are aimed at identifying TBML trends at a global level.⁴⁰⁸ They are a novel US concept in the combatting of TBML.⁴⁰⁹ The first TTU in the US was created in 2004.⁴¹⁰ The TTUs are an interagency platform where various US competent authorities such as customs and law enforcement agencies converge.⁴¹¹ They are useful in detecting documentary fraud and monitoring trade transactions for anomalies between participating countries.⁴¹² Thus, the TTUs

⁴⁰¹ See para 7.4.2, para 7.4.4 and para 7.4.6 above.

⁴⁰² See www.ice.gov/about-ice [Accessed on 17 November 2022].

⁴⁰³ Ibid.

⁴⁰⁴ See FATF (2016) *US Mutual Evaluation Report* 26.

⁴⁰⁵ See USGAO (2020) *TBML Report* 10. See also FATF (2016) *US Mutual Evaluation Report* 26; www.ice.gov/about-ice [Accessed on 17 November 2022].

⁴⁰⁶ See Ch 5 para 5.4.10 above. See also Ch 6 para 6.4.12 above and Ch 8 para 8.4.10 below for similar customs authorities with AML roles to play in the other comparative jurisdictions.

⁴⁰⁷ See McSkimming (2010) 15 *Deakin L Rev* 37 at 52; US Senate Caucus on International Narcotics Control (2013) *The Buck Stops Here: Improving US Anti-Money Laundering Practices Report* 21.

⁴⁰⁸ See US Senate (2013) *Improving US Anti-Money Laundering Practices Report* 21; FATF (2016) *US Mutual Evaluation Report* 44.

⁴⁰⁹ For the background and development of the concept, see Cassara *Next Frontier* 158-161.

⁴¹⁰ See McSkimming (2010) 15 *Deakin L Rev* 37 at 52; Hoffmann (2013) 48 *Tex Int'l L J* 326 at 336; and FATF (2016) *US Mutual Evaluation Report* 70.

⁴¹¹ See FATF (2016) *US Mutual Evaluation Report* 44; USGAO (2019) *US Efforts to Combat TBML Report* 11.

⁴¹² See Delston & Walls (2012) 44 *Case W Res Int'l L* 737 at 743; USGAO (2020) *TBML Report* 10.

may be useful in the investigation of TBML in trade-finance instruments especially where there is cooperation between financial institutions and the HSI-ICE.

The role of the HSI-ICE in the TTUs resemble that of FIUs in that they collect, analyse and disseminate trade data in order to identify financial crimes, including TBML.⁴¹³ In this regard, the HSI-ICE analyse trade data passing through the TTUs for anomalies that may indicate the presence of TBML through an automated programme called Data Analysis and Research for Trade Transparency System.⁴¹⁴ The HSI-ICE also use red-flag indicators for TBML in the TTUs such as payment of vendors using unrelated third-party sources and false classification of goods.⁴¹⁵

Two types of analyses are used in the TTUs by the HSI-ICE to detect anomalies that may indicate TBML in trade-finance transactions. These are the unit-price and character-based analysis.⁴¹⁶ The unit-price analysis is a statistical price-filtering exercise on the US Merchandise Trade Database, which is also called the International Price Profiling System.⁴¹⁷ It employs a risk-based analysis of the characteristics of price of goods in trade transactions.⁴¹⁸ It should be noted that although the International Price Profiling System may indicate suspicious pricing of goods in international trade transactions, such indication is not conclusive proof of the existence of TBML.⁴¹⁹ Further analysis of the suspicion by the relevant US investigative AML agencies, such as the FBI, may need to be conducted.⁴²⁰

The other type of analysis the HIS-ICE uses in the TTUs is the character-based analysis. It entails an evaluation of non-price characteristics of the transaction such as the risk profile of the customer and the country of origin of the transaction.⁴²¹ These

⁴¹³ See McSkimming (2010) 15 *Deakin L Rev* 37 at 52. See also para 7.4.2 above.

⁴¹⁴ See Hoffmann (2013) 48 *Tex Int'l L J* 326 at 336-7; US Senate (2013) *Improving US Anti-Money Laundering Practices Report* 21; and USGAO (2019) *US Efforts to Combat TBML Report* 20.

⁴¹⁵ See Hoffmann (2013) 48 *Tex Int'l L J* 326 at 337. See also Ch 4 para 4.3.2 et seq above and Ch 2 para 2.3.4 et seq above.

⁴¹⁶ See Zdanowicz (2009) 5 *Review of Law & Economics* 855 at 875; McSkimming (2010) 15 *Deakin L Rev* 37 at 53.

⁴¹⁷ See Zdanowicz (2009) 5 *Review of Law & Economics* 855 at 875.

⁴¹⁸ *Ibid.*

⁴¹⁹ *Ibid.*

⁴²⁰ *Ibid.*

⁴²¹ *Ibid.* See also para 7.3.4 et seq above.

may be used to indicate potential TBML risks associated either with the customer or with the jurisdiction where the trade-finance transaction is being initiated.⁴²²

Although both the price and character-based analyses may not readily indicate TBML activities, they may reveal transactions that may warrant further scrutiny.⁴²³ The methods may also help in evaluating TBML red flags recommended by the FATF and the FFIEC.⁴²⁴ The FFIEC encourages financial institutions in the US to employ both the price and character-based analyses of transactions to increase the chances of detecting TBML in trade-finance transactions.⁴²⁵

Despite their apparent advantages, the HSI-ICE's TTUs have been criticised for being less effective in combatting TBML.⁴²⁶ One of the criticisms is that the TTUs may fail to detect TBML where complex trade-finance transactions and more entities are involved.⁴²⁷ Statistics from the TTUs, used by the HSI-ICE as the basis for investigations, may also be flawed. This is because organised crime groups sometimes use fraudulent documents in an attempt to evade taxes and commit other forms of customs crimes.⁴²⁸ Furthermore, due to the HSI-ICE's multi-pronged approach in dealing with all sorts of customs crimes, the effectiveness of the TTUs in fighting TBML, especially in trade-finance transactions, may also be questionable.⁴²⁹ Despite these criticisms, the idea of TTUs has expanded. The HSI-ICE has set up similar TTUs with partner countries, with the first one being in Colombia in 2005 and the recent one being in New Zealand in 2019.⁴³⁰ The intention of establishing these TTUs is to exchange trade data and to have partner countries assisting each other in identifying anomalies that may be indicative of TBML, including in trade-finance transactions.⁴³¹

⁴²² See also para 7.3.4.6 above on the AML obligation of banks to conduct CDD measures and how it may be used to detect TBML in trade-finance transactions.

⁴²³ See Zdanowicz (2009) 5 *Review of Law & Economics* 855 at 870.

⁴²⁴ Ibid. See also para 7.5.4 below and Ch 4 para 4.3.2 et seq above.

⁴²⁵ See Zdanowicz (2009) 5 *Review of Law & Economics* 855 at 874. See also para 7.5.4 below.

⁴²⁶ See Delston & Walls (2012) 44 *Case W Res Int'l L* 737 at 743.

⁴²⁷ Ibid.

⁴²⁸ Ibid.

⁴²⁹ See Hoffmann (2013) 48 *Tex Int'l L J* 326 at 337.

⁴³⁰ Idem at 336; USGAO (2020) *TBML Report* 31.

⁴³¹ See FATF (2016) *US Mutual Evaluation Report* 71; USGAO (2020) *TBML Report* 31.

7.4.13 Conclusion

The HSI-ICE has established TTUs as one of the many responses to the problem of TBML by the US.⁴³² TTUs are based on the idea that information should be shared between the US and its trading partners in order to detect abnormalities that would point to TBML.⁴³³ Although the TTUs operate outside the purview of banks and other financial institutions, the information they generate may help banks to identify potential TBML activities in the trade-finance transactions they facilitate. The TTUs assist in refining large volumes of trade data by using data analytics by profiling unit prices of goods and flagging those transactions that seem suspicious for TBML, among other financial crimes.⁴³⁴ Since the process is automated, it is generally expensive and for countries without enough resources, it may be difficult to replicate.

Although the TTUs are a noble idea from the HSI-ICE, their focus on many forms of financial crimes, from tax fraud to money laundering, may weaken its effectiveness on specialised crimes such as TBML. This becomes even more pertinent when it comes to detecting TBML in trade-finance transactions, which is facilitated mainly by financial institutions. The HSI-ICE is a customs authority whose focus is on revenue collection beyond the facilitation of trade-finance transactions by financial institutions. Outside the cost of establishing one, the TTUs are a good platform to sift trade data and compare prices of goods, which may present anomalies indicative of TBML in trade-finance transactions. The TTUs present a more suitable platform of cooperation among AML authorities and should be emulated under the South African AML regime.

7.5 SOME INITIATIVES BY THE FINANCIAL-SECTOR BODIES AGAINST TBML

7.5.1 General

Some US financial-sector bodies are significant in the fighting of organised crime, including money laundering.⁴³⁵ Organised crime groups would usually desire to clean their funds through the financial system.⁴³⁶ This places financial institutions at the

⁴³² See para 7.4.12 above.

⁴³³ See again para 7.4.12 above.

⁴³⁴ See again para 7.4.12 above.

⁴³⁵ See para 7.5.2 et seq below.

⁴³⁶ See Ch 2 above, generally, on the need to launder money by organised crime groups using various methods, including through TBML.

centre of organised-crime control. Consequently, certain institutions are seized with the role of combatting money laundering in the US financial system, including TBML. These institutions include the Federal Bank Regulators,⁴³⁷ the Federal Financial Institutions Examination Council,⁴³⁸ and the American Bankers Association.⁴³⁹ I have selected these institutions for analysis due to their relevance in the banking regulatory sector. An attempt will be made to assess the level of contribution of these institutions, if any, against the control of TBML in trade-finance instruments.

7.5.2 Federal Bank Regulators

Certain US competent authorities play a crucial part in ensuring that the BSA regulatory requirements are implemented. These entities include FinCEN,⁴⁴⁰ the Board of Governors of the Federal Reserve System and the Office of the Comptroller of the Currency.⁴⁴¹ The Board of Governors of the Federal Reserve System and the Office of the Comptroller of the Currency (OCC) are relevant to the banking sector.⁴⁴² Both are banking-sector regulators in the US at the federal level but with different remits, which overlap. The SARB's Prudential Authority under the South African AML regime resembles the Board of Governors of the Federal Reserve System and the OCC in terms of its regulatory functions against money laundering.⁴⁴³

On one hand, the Board of Governors of the Federal Reserve supervises state-chartered banks.⁴⁴⁴ On the other hand, the OCC is an autonomous office within the Department of the US Treasury, which regulates and supervises banks, which are not state-chartered, among other roles.⁴⁴⁵ The Board of Governors of the Federal Reserve and the OCC are collectively known as the Federal Bank Regulators.⁴⁴⁶ Both of these

⁴³⁷ See para 7.5.2 below.

⁴³⁸ See para 7.5.4 below.

⁴³⁹ See para 7.5.6 below.

⁴⁴⁰ See para 7.4.2 above.

⁴⁴¹ See FFIEC (2014) *BSA/AML Manual* 4.

⁴⁴² The two are part of what are generally referred to as 'Federal Bank Regulators' together with two other supervisory authorities namely, the Federal Deposit Insurance Corporation and the National Credit Union Administration whose mandates are outside the purview of this study, see FFIEC (2014) *BSA/AML Manual* 5.

⁴⁴³ See Ch 5 para 5.5.2 above. See also Ch 6 para 6.5.2 above and Ch 8 para 8.5.2 below for similar banking-sector regulatory authorities in the other comparative jurisdictions.

⁴⁴⁴ See FATF (2016) *US Mutual Evaluation Report* 27.

⁴⁴⁵ See Simons IV (2013) 17 *N C Banking Inst* 249 at 460; FATF (2016) *US Mutual Evaluation Report* 27; Wilkes (2020) 95 *Ind L J* 649 at 673.

⁴⁴⁶ See FFIEC (2014) *BSA/AML Manual* 5.

regulators play significant roles in ensuring compliance with the AML obligations under the BSA and other federal laws.⁴⁴⁷ Each bank under the supervision of the Federal Bank Regulator must establish and maintain a BSA compliance programme.⁴⁴⁸

As part of a robust AML compliance programme, the Federal Bank Regulators ensure that a financial institution has policies and procedures in place to identify and report any suspicious financial transactions to law enforcement authorities.⁴⁴⁹ Through their supervisory processes, the Federal Bank Regulators assess whether financial institutions have adequate AML policies to effectively identify and report any suspicious transactions.⁴⁵⁰ The Federal Bank Regulators also publish an *Interagency Statement on Enforcement of Bank Secrecy Act/Anti-Money Laundering Requirements*.⁴⁵¹ The statement outlines their approach in enforcing AML standards as per the BSA requirements. It also provides for uniformity in the way agencies enforce requirements of the BSA.⁴⁵² The regulators have constantly published such *Interagency Statements* with the latest being on the preparatory aspects of implementing the AMLA of 2020 by the US financial institutions.⁴⁵³ It is possible that these *Interagency Statements* could be used by the Federal Bank Regulators to update member banks on the status of TBML in trade-finance transactions within the US. The regulators could also use the *Interagency Statements* to guide banks on how to comply with their AML requirements under the BSA *vis-à-vis* the risk of TBML in trade-finance transactions.

Each of the Federal Bank Regulators has undertaken specific AML initiatives intended for the banks under their purview. On one hand, the Board of Governors of the Federal Reserve has established AML control systems to monitor money-laundering vulnerabilities within the operations of institutions under its supervision.⁴⁵⁴ On the other hand, the OCC has been able to categorise money-laundering risks in individual banks and across institutions within the banking sector through its Money-Laundering Risk

⁴⁴⁷ Ibid.

⁴⁴⁸ See FFIEC (2014) *BSA/AML Manual* 5. See also para 7.3.4.2 above on bank AML governance and oversight.

⁴⁴⁹ See again para 7.3.4.2 above on bank AML governance and oversight. See also OCC *Money Laundering* 4.

⁴⁵⁰ See FFIEC (2014) *BSA/AML Manual* 6.

⁴⁵¹ Ibid.

⁴⁵² Ibid.

⁴⁵³ The first statement was published on 19 July 2007, see FFIEC (2014) *BSA/AML Manual* 6.

⁴⁵⁴ See FATF (2016) *US Mutual Evaluation Report* 140.

System.⁴⁵⁵ In addition, it has a Lead Expert Network that assists it in identifying and analysing the money-laundering risks across institutions under its regulatory purview. The process helps the OCC to detect emerging money-laundering risks at an early stage.⁴⁵⁶ However, both of the Federal Bank Regulators have not made a statement regarding the potential threat of TBML in trade-finance transactions to the operations of their members. Their recognisable and indirect contribution against TBML is through their membership in the FFIEC. The FFIEC has produced an *AML Manual*, which partly address TBML in trade-finance transactions.⁴⁵⁷

7.5.3 Conclusion

The Federal Bank Regulators are critical in examining banks for compliance with the BSA AML requirements.⁴⁵⁸ They prescribe AML guidelines for banks under their purview. However, they have not made any pronouncements on TBML outside their role in the FFIEC.⁴⁵⁹ As part of the FFIEC, the Federal Bank Regulators have contributed towards the publishing of the *AML Manual*, a section of which is directed at managing money-laundering risks in trade-finance transactions.⁴⁶⁰ Since the BSA and other US AML statutes are currently used to combat all forms of money laundering, including TBML, the Federal Bank Regulators might be said to be dealing with TBML as well.⁴⁶¹ Current reports, however, do not show any evidence of them dealing with the challenge.

7.5.4 Federal Financial Institutions Examination Council (FFIEC)

The FFIEC was established in March 1979.⁴⁶² It is composed of the Board of Governors of the Federal Reserve System,⁴⁶³ the Federal Deposit Insurance Corporation, the Consumer Financial Protection Bureau, the National Credit Union Administration, the Office of the Comptroller of the Currency,⁴⁶⁴ and the State Liaison

⁴⁵⁵ Ibid.

⁴⁵⁶ Ibid.

⁴⁵⁷ See para 7.5.4 below.

⁴⁵⁸ See para 7.5.2 above.

⁴⁵⁹ See again para 7.5.2 above.

⁴⁶⁰ See para 7.5.4 below.

⁴⁶¹ See para 7.3.2 above.

⁴⁶² See FFIEC (2014) *BSA/AML Manual* 1; FATF (2016) *US Mutual Evaluation Report* 31.

⁴⁶³ See para 7.5.2 above.

⁴⁶⁴ See para 7.5.2 above.

Committee.⁴⁶⁵ The FFIEC was established to provide consistent guidelines and standards for the oversight of financial institutions in the US.⁴⁶⁶

The FFIEC publishes the *AML Manual*, which provides guidance to regulatory examiners when conducting the AML compliance reviews.⁴⁶⁷ The *AML Manual* provides an outline of the AML compliance requirements, expected money-laundering risk assessment procedures and recommended sound-industry practices for banks and other financial institutions.⁴⁶⁸ The FFIEC published its first *AML Manual* in 2005 and has subsequently updated it on a regular basis.⁴⁶⁹ The latest updates were done in 2023 and are indicated on the FFIEC BSA/AML infobase.⁴⁷⁰

As an AML authority in the US, the FFIEC is quite aware of the risk of TBML in trade-finance transactions. It first raised money-laundering alerts in the trade-finance sector in its *AML Manual* of 2007.⁴⁷¹ A section within the FFIEC *AML Manual* is dedicated towards giving guidance to financial institutions on how to deal with TBML in their trade-finance transactions.⁴⁷² Under the section titled *Trade-Finance Activities-Overview*, the FFIEC encourages regulatory authorities to examine financial institutions' systems in managing the risk of TBML.⁴⁷³ In this regard, the FFIEC *AML Manual* gives guidance to US banks on how trade-finance transactions may be manipulated through TBML schemes.⁴⁷⁴

Significantly, the FFIEC provides for what could pass as risk factors for TBML in trade-finance instruments and a corresponding explanation of mitigating measures, which banks could use to counter those risks.⁴⁷⁵ For example, the FFIEC alerts financial institutions to the fact that the international trade system is prone to abuse through TBML by organised crime groups. Therefore, the institutions need to be always alert

⁴⁶⁵ See FFIEC (2014) *BSA/AML Manual* 1; FATF (2016) *US Mutual Evaluation Report* 31.

⁴⁶⁶ See Zdanowicz (2009) 5 *Review of Law & Economics* 855 at 869; FFIEC (2014) *BSA/AML Manual* 1; and FATF (2016) *US Mutual Evaluation Report* 31.

⁴⁶⁷ See FFIEC (2014) *BSA/AML Manual* 1; FATF (2016) *US Mutual Evaluation Report* 31.

⁴⁶⁸ See FFIEC (2014) *BSA/AML Manual* 1; FATF (2016) *US Mutual Evaluation Report* 31.

⁴⁶⁹ See Zdanowicz (2009) 5 *Review of Law & Economics* 855 at 857.

⁴⁷⁰ See FDIC (2023) 'Bank Secrecy Act/Anti-Money Laundering Examination Manual Update' <https://www.fdic.gov> [Accessed on 9 September 2023].

⁴⁷¹ See Zdanowicz (2009) 5 *Review of Law & Economics* 855 at 869.

⁴⁷² See FFIEC (2014) *BSA/AML Manual* 267.

⁴⁷³ Ibid.

⁴⁷⁴ Ibid. See also Ch 3 para 3.3 et seq above.

⁴⁷⁵ See FFIEC (2014) *BSA/AML Manual* 267.

to documentary fraud, which is usually employed to facilitate TBML in trade-finance transactions.⁴⁷⁶

To illustrate how financial institutions can employ risk-mitigation measures, the FFIEC uses an example of the documentary credit transaction.⁴⁷⁷ In this regard, it encourages the institutions to train trade-processing staff about money-laundering risks in trade-finance transactions.⁴⁷⁸ Furthermore, the FFIEC encourages US financial institutions to use best industry guidance and TBML red-flag indicators published by the FATF and the Wolfsberg Group, to manage their possible risk exposures to TBML in trade-finance transactions.⁴⁷⁹ The FFIEC guidance on how banks should manage TBML risks through CDD, suspicious transaction reports, has been discussed above under the preventive AML obligations for banks.⁴⁸⁰

7.5.5 Conclusion

The FFIEC standardises the way the Federal Bank Regulators supervise institutions under their purview for compliance with the BSA AML requirements.⁴⁸¹ It publishes the *AML Manual* intended to guide financial institutions on how to comply with the BSA AML obligations.⁴⁸² Through the *AML Manual*, the FFIEC guides financial institutions on various issues that include AML governance, CDD measures, the RBA, suspicious transaction reporting, record keeping, and staff training. Thus, the FFIEC *AML Manual* is the cornerstone of the US AML regime since it provides guidance to banks on how to interpret and implement AML laws particularly the BSA.

The FFIEC is quite aware of the threat of TBML to the US financial system. It has, therefore, provided guidance to financial institutions on how to mitigate the risk of TBML in their trade-finance transactions.⁴⁸³ The FFIEC has devoted a section in its *AML Manual* on how to deal with TBML should it be encountered by banks in their daily activities. The guidance on TBML control is centred on assisting banks to conduct

⁴⁷⁶ Idem at 268. See also Ch 2 para 2.3.4 et seq above and Ch 3 para 3.3 et seq above.

⁴⁷⁷ See also Ch 3 para 3.3 et seq above.

⁴⁷⁸ See FFIEC (2014) *BSA/AML Manual* 269.

⁴⁷⁹ Ibid. See also Ch 4 para 4.3.2 and para 4.4.5 et seq above.

⁴⁸⁰ See again para 7.3.4 et seq above.

⁴⁸¹ See para 7.5.2 and para 7.5.4 above.

⁴⁸² See again para 7.5.4 above.

⁴⁸³ See again para 7.5.4 above.

money-laundering risk assessments using the RBA.⁴⁸⁴ Thus, each bank irrespective of its size should be able to initiate an AML plan suited for its operations in order to combat TBML in trade-finance transactions. More importantly, the FFIEC encourages banks in the US to make use of the red-flag indicators published by the FATF and the Wolfsberg Group, in identifying possible incidences of TBML.⁴⁸⁵ Its efforts against TBML are worth emulating by other jurisdictions, including South Africa.

7.5.6 American Bankers Association (ABA)⁴⁸⁶

The ABA was created in July 1875 by a grouping of 350 banks from 32 states at the time.⁴⁸⁷ The goal of the ABA members then, was to stay connected and be able to share ideas of mutual interest within the banking community.⁴⁸⁸ Although there has been many changes since 1875, the ABA still largely follows its original objectives taking into consideration developments in the banking industry over the years.⁴⁸⁹ Most importantly, the ABA advocates for the US banking industry on matters of common interest to banks, including the necessity of preventing money laundering within the banking sector.⁴⁹⁰ Under the South African AML regime, the BASA is the equivalent association to the ABA.⁴⁹¹

The ABA membership, which largely constitutes US banks, turn to it for training on various issues, including money laundering.⁴⁹² The organisation recognises banks' contribution as the US financial system's gatekeepers in the fight against money

⁴⁸⁴ See para 7.3.4 above.

⁴⁸⁵ See Ch 4 para 4.3.2 and para 4.4.5 above.

⁴⁸⁶ This should not be confused with the American Bar Association whose abbreviation is also the same as that of the American Bankers Association.

⁴⁸⁷ Harold Stonier 'The American Bankers Association' in: Herbert V Prochnow (ed) *American Financial Institutions* (1951) (hereinafter Stonier 'The American Bankers Association') 739. See also www.aba.com [Accessed 17 November 2022]; The Business Professor 'American Bankers Association-Explained' <https://thebusinessprofessor.com> [Accessed on 13 September 2023].

⁴⁸⁸ Stonier 'The American Bankers Association' 739. See also www.aba.com [Accessed 17 November 2022]. See also The Business Professor 'American Bankers Association-Explained' <https://thebusinessprofessor.com> [Accessed on 13 September 2023].

⁴⁸⁹ See www.aba.com [Accessed 17 November 2022]; The Business Professor 'American Bankers Association-Explained' <https://thebusinessprofessor.com> [Accessed on 13 September 2023].

⁴⁹⁰ See Harris Proschansky 'The American Bankers Association: Its Past and Present by Wilbert M Schneider Washington, DC, Public Affairs Press, 1956 Pp 275 USD\$5 00' (1957) 31 *Business History Review* 351-354, (hereinafter Proschansky 'The American Bankers Association') at 352.

⁴⁹¹ See Ch 5 para 5.5.4 above. See also Ch 6 para 6.5.6 above and Ch 8 para 8.5.4 below for similar associations in the other comparative jurisdictions.

⁴⁹² Stonier 'The American Bankers Association' 744. See also www.aba.com [Accessed 17 November 2022].

laundering. Consequently, the ABA encourages banks to be up to date in technological innovations in order to serve their customers with efficiency and security.⁴⁹³

The ABA has had various initiatives in supporting the US AML regime insofar as it affects the banking industry.⁴⁹⁴ For example, the organisation offered support to the US Congress in the passage of the AMLA of 2020.⁴⁹⁵ In this regard, the ABA is of the view that the AMLA is a good starting point to reform the US AML system.⁴⁹⁶ In addition, the ABA also works closely with other US AML agencies, institutions and Federal Bank Regulators such as FinCEN.⁴⁹⁷ It pledges to continue to collaborate with the US Congress, law enforcement authorities, Federal Bank Regulators and banks, in finding ways of improving the US AML regime. Furthermore, the ABA also supports efforts to improve the AML system especially through interagency cooperation with other US AML institutions.⁴⁹⁸

As a representative body of the banking industry, the ABA also supports efforts by FinCEN to see to it that unnecessary suspicious activity reports are not filed.⁴⁹⁹ It also advocates for the increased sharing of information between financial institutions.⁵⁰⁰ Furthermore, the ABA also ensures that its members consistently apply the RBA in compliance with the BSA requirements.⁵⁰¹ The organisation also regularly participates in the updating of the FFIEC *AML Manual* to ensure that it is in line with current developments in AML trends.⁵⁰² The ABA has participated in the formulating of initiatives against TBML in trade-finance instruments through its subsidiary the BAFT.⁵⁰³

⁴⁹³ See www.aba.com [Accessed 17 November 2022].

⁴⁹⁴ See Proschansky 'The American Bankers Association' 352.

⁴⁹⁵ Ibid. See also para 7.3.2.5 above on the brief review of the AMLA.

⁴⁹⁶ See www.aba.com [Accessed 17 November 2022].

⁴⁹⁷ Ibid. See also para 7.4.2 above; Simons IV (2013) 17 *N C Banking Inst* 249 at 268.

⁴⁹⁸ See www.aba.com [Accessed 17 November 2022].

⁴⁹⁹ See also para 7.4.2 above.

⁵⁰⁰ See www.aba.com [Accessed 17 November 2022].

⁵⁰¹ See also para 7.3.4 et seq above.

⁵⁰² See www.aba.com [Accessed 17 November 2022]. See also para 7.5.4 above.

⁵⁰³ For the contributions of the BAFT against TBML in trade-finance instruments, see Ch 4 para 4.4.6 et seq above.

7.5.7 Conclusion

The ABA is an important stakeholder in the US AML regime. It has demonstrated its significance by being a cooperative partner in most AML initiatives in the US, including law reform.⁵⁰⁴ The ABA has not made any position statement of its own on TBML in trade-finance transactions.⁵⁰⁵ However, it has participated in the updating of the FFIEC's *AML Manual*, which partly addresses the problem of TBML in trade-finance transactions.⁵⁰⁶ I submit that the ABA's general efforts towards the combatting of money laundering may also arguably encompass TBML. In any case, it has the capacity and the necessary membership to deliberate over issues of TBML in trade-finance transactions and how it could be governed through the BSA. The AMLA, for which the ABA has encouraged the US Congress to pass, is the first US legislation to mention TBML as a specific form of money laundering.⁵⁰⁷ Although this mentioning cannot directly be attributed to the lobbying of the ABA, the body's influence on the passage of the AMLA itself may not be overlooked. The ABA could also get feedback from its members on how they are currently handling TBML in trade-finance and pass it on to relevant AML regulators for the adoption of a unified position on how to deal with the problem.

7.6 CONCLUSION

The US pioneered in outlawing the practice of money laundering in the world.⁵⁰⁸ It has passed several pieces of legislation over the years, which are aimed at combatting money laundering.⁵⁰⁹ The US government is aware of the threat of TBML judging by its response through various means. However, government has not passed any specific legislation to deal with TBML in trade-finance transactions. Instead, it relies on current AML legislation to deal with cases of TBML. The crime of money laundering is catered for in the MLCA. The provision covering the offence is wide enough to potentially cover TBML in trade-finance transactions.⁵¹⁰ This is a good move that

⁵⁰⁴ See again para 7.5.6 above.

⁵⁰⁵ See again para 7.5.6 above.

⁵⁰⁶ See again para 7.5.4 above.

⁵⁰⁷ See again para 7.5.6 above; and para 7.3.2.5 above.

⁵⁰⁸ See para 7.3.2 et seq above.

⁵⁰⁹ See again para 7.3.2 et seq above.

⁵¹⁰ See para 7.3.2.6 above.

dispenses with the need for the US Congress to pass further legislation specifically aimed for TBML. Through the AMLA, the US Congress has requested that TBML be further researched in the US. This is intended to fully appreciate its extent and impact on the US economy in order to formulate appropriate responses. The AMLA, however, does not specify whether it desires TBML to be investigated in its general form or as being specific to trade-finance transactions.⁵¹¹

The US AML regime has many institutions devoted to the combatting of money laundering. These institutions have made varied contributions towards the control of TBML in trade-finance transactions, which are direct and indirect.⁵¹² FinCEN, which is the US FIU, has issued advisory notices to banks to be alert about the problem of TBML. Besides advisory notices, FinCEN has also issued GTOs to prevent TBML occurrences in the US.⁵¹³ Although these advisory notices and the GTOs are specific to TBML, they are not targeted at trade-finance transactions. Other significant contributions towards the challenge of TBML in the US comes from the HSI-ICE and the FFIEC. The HSI-ICE has made one of the most significant innovations against TBML through the concept of TTUs.⁵¹⁴ The TTUs have been used to profile potential cases of TBML through a data analytics process that relies on unit-price analysis between the US and its trading partners. The TTU concept reflects the US's commitment to deal with TBML at a macro level since it does not focus on trade-finance transactions.⁵¹⁵

A more specific intervention to the problem of TBML in trade-finance instruments under the US AML regime, comes from the FFIEC.⁵¹⁶ The FFIEC has provided guidance to banks on how to manage the risk of TBML in trade-finance transactions through its *AML Manual*.⁵¹⁷ The *AML Manual*, which gives guidance to banks on how to comply with the BSA requirements, specifically addresses TBML in trade-finance instruments by guiding banks on the RBA, CDD and reporting of suspicious activities.⁵¹⁸ However, the US AML regime is not an absolute model for dealing with

⁵¹¹ See para 7.3.2 above.

⁵¹² See para 7.4 et seq above.

⁵¹³ See para 7.4.2 above.

⁵¹⁴ See para 7.4.12 above.

⁵¹⁵ See again para 7.4.12 above.

⁵¹⁶ See para 7.5.4 above.

⁵¹⁷ See again para 7.5.4 above.

⁵¹⁸ See para 7.3.4 above.

the challenge of TBML in trade-finance instruments. Despite this, it has many positive initiatives and takeaways against TBML, which could be adopted and adapted by other jurisdictions, including South Africa. Such positive takeaways will be highlighted and dealt with on a comparative basis in Chapter 9 below.⁵¹⁹ In that chapter, insights from other jurisdictions selected for this comparative study are also put into perspective.

⁵¹⁹ See Ch 9 below generally.

CHAPTER 8: THE CONTROL OF TBML IN TRADE-FINANCE INSTRUMENTS UNDER SINGAPORE LAW¹

8.1 GENERAL

In the previous chapter, I discussed the US AML regime and examined its possible application to the problem of TBML in trade-finance instruments.² I also analysed points of strengths and weaknesses under the US AML regime in order to establish points of departure, which could be used as learning points for the South African AML regime in controlling TBML in trade-finance instruments.³

This chapter focuses on the comparative aspects of the AML regime of Singapore. It commences by giving an overview of the threat of TBML to Singapore's economy in order to ascertain whether the country is aware of the dangers associated with money laundering confronting it.⁴ The chapter then proceeds to discuss the AML legislation in Singapore and its scope for covering the risk of TBML in trade-finance transactions.⁵ Furthermore, the chapter reviews the AML obligations for financial institutions in Singapore and how they may be applied against TBML in trade-finance instruments.⁶ Besides its laws, a country's AML regime also depends on its institutional capacity to combat financial crimes. Therefore, the chapter further reviews the role played by institutions, law enforcement agencies and some financial-industry players in Singapore against TBML in trade-finance transactions.⁷ The overall aim of this chapter, as is the case with all the comparative jurisdictions, is to establish learning points for the South African AML regime against TBML in trade-finance instruments.⁸ Such learning points will be revealed more clearly, when the AML regime of South

¹ The terminology 'Singapore law', 'Singapore legal system' or 'Singapore legislation' or similarly structured phrases, will be used in this chapter instead of 'Singaporean law' or 'Singaporean legislation'. This is in line with how such terminology and similar phrases have been used in Singapore legal texts, see FATF and APG (2016), *Anti-Money Laundering and Counter-Terrorist Financing Measures -Singapore*, Fourth Round Mutual Evaluation Report, FATF, Paris and APG, Sydney, www.fatf-gafi.org/publications/mutualevaluations/documents/mer-singapore-2016.html; Veltrice Tan 'The Art of Deterrence: Singapore's Anti-Money Laundering Regimes' (2018) 25 *Journal of Financial Crime* 467-498; 'Singapore Law Review', www.singaporelawreview.com 'Singapore law watch' <https://www.singaporelawwatch.sg> [Accessed 2 June 2023].

² See Ch 7 above generally and Ch 3 para 3.3 et seq above.

³ See again Ch 7 above generally. See also Ch 5 above generally and Ch 3 para 3.3 et seq above.

⁴ See para 8.2 below.

⁵ See para 8.3.2 below.

⁶ See para 8.3.4 below. See also Ch 3 para 3.3 et seq below.

⁷ See para 8.4 et seq below.

⁸ See Ch 5 above generally and Ch 3 para 3.3 et seq above.

Africa is compared with those of selected comparative jurisdictions in this study, including Singapore in this chapter.⁹

8.2 OVERVIEW OF THE THREAT OF TBML IN SINGAPORE

Singapore is a major financial centre in the Asia/Pacific region.¹⁰ It has a well-structured banking system.¹¹ Despite having the lowest domestic-crime rate, Singapore's status as a global financial hub exposes it to the risk of money laundering.¹² A large portion of the money-laundering risk exposure to Singapore emanates from offences whose origins are foreign in nature.¹³ Being an international transportation hub, Singapore is also vulnerable to abuse through TBML.¹⁴ Further factors, which make Singapore attractive to money launderers, include the stability and efficiency of its banking processes which also promote secrecy.¹⁵ In its 2022 world financial secrecy, the Tax Justice Network¹⁶ ranks Singapore third on its Global

⁹ See Ch 6; and Ch 7 above. See also Ch 9; and Ch 10 below generally.

¹⁰ See Dora Neo 'Inside the Singapore Financial Centre' in: Hu Jiaxing, Matthias Vanhullebusch & Andrew Harding (eds) *Finance, Rule of Law and Development in Asia: Perspectives from Singapore, Hong Kong and Mainland China* (2016) 19, (hereinafter Neo 'Inside the Singapore Financial Centre'); Alvin Yeo & Joy Tan 'Singapore' in: Arun Srivastava, Mark Simpson & Richard Powell (eds) *International Guide to Money Laundering Law and Practice* (2019) 1269, (hereinafter Yeo & Tan 'Singapore').

¹¹ Madeline Lee 'Country Report: Anti-Money Laundering Laws and Regulations in Singapore' in Mark Pieth & Gemma Aiolfi (eds) *A Comparative Guide to Anti-Money Laundering A Critical Analysis of Systems in Singapore, Switzerland, the UK and the USA* (2004) 99, (hereinafter Lee 'AML in Singapore'); Neo 'Inside the Singapore Financial Centre' 23.

¹² See Tan Sin Liang 'Good Compliance - A Singapore Banking Industry Perspective' (2002) 9 *Journal of Financial Crime* 380-382 at 381; FATF & APG (2016) *Anti-Money Laundering and Counter-Terrorist Financing Measures-Singapore, Fourth Round Mutual Evaluation Report* 15 (hereinafter 'FATF & APG (2016) Singapore Mutual Evaluation Report'); Hamidul Haq 'Cracking the Whip on Financial Crimes in Singapore' in: Hu Jiaxing, Matthias Vanhullebusch & Andrew Harding (eds) *Finance, Rule of Law and Development in Asia: Perspectives from Singapore, Hong Kong and Mainland China* (2016) 437, (hereinafter Haq 'Cracking the Whip on Financial Crimes in Singapore'). See also *Public Prosecutor v Teo Cheng Kiat* [2000] SGHC 129 being the first money-laundering case to be investigated and prosecuted.

¹³ See Andreas Schloenhardt *Palermo in the Pacific: Organised Crime Offences in the Asia Pacific Region* (2010) 223; FATF & APG (2016) *Singapore Mutual Evaluation Report* 16; Haq 'Cracking the Whip on Financial Crimes in Singapore' 437.

¹⁴ See FATF & APG (2016) *Singapore Mutual Evaluation Report* 17. See also Schloenhardt *Palermo in the Pacific* 223.

¹⁵ See Shiqing Yu 'Still Keeping Secrets? Bank Secrecy, Money Laundering and Anti-Money in Switzerland and Singapore' (2016) 6 *IALS Student Law Review* 19-25 at 21-24; Yeo & Tan 'Singapore' 1269.

¹⁶ The Tax Justice Network is an advocacy group which is based in Bristol, England and is concerned about tax issues such as tax havens, tax evasion and competition. It seeks to achieve equality and social justice through advocating, among other things, for fair taxes on wealthier members of society and international corporations, see <https://taxjustice.net> [Accessed on 3 June 2023].

Financial Secrecy Index (GFSI).¹⁷ The GFSI is a ranking of countries, which are most complicit in facilitating the hiding of individual finances from law enforcement authorities through various means.¹⁸ Jurisdictions with high-financial secrecy are known for promoting tax evasion and money laundering, among other organised-crime operations.¹⁹ This is due to the opaque nature of the financial system and the prevailing secrecy laws in those jurisdictions.²⁰ Thus, the ranking of Singapore on the third position means that it is more attractive to organised crime groups desiring to launder 'dirty' money through its financial system.

In its 2014 *National Money-Laundering Risk Assessment Report*, Singapore identifies tax-related offences and TBML as significant threats to its economy.²¹ In a follow up *National Money Laundering Risk Assessment Report* of 2024, TBML is still identified as a significant threat in Singapore.²² The report notes that in recent years there has been an increase in requests from foreign counterparts pertaining to TBML activities with some connection to Singapore.²³ The FATF and the APG note that while Singapore seems to be largely aware of the money-laundering risks confronting it, more still needs to be done to understand the risks posed by TBML especially in trade-finance transactions.²⁴

Given the awareness of the challenge of TBML as shown by both the 2014 and the 2024 *National Money-Laundering Risk Assessment Reports*, AML authorities in Singapore have also sensitised stakeholders about TBML through issuance of guidance notes and red flag indicators.²⁵ Since the publication of its first *National Money-Laundering Risk Assessment Report* in 2014 and the latest one in 2024, Singapore has made a considerable effort to tap from other countries and

¹⁷ It was surpassed only by the US and Switzerland which were ranked first and second respectively, see www.fsi.taxjustice.net [Accessed on 3 June 2023].

¹⁸ See www.fsi.taxjustice.net [Accessed on 5 March 2023].

¹⁹ See Ch 2 para 2.4.9 above.

²⁰ See again Ch 2 para 2.4.9 above.

²¹ See Singapore (2013) *National Money Laundering and Terrorist Financing Risk Assessment Report* generally; FATF & APG (2016) *Singapore Mutual Evaluation Report* 17.

²² See Singapore (2024) *National Money Laundering and Terrorist Financing Risk Assessment Report* 34-36.

²³ See Singapore (2024) *National Money Laundering and Terrorist Financing Risk Assessment Report* 10.

²⁴ See FATF & APG (2016) *Singapore Mutual Evaluation Report* 18.

²⁵ Idem at 17. See also para 8.4.4, para 8.5.2 and para 8.5.4 below.

organisations' understanding of TBML in trade-finance transactions.²⁶ Such understanding will be revealed in the discussion below in relevant paragraphs.

8.3 SINGAPORE AML LEGAL FRAMEWORK FOR TBML

8.3.1 General

The government of Singapore has ratified the Conventions targeted at combatting money laundering, namely, the Vienna and Palermo Conventions.²⁷ It is also a member of the FATF, the APG and the Egmont Group of FIUs.²⁸ These organisations are all significant to the combatting of TBML at the global level.²⁹ Pursuant to its membership to these Conventions, Singapore adopts an AML approach designed to meet international standards, particularly those intended to meet the FATF Recommendations.³⁰ Therefore, it has passed AML laws, which largely comply with the provisions of these Conventions and the FATF Recommendations in terms of prohibiting money laundering in Singapore.³¹ This paragraph presents the AML laws and institutions tasked with the combatting of money laundering in Singapore. It also provides a critique of whether such laws and institutions adequately address the challenge of TBML in trade-finance instruments.

8.3.2 Overview of AML Legislation in Singapore

8.3.2.1 General

The government of Singapore relies on two major pieces of legislation to combat organised-crime activities, including TBML in trade-finance transactions. These are the Corruption, Drug Trafficking and other Serious Crimes (Confiscation of Benefits)

²⁶ See FATF & APG (2016) *Singapore Mutual Evaluation Report* 37.

²⁷ Singapore ratified the Vienna Convention on 23 October 1997 and the Palermo Convention on 28 August 2007. See Lee 'AML in Singapore' 74; FATF & APG (2016) *Singapore Mutual Evaluation Report* 195; Yeo & Tan 'Singapore' 1270. For a brief discussion of the Vienna and Palermo Conventions, see Ch 2 para 2.2.2; Ch 4 para 4.3.1 above.

²⁸ See Ch 4 para 4.3 et seq and para 4.4 et seq above.

²⁹ See Chee Fang Theng & Khattar Wong 'Singapore' in Wouter H Muller, Christian H Kalin & John G Goldsworth (eds) *Anti-Money Laundering: International Law and Practice* (2007) 674, (hereinafter Theng & Wong 'Singapore'). See also Ch 4 para 4.3 et seq and para 4.4 et seq above.

³⁰ See again Ch 4 para 4.3.2 et seq above. See also Yeo & Tan 'Singapore' 1270; Komkrich Silathong *A Comparative Analysis of Financial Intelligence Units in the United Kingdom, Singapore and Thailand* (Unpublished PhD Thesis University of the West of England, Bristol, 2021) 120.

³¹ See Yeo & Tan 'Singapore' 1269; Silathong *FIUs in the United Kingdom, Singapore and Thailand* 120. See also Recommendation 3 of the FATF (2012) *Standards*.

Act 1992 and the Monetary Authority of Singapore Act 1970.³² Various directions and regulations from the MAS and other industry-best practice guidelines from the ACIP and the ABS complement these laws.

8.3.2.2 *The Corruption, Drug Trafficking and other Serious Crimes (Confiscation of Benefits) Act* ³³(CDSA)

The primary AML law in Singapore is the CDSA.³⁴ It was first passed in 1993 with the intention of making it illegal to launder money obtained from drug sales.³⁵ In 1999 the CDSA was amended to cover virtually every serious crime that may generate proceeds of crime beyond drug trafficking.³⁶ The CDSA is largely based on the English Drug Trafficking Offences Act with some modifications intended to suit the context of Singapore.³⁷

The principal object of the CDSA is to prevent ill-gotten funds from being laundered into other properties with a view to evade being discovered by law enforcement authorities.³⁸ However, it should be noted that the CDSA does not use the term 'money laundering' in any of its provisions.³⁹ It does not even define the term.⁴⁰ Instead, the Act criminalises the dealing in property that represents the benefit of criminal

³² See Lee 'AML in Singapore' 99; Haq 'Cracking the Whip on Financial Crimes in Singapore' 438. See also para 8.3.2.2 and para 8.5.2 below.

³³ 1992 (2020 Ed). The government of Singapore signed the Convention against Transnational Organised Crime on December 13, 2000 and ratified it on August 28, 2007. To comply with the obligations under the Convention, the government then passed the CDSA 2007, see Schloenhardt *Palermo in the Pacific* 223-224.

³⁴ Lee 'AML in Singapore' 75; Chan 'Singapore' in: Jan Putnis (ed) *The Banking Regulation Review* 3rd ed (2012) 642; Kenny Foo 'Money Laundering Offences under the Corruption, Drug Offences and Other Serious Crimes (Confiscation of Benefits) Act: Interpretative Difficulties and a Proposed Solution' (2017) 29 *SAC L J* 163-193 at 164; and Tan (2018) 25 *Journal of Fin Crime* 467-498 at 473. Other relevant AML laws are the Monetary Authority of Singapore Act 1970; Notes and Guidance issued by the Monetary Authority of Singapore and Moneylenders (Prevention of Money Laundering and Financing of Terrorism) rules 2007.

³⁵ See Tan Sin Liang 'Singapore: Money Laundering-Legal Implications for Financial Institutions' (1997) 1 *Journal of Money Laundering Control* 184-189 at 184; Lee 'AML in Singapore' 75.

³⁶ See Lee 'AML in Singapore' 64. The CDSA has been further revised, in 2020 and amended in 2023, see the CDSA, 1992 (2020 Ed) and CDSA (Amendment) Act 2023.

³⁷ See Lee 'AML in Singapore' 75. On the overview of the historical similarities of the Singapore legal system and that of England, see Ch 1 para 1.6.3 et seq above.

³⁸ See the long title of the CDSA which provides 'for the confiscation of benefits derived from, and to combat, corruption, drug dealing and other serious crimes'. See also Foo (2017) 29 *SAC L J* 163 at 164; *WBL Corp Ltd v Lew Chee Fai Kevin appeal* [2012] 2 SLR 978 at 31; and Yeo & Tan 'Singapore' 1271.

³⁹ See Foo (2017) 29 *SAC L J* 163 at 164. On the discussion of the offence of money laundering in Singapore, see para 8.3.2.4 below.

⁴⁰ See Lee 'AML in Singapore' 76; Foo (2017) 29 *SAC L J* 163 at 164.

conduct.⁴¹ 'Criminal conduct' is defined as any serious offence committed either in or outside Singapore.⁴² The CDSA has extra territorial reach in that it applies to any property whether situated in Singapore or elsewhere.⁴³

8.3.2.3 Monetary Authority of Singapore Act⁴⁴ (MAS Act)

The MAS Act is the other law, besides the CDSA, which is significant in the combatting of money laundering in Singapore. Principally, it establishes the Monetary Authority of Singapore (MAS), which is Singapore's financial regulatory authority in charge of regulating money laundering.⁴⁵ In terms of section 27B of the MAS Act, the MAS may, from time-to-time, issue AML directions, notices or regulations to assist financial institutions operating in Singapore to combat money laundering-activities.⁴⁶ Such directions or regulations may provide for CDD measures and record-keeping duties that are necessary in preventing money laundering by banks.⁴⁷

Pursuant to its mandate under section 27B of the MAS Act, the MAS issued the MAS Notice 626 *Prevention of Money Laundering and Countering the Financing of Terrorism-Banks* (MAS Notice 626) in March 2015.⁴⁸ Since then, the MAS Notice 626 has been amended regularly, the latest amendment being in March 2022.⁴⁹ The MAS Notice 626 outlines AML requirements for banks, which include the conducting of risk assessment, the RBA, CDD measures, staff training and the reporting of suspicious transactions.⁵⁰ Thus, the MAS Notice 626 plays a central role in the preventive architecture of Singapore's AML regime.⁵¹ To facilitate the implementation of the MAS

⁴¹ See s19(7)(a)(b) of the CDSA states that 'dealing with property' held by any person includes (a) where a debt is owed to that person, making a payment to any person in reduction of the amount of the debt; and (b) removing the property from Singapore. The term 'criminal conduct' is defined in s2(1) of the CDSA to mean 'doing or being concerned in in any act constituting a serious offence or foreign serious offence'. See also *Luyono Lam v Public Prosecutor* [2010] 4 SLR 37 at 13; *Osborn Yap Chen Hsiang v Public Prosecutor* [2019] SGCA 40 at 19.

⁴² See s 2(1) of the CDSA. See also *Osborn Yap Chen Hsiang v Public Prosecutor* [2019] SGCA 40 at 19; Lee 'AML in Singapore' 75-6.

⁴³ See s 4(5) of the CDSA.

⁴⁴ 1970.

⁴⁵ For a detailed discussion on the AML regulatory and supervisory roles of the MAS in Singapore's banking sector, see para 8.5.2 below.

⁴⁶ See s27B of the MAS Act.

⁴⁷ See s27B(1A)(a)(b) of the MAS Act.

⁴⁸ See MAS Notice 626 para 1.1.

⁴⁹ See preamble of MAS Notice 626.

⁵⁰ See MAS Notice 626 para 4 et seq. For a detailed discussion of the preventive AML obligations for banks in Singapore, see para 8.3.4 et seq below.

⁵¹ See para 8.4.4 et seq below.

Notice 626, the MAS has issued *Guidelines to MAS Notice 626 on Prevention of Money Laundering and Countering the Financing of Terrorism* in April 2015 (MAS AML Guidelines).⁵² Thus, the MAS AML Guidelines should be read in conjunction with the MAS Notice 626 since the latter extensively outlines the AML obligations of financial institutions in Singapore.⁵³

8.3.2.4 The Crime of Money Laundering and Scope for TBML

Money laundering under the CDSA is a derivative offence based on the specified types of criminal conduct⁵⁴ set out in the first Schedule of the same Act.⁵⁵ An all-crimes approach is applied for predicate offences of money laundering in Singapore, including tax-related crimes.⁵⁶ It should be noted, however, that the CDSA criminalises the laundering of proceeds of crime and the handling of any benefits of crime without expressly mentioning the term 'money laundering'.⁵⁷ Criminal conduct that amounts to serious offences in Singapore, but that occurred in foreign jurisdictions, are also regarded as primary crimes for money laundering under the CDSA.⁵⁸ The only condition for this is that the laws of the foreign jurisdiction involved must similarly prohibit such criminal conduct.⁵⁹

The AML provisions under the CDSA are in two parts. The accused person's laundering of the proceeds of crime is covered in the first section, while the laundering of the proceeds of crime on behalf of another party is covered in the second.⁶⁰ On the first part, it is unlawful, according to the CDSA, to acquire, possess, use, conceal, or transfer property representing the accused's benefits of criminal conduct.⁶¹ In this regard, the Act also criminalises the mere possession or use of any property, which may reasonably be suspected to be criminal benefits, and the accused person is

⁵² See MAS (2015) AML Guidelines para 1-1.

⁵³ See para 1-1 of the MAS (2015) AML Guidelines.

⁵⁴ Also known as predicate offences or crimes of money laundering in some scholarly works, see for example Aldridge *Money Laundering Law* 124; Mugarura (2011) 19 *Journal of Fin Reg and Comp* 174-194.

⁵⁵ See Yeo & Tan 'Singapore' 1274.

⁵⁶ Ibid.

⁵⁷ Idem at 1271.

⁵⁸ See s 4(5) of the CDSA. See also Yeo & Tan 'Singapore' 1274.

⁵⁹ See Yeo & Tan 'Singapore' 1274.

⁶⁰ See Foo (2017) 29 *SAC L J* 163 at 166; Yeo & Tan 'Singapore' 1272.

⁶¹ See ss 53(1) and 54(1) of the CDSA. See also Haq 'Cracking the Whip on Financial Crimes in Singapore' 438; Foo (2017) 29 *SAC L J* 163 at 166.

unable to give a satisfactory account of how they acquired the property.⁶² On the second part, it is illegal, according to the CDSA, to conceal, disguise, convert, transfer, or remove from Singapore someone else's benefits of criminal conduct.⁶³ Thus, it is an offence under the CDSA to assist another person to retain his or her benefits from criminal conduct.⁶⁴ In all instances, the prosecution need not prove that the accused person had actual knowledge of dealing with the proceeds of crime.⁶⁵ All they need to do is to demonstrate that the accused person had substantial reasons to suspect that they were dealing with proceeds of crime.⁶⁶ Thus, the proof of liability under the CDSA is an objective one.⁶⁷

8.3.2.5 Scope of the CDSA for TBML in Trade-Finance Instruments

The CDSA provisions for money laundering do not attempt to cover specific types of money laundering. In this regard, they do not specify TBML in trade-finance transactions as a standalone type of money laundering.⁶⁸ However, the ambit of the general money-laundering offence under the Act is arguably wide enough to include even TBML in trade-finance instruments. A look at TBML indicates that it can be used by a person to engage in self-laundering where they launder the proceeds of their own crimes through trade-related activities.⁶⁹ It is also possible to assist someone to launder proceeds of crime, either knowingly, as a colluding party in a typical trade-finance transaction, or unknowingly, as a financial intermediary in the ordinary course of facilitating a legitimate transaction.⁷⁰ These possible scenarios bring TBML in trade-finance transactions under the purview of the CDSA. Thus, the legislature in Singapore did not see any need to amend its AML legislation to cover any specific types of money laundering, including TBML. In this regard, the ACIP and the MAS have acknowledged

⁶² See s 55 of the CDSA.

⁶³ See ss 53(2) and 54 (2) of the CDSA. See also Haq 'Cracking the Whip on Financial Crimes in Singapore' 438.

⁶⁴ See ss 50 and 51 of the CDSA. See also *Public Prosecutor v Ong Tian Soon* [2008] SGDC 35.

⁶⁵ See s 56 of the CDSA. See also *Ang Jeanette v Public Prosecutor* [2011] 4 SLR 1 at 100.

⁶⁶ See s 56 of the CDSA.

⁶⁷ See Lee 'AML in Singapore' 80. See also *Koh Hak Boon v Public Prosecutor* [1993] 3 SLR 427 at [13]; *Ang Jeanette v Public Prosecutor* [2011] 4 SLR 1 at 70.

⁶⁸ See para 8.3.2.4 above.

⁶⁹ For the discussion of TBML in general, see Ch 2 para 2.3 et seq above.

⁷⁰ For a discussion of the possible abuse of selected trade-finance instruments through TBML, see Ch 3 para 3.3 et seq above.

the application of the CDSA to TBML in trade-finance instruments by simply providing guidance on how to control it using its current AML provisions.⁷¹

8.3.3 Conclusion

The government of Singapore is aware of the money-laundering threats to its economy. It has conducted a national money-laundering risk assessment to appreciate the status of money-laundering risk in the country.⁷² The FATF and the APG have also conducted an AML mutual-evaluation exercise out of which they have rated Singapore's AML regime as strong. Although the country still has to do more, to comprehensively address the risk of money laundering in various sectors of Singapore's economy, it seems to have an adequate AML framework. In both its *National Money-Laundering Risk Assessment and Mutual Evaluation Reports*, Singapore recognises its vulnerability to the challenge of TBML in trade-finance transactions. This vulnerability is due to many factors, including the role of Singapore in international trade and its status as a regional financial centre in the southeastern part of Asia.⁷³

To address the challenge of money laundering, Singapore has passed AML laws in line with the UN Conventions and the FATF Recommendations. The CDSA is the primary AML legislation in Singapore.⁷⁴ It broadly covers situations that may be deemed to be money laundering although it does not use the term 'money laundering' itself. The CDSA provides for the crime of money laundering in a wide manner such that TBML in trade-finance transactions can be covered as well.⁷⁵ This is a welcome development in that a broad legislative provision can be applicable to various situations without the need for amendments to cover sector-specific types of money laundering such as TBML in trade-finance instruments.

⁷¹ See para 8.3.4 et seq below; para 8.4.4 below; and para 8.5.2 below.

⁷² See para 8.2 above.

⁷³ See again para 8.2 above.

⁷⁴ See para 8.3.2 above.

⁷⁵ See para 8.3.2.4 above.

8.3.4 Preventive AML Obligations for Banks⁷⁶ in Singapore

8.3.4.1 General

Given its significance as a centre of financial activity in the Asia-Pacific region, Singapore appreciates the importance of having functional and effective systems to curb potential threats of money laundering.⁷⁷ The FATF and the APG note that structural AML control elements, both in terms of laws and institutions, seem to be present in Singapore.⁷⁸ The role of banks and other financial organisations is important in controlling money laundering in Singapore.⁷⁹ They are subject to a broad range of AML obligations, which include CDD measures, reporting of suspicious transactions, record keeping, and staff training.⁸⁰

The CDSA, the MAS Act and the MAS Notice 626 do not address TBML in trade-finance transactions, in specific terms. However, as shall be demonstrated below, the MAS, the Anti-Money Laundering/Counter Financing of Terrorism Industry Partnership (ACIP),⁸¹ and the Association of Banks Singapore (ABS),⁸² have partly cured that deficiency through provision of guidelines or notices to address the problem of TBML in trade-finance instruments.⁸³ Such guidelines and notices help banks to adhere to their AML obligations in the context of TBML in trade-finance transactions.⁸⁴

⁷⁶ The terms 'financial institution' or 'financial institutions' are used interchangeably in this thesis for 'bank' or 'banks' vice versa. For other terminologies used in this thesis generally, see Ch 1 para 1.11 above.

⁷⁷ See Lee 'AML in Singapore' 64; Schloenhardt *Palermo in the Pacific* 223; Yeo & Tan 'Singapore' 1269.

⁷⁸ See FATF & APG (2016) *Singapore Mutual Evaluation Report* 20.

⁷⁹ See Lee 'AML in Singapore' 65.

⁸⁰ See Lee 'AML in Singapore' 94-95; MAS Notice 626 generally, and FATF & APG (2016) *Singapore Mutual Evaluation Report* 31.

⁸¹ More on the ACIP as an organisation and its contribution towards the combatting of TBML in trade-finance transactions in Singapore, see para 8.4.4 below.

⁸² On the role of the ABS as an organisation in the Singapore banking sector and its contribution towards the control of TBML in trade-finance instruments, see para 8.5.4 below.

⁸³ These are MAS (2015) *Guidance on Anti-Money Laundering and Countering the Financing of Terrorism Controls in Trade Finance and Correspondent Banking* (MAS (2015) *AML Guidance for Trade Finance*); The ACIP (2018) *Best Practices for Countering Trade-Based Money Laundering* (ACIP (2018) *Best Practices for Countering TBML*); and the ABS (2015) *Guidelines on Anti-Money Laundering and Countering the Financing of Terrorism* (ABS (2015) *AML Principles for Trade Finance*).

⁸⁴ See MAS (2015) *AML Guidance for Trade Finance*; ABS (2015) *AML Principles for Trade Finance*; and ACIP (2018) *Best Practices for Countering TBML* generally.

8.3.4.2 AML Governance and Oversight

Banks in Singapore are required under the MAS Notice 626 to have proper internal-control policies and systems for AML measures.⁸⁵ Such policies should include compliance training for the management and staff.⁸⁶ Where the bank's internal AML policies are found to be weak, the MAS intervenes to ensure that the bank takes corrective measures.⁸⁷

The requirement to have internal AML policies is an overarching one and speaks to the need for documenting AML efforts by a bank.⁸⁸ Thus, the internal policies are expected to address various AML issues within the bank from the application of the RBA,⁸⁹ CDD measures,⁹⁰ reporting of suspicious transactions to ongoing staff training.⁹¹

8.3.4.3 Scope of the AML Governance for TBML in Trade-Finance Instruments

Although the CDSA and the MAS Act do not address the risk of TBML in trade-finance transactions, the MAS, the ACIP and the ABS provide guidance on the governance of this type of risk.⁹² According to these organisations, a bank should develop a framework of policies to specifically deal with the risk of TBML in trade-finance transactions.⁹³ Such policies should allow the bank with customer and transaction identification, which pose the greatest risk of TBML in trade-finance instruments.⁹⁴

The policies and procedures should be updated regularly to take into consideration emerging money-laundering risks.⁹⁵ The bank's senior management is encouraged by the MAS and the ACIP to set up a specialised committee dedicated to the combatting of TBML in trade-finance transactions. Such a committee should co-opt the

⁸⁵ See MAS Notice 626 para 15.

⁸⁶ See MAS Notice 626 para 15.4; FATF & APG (2016) *Singapore Mutual Evaluation Report* 31; and Yeo & Tan 'Singapore' 1293.

⁸⁷ See Yeo & Tan 'Singapore' 1293.

⁸⁸ See MAS Notice 626 para 15; MAS (2015) *AML Guidelines* para 15-1.

⁸⁹ See para 8.3.4.4 below.

⁹⁰ See para 8.3.4.6 below.

⁹¹ See para 8.3.4.10 and para 8.3.4.13 below.

⁹² See para 8.4.4 and para 8.5.4 respectively below.

⁹³ See MAS (2015) *AML Guidance for Trade Finance*; ABS (2015) *AML Principles for Trade Finance* para 8; and ACIP (2018) *Best Practices for Countering TBML* 11.

⁹⁴ See ACIP (2018) *Best Practices for Countering TBML* 11.

⁹⁵ See MAS (2015) *AML Guidance for Trade Finance* 5; ACIP (2018) *Best Practices for Countering TBML* 8.

compliance team among its staff in order to provide AML compliance insight and highlight potential risks of TBML in the trade-finance transactions.⁹⁶

In addition to the foregoing, the bank's policies should define the duties of the different divisions within the bank so that there is an understanding of their AML roles in relation to trade-finance transactions.⁹⁷ Such policies may include steps on how staff can escalate a trade-finance transaction to the compliance department for increased monitoring should there be suspicion of TBML.⁹⁸

Furthermore, the bank's AML policies should have guidance on how staff may conduct price checks for purposes of identifying potential TBML activities in trade-finance transactions.⁹⁹ Such policies and procedures should also provide for acceptable levels of price variance and escalation procedures where there are significant variations in identified prices.¹⁰⁰ The MAS recommends that price checks be conducted by a division independent of the front office to ensure that the process is effective.¹⁰¹ This is usually the trade-processing staff who are experts in trade-finance processes.¹⁰²

The MAS further recommends that the policies and procedures be designed to identify related parties and their trade-finance transactions.¹⁰³ Related-party transactions are usually associated with the risk of collusion in TBML schemes.¹⁰⁴ In this regard, the policies should cater for the identification of the instructing party and the frequency of their trade transactions.¹⁰⁵ Further precautionary measures to be catered for under the policies and procedures, are the checking of the transactions against warning notices from independent sources such as the IMB.¹⁰⁶ Where trade-finance transactions raise suspicion, these should be verified using even external sources such as the ICC's Commercial Crime Services.¹⁰⁷

⁹⁶ See ACIP (2018) *Best Practices for Countering TBML* 8.

⁹⁷ See MAS (2015) *AML Guidance for Trade Finance* 17.

⁹⁸ *Idem* at 18.

⁹⁹ *Idem* at 14. See also ABS (2015) *AML Principles for Trade Finance* para 8.

¹⁰⁰ See MAS (2015) *AML Guidance for Trade Finance* 14.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.* See also ACIP (2018) *Best Practices for Countering TBML* 8.

¹⁰³ *Idem* at 16.

¹⁰⁴ See Ch 3 para 3.3 et seq above.

¹⁰⁵ On the bank's AML obligation to conduct CDD, see para 8.3.4.6 below.

¹⁰⁶ See ABS (2015) *AML Principles for Trade Finance* para 8(g). See also Ch 4 para 4.4.2 et seq above.

¹⁰⁷ See ABS (2015) *AML Principles for Trade Finance* para 8(h). See also Ch 4 para 4.4.2 et seq above.

8.3.4.4 *The Risk-Based Approach (RBA)*

Banks in Singapore are required by the ACIP to conduct enterprise-wide risk assessments in order to establish their level of exposure to money-laundering risks.¹⁰⁸ Such assessment should be done on an RBA basis taking into account the size of the bank and the scope of its operations.¹⁰⁹ This is a commendable approach given that banks differ in size in terms of capitalisation and risk exposure to their operations. The money-laundering risk assessment should be conducted in relation to four aspects. First, in relation to customers in order to understand the potential money-laundering risks likely to be posed by them.¹¹⁰ Secondly, in relation to countries from which customers come.¹¹¹ Thirdly in relation to countries in which the bank conducts its operations.¹¹² This is in recognition of the fact that the FATF classifies some countries as having higher money-laundering risks than others.¹¹³ Fourthly, the money-laundering risk assessment should also be conducted in relation to products, transactions and delivery channels.¹¹⁴ These can be varied and broad in spectrum based on the size and type of operations of the bank. In this regard, the MAS recommends that the risk-assessment process be documented for easy replication in future.¹¹⁵

8.3.4.5 *Scope of the RBA for TBML in Trade-Finance Instruments*

The RBA is an overarching principle in Singapore applicable even to TBML in trade-finance transactions. Although the CDSA and the MAS Act do not address how the RBA may be deployed in certain circumstances, where the risk of TBML is perceived in trade-finance transactions, the MAS and the ACIP provide such guidance. The MAS recommends that banks should conduct risk assessments of their trade-finance transactions. In doing so, they should consider the geographic locations served by the bank, the customer base and emerging risks in order to establish their exposure to

¹⁰⁸ See ACIP (2018) *Best Practices for Countering TBML* 4.

¹⁰⁹ *Idem* at 3.

¹¹⁰ See MAS Notice 626 para 4.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ See Ch 4 para 4.3.2 et seq above.

¹¹⁴ See MAS Notice 626 para 4.

¹¹⁵ See MAS Notice 626 para 4.2 (a).

any risks of TBML.¹¹⁶ It should be noted that these factors are pertinent in controlling TBML in trade-finance transactions. Thus, a bank applying the RBA to its trade-finance business should be able to identify customers or transactions that are likely to pose the risk of TBML.

The risk-based assessment for money laundering could be conducted as part of the entire bank's AML risk assessment or as a standalone exercise targeted at trade-finance transactions.¹¹⁷ When conducting the AML risk assessment in relation to trade-finance transactions, the ACIP recommends that CDD, reporting of suspicious transactions, record keeping and training of staff should be considered, among other things.¹¹⁸ In other words, the assessment should encompass all standard AML obligations for banks to capture potential weaknesses in any of them.

8.3.4.6 *The Obligation to Conduct Customer Due Diligence*

The CDD measures, which are aimed at knowing the customer in banking transactions, are a well-established principle in Singapore.¹¹⁹ In *Choo Pit Hong Peter v Public Prosecutor*¹²⁰ the High Court of Singapore noted that the KYC principle is a front-line weapon of any given legal system in the prevention of fraud.¹²¹ It should be added that not only is the principle useful in preventing fraud, but also necessary in combatting money laundering. The MAS Act requires banks to conduct CDD before establishing a business relationship.¹²² In situations where the client is a corporate one, the verification process entails striving to identify the beneficial owner of the entity customers involved.¹²³ The CDD measures also involve obtaining information about the nature of business the customer undertakes.¹²⁴

Following the establishment of a business relationship, the bank is required to monitor the relationship continuously and periodically examine the customer information it first

¹¹⁶ See MAS (2015) *AML Guidance for Trade Finance* 5.

¹¹⁷ See ACIP (2018) *Best Practices for Countering TBML* 4.

¹¹⁸ Ibid. See also para 8.3.4 et seq below.

¹¹⁹ See Lee 'AML in Singapore' 93. See also Yeo & Tan 'Singapore' 1291.

¹²⁰ [1995] 2 SLR 255.

¹²¹ See Lee 'AML in Singapore' 94; *Choo Pit Hong Peter v Public Prosecutor* [1995] 2 SLR 255

¹²² See s 27B(1B) (a) of the MAS Act; MAS Notice 626 para 6.2. See also Theng & Wong 'Singapore' 672; Chan 'Singapore' 642; Yeo & Tan 'Singapore' 1293.

¹²³ See MAS Notice 626, para 6.15; Theng & Wong 'Singapore' 672; and Yeo & Tan 'Singapore' 1294.

¹²⁴ See MAS Notice 626 para 6. See also Theng & Wong 'Singapore' 672.

collected.¹²⁵ Ongoing monitoring of the banker-customer relationship entails observing activities through the customer's account and the scrutinising of transactions, which the customer undertakes with third parties in the course of the business relationship. In doing so, the bank is able to guarantee that customer transactions remain consistent with the bank's confirmed knowledge of the customer, its business operations, and its risk profile.¹²⁶ The MAS encourages banks to monitor customer transactions closely, with a focus on complex and irregular transactions that appear to have no legitimate purpose or make no economic sense.¹²⁷

Where the risk of money laundering is assessed by the bank to be low, the bank can undertake simplified CDD measures provided such measures are documented properly.¹²⁸ For instance, simple CDD might be used where the customer is another bank whose AML controls are familiar due to previous dealings.¹²⁹ However, a bank may also conduct enhanced due diligence where the possibility of money laundering is perceived to be high.¹³⁰ The money-laundering risk is generally perceived to be high in situations where the bank is dealing with, for example, politically exposed persons, and persons from jurisdictions with inadequate AML regimes.¹³¹

8.3.4.7 Scope of the CDD Measures for TBML in Trade-Finance Instruments

In addition to the general guidance on CDD under the MAS Notice 626, there is guidance in Singapore on how the same process should be conducted specifically to curb TBML in trade-finance transactions.¹³² In line with the MAS Notice 626, the CDD process should be conducted on the customer before establishing a business with them and/or allowing them a trade-finance transaction.¹³³ Additionally, the ACIP recommends that when conducting CDD for trade-finance customers, the bank should first understand the customer's business model before onboarding the customer.¹³⁴

¹²⁵ See MAS Notice 626 para 6.19. See also Yeo & Tan 'Singapore' 1294.

¹²⁶ See MAS Notice 626 para 6.20; Yeo & Tan 'Singapore' 1294.

¹²⁷ See MAS Notice 626 para 6.21.

¹²⁸ See Yeo & Tan 'Singapore' 1294.

¹²⁹ See MAS Notice 626 para 7; Yeo & Tan 'Singapore' 1294.

¹³⁰ See MAS Notice 626 para 8; Yeo & Tan 'Singapore' 1295.

¹³¹ Yeo & Tan 'Singapore' 1295.

¹³² See MAS (2015) *AML Guidance for Trade Finance* 5; ACIP (2018) *Best Practices for Countering TBML* 12; and ABS (2015) *AML Principles for Trade Finance* passim.

¹³³ See MAS (2015) *AML Guidance for Trade Finance* 6; ACIP (2018) *Best Practices for Countering TBML* 12; and ABS (2015) *AML Principles for Trade Finance* para 7.

¹³⁴ See ACIP (2018) *Best Practices for Countering TBML* 8.

The bank should also get additional KYC-related information in order to adequately assess the risk of TBML associated with particular customers.¹³⁵

It should, however, be noted that the CDD process to be conducted by banks in a trade-finance transaction depends on the role that the bank plays in the transaction.¹³⁶

It is thus, recommended by the ABS and the ACIP that the bank identify at least one party involved in a trade-finance transaction as a customer.¹³⁷ Generally, the instructing party in a transaction involving a documentary credit should be identified as the customer.¹³⁸ However, where the bank plays the role of an advising or confirming bank in the same transaction, its customer will be the issuing bank.¹³⁹

In order to adequately execute its AML role, a bank should obtain additional information about the parties in the trade-finance transaction, taking into consideration the role it plays under the transaction.¹⁴⁰ Such additional information may include identifying trading partners of the customer and their counter parties, country of origin of goods, the nature of goods being traded, the trade cycle involved and the market prices of the goods under the transaction.¹⁴¹ The MAS recommends that a bank should verify information it obtains under the trade-finance transaction against independent or public sources, to ensure that such documents are authentic.¹⁴² Where a bank discovers that the trade-finance transaction is between the customer and the customer's related parties, it should enhance its CDD process due to the heightened risk of fraud and collusion in related-party transactions.¹⁴³

¹³⁵ See ABS (2015) *AML Principles for Trade Finance* para 7; ACIP (2018) *Best Practices for Countering TBML* 11.

¹³⁶ See MAS (2015) *AML Guidance for Trade Finance* 5; ABS (2015) *AML Principles for Trade Finance* para 6.

¹³⁷ See ACIP (2018) *Best Practices for Countering TBML* 12; ABS (2015) *AML Principles for Trade Finance* para 6. See also MAS (2015) *AML Guidance for Trade Finance* 5.

¹³⁸ See ACIP (2018) *Best Practices for Countering TBML* 12.

¹³⁹ See ABS (2015) *AML Principles for Trade Finance* para 6.

¹⁴⁰ See MAS (2015) *AML Guidance for Trade Finance* 6.

¹⁴¹ *Idem* at 7.

¹⁴² *Ibid.*

¹⁴³ *Idem* at 15.

8.3.4.8 The Obligation to Keep Records

The keeping of records of transactions and customers by a bank is significant in money-laundering risk management.¹⁴⁴ The CDSA and the MAS Notice 626 require that banks maintain records of their customer relationships and transactions.¹⁴⁵ Every financial-transaction document relating to the opening or closing of an account, transfer of funds or identity of customers must be kept.¹⁴⁶

Four reasons can be given for the banks' obligation to keep records under the Singapore AML regime. First, it ensures that banks comply with the AML laws such as the CDSA and the MAS Notice 626.¹⁴⁷ Secondly, the obligation ensures that records can be reconstructed should the need arise such as the conducting of an investigation in suspicious transactions.¹⁴⁸ Consequently, the records can be kept in any format which allows the retrieval and reconstruction processes to be feasible.¹⁴⁹ Thirdly, the keeping of records ensures that banks are able to give timeous feedback to regulators on enquiries regarding beneficial ownership of funds deposited with them.¹⁵⁰ Fourthly, keeping records also demonstrates that the bank's AML controls are not only adequate but are also operating effectively.¹⁵¹ Thus, proper records and record keeping ensure that compliance monitoring can be conducted efficiently.¹⁵²

Furthermore, all transactions that are referred to the STRO must have records maintained.¹⁵³ These should be kept together with any accompanying internal discoveries and analyses conducted in relation to the records.¹⁵⁴ Records of customers and transactions must be retained by a bank for a minimum of five years following the termination of the business relationship or transaction.¹⁵⁵ Where there is

¹⁴⁴ See ACIP (2018) *Best Practices for Countering TBML* 22. See also Theng & Wong 'Singapore' 672.

¹⁴⁵ See s 42 of the CDSA. See also s 27B(1B)(b) of the MAS Act; Theng & Wong 'Singapore' 672; MAS Notice 626 para 12.1.

¹⁴⁶ See s 42(1) of the CDSA.

¹⁴⁷ See MAS Notice 626 para 12.2(a); Lee 'AML in Singapore' 94.

¹⁴⁸ See Lee 'AML in Singapore' 94; Theng & Wong 'Singapore' 673; MAS Notice 626 para 12.2 (b).

¹⁴⁹ See s 42(2) and s 43(2) of the CDSA; MAS Notice 626 para 12.4.

¹⁵⁰ See MAS Notice 626 para 12.2 (c); Lee 'AML in Singapore' 94.

¹⁵¹ See ACIP (2018) *Best Practices for Countering TBML* 22.

¹⁵² Ibid.

¹⁵³ See MAS Notice 626 para 14.1 (b).

¹⁵⁴ See Yeo & Tan 'Singapore' 1292.

¹⁵⁵ See s 42(1) and s 43(1) of the CDSA; MAS Notice 626 para 12.3(a). See also Yeo & Tan 'Singapore' 1297.

an investigation linked to the records, such records may be kept for longer periods than the prescribed ones until the investigation is concluded.¹⁵⁶ Failure to keep records of financial transactions conducted by a bank is an offence punishable by a fine upon conviction.¹⁵⁷

8.3.4.9 Scope of the Record Keeping Duty for TBML in Trade-Finance Instruments

There is no express provision under either the CDSA or the MAS Act, governing the keeping of records related to trade-finance transactions. Thus, it may be argued that the general requirement to keep records under the CDSA or the MAS Act would equally apply to trade-finance records as well. The only specific recommendation regarding the keeping of records to curb the problem of TBML in trade-finance transactions comes from the ACIP. The ACIP recommends that banks should specifically keep records pertaining to trade-finance transactions in accordance with the requirements of the MAS Notice 626.¹⁵⁸ The records of the audit trail conducted by the bank to address risks of TBML in trade-finance transactions should also be kept.¹⁵⁹

8.3.4.10 The Obligation to Report Suspicious Transactions

A crucial obligation in the combatting of money laundering is the AML requirement to recognise and report suspicious transactions.¹⁶⁰ The CDSA and the MAS Notice 626 require banks in Singapore to implement adequate systems to identify and detect suspicious transactions, which may indicate the occurrence of money laundering.¹⁶¹

A bank is required to report suspicious transactions to the STRO if it has good reason to believe that a customer's funds are the proceeds of illegal activity.¹⁶² The report must be made whether the suspicious transaction has been completed or aborted.¹⁶³

¹⁵⁶ See Yeo & Tan 'Singapore' 1297.

¹⁵⁷ See s 43(3) of the CDSA.

¹⁵⁸ See ACIP (2018) *Best Practices for Countering TBML* 22. See also para 8.3.4.8 above.

¹⁵⁹ See ACIP (2018) *Best Practices for Countering TBML* 22.

¹⁶⁰ See Recommendation 20 of the FATF (2012) *Standards*.

¹⁶¹ See s 45 of the CDSA; MAS Notice 626 para 14.2. See also Lee 'AML in Singapore' 94; Theng & Wong 'Singapore' 673.

¹⁶² See s 45(1) of the CDSA. See also MAS Notice 626 para 14; Theng & Wong 'Singapore' 673; Yeo & Tan 'Singapore' 1278.

¹⁶³ See s 45(2) of the CDSA.

A copy of such a report must be filed with the MAS as well.¹⁶⁴ Once a bank has filed a report to the STRO, it must not establish a business relationship with the prospective customer.¹⁶⁵ Failure to make a report of suspicious transactions to the STRO is an offence punishable either by a fine or through imprisonment on conviction.¹⁶⁶

The MAS Notice 626 provides for a partial list of instances where banks should always report suspicious transactions.¹⁶⁷ Such instances include where transactions do not seem to make any economic business sense.¹⁶⁸ This, of course, may require the business acumen of the person reporting such transactions since even legitimate transactions may also not make economic sense sometimes.

8.3.4.11 Scope of the Duty to Report for TBML in Trade-Finance Instruments

Although both the CDSA and the MAS Act provide for the need for banks to report suspicious transactions to curb money-laundering activities, they do not address TBML in trade-finance instruments. However, the MAS and the ACIP provide guidance on how banks should report transactions suspected of TBML in trade-finance instruments. During its on-site inspections, the MAS discovered that banks in Singapore were filing few suspicious transaction reports on trade-finance transactions suspected of TBML.¹⁶⁹ This, at least, is an indirect acknowledgement of the fact that banks always file all the required reports, but that there are not many reports to be filed. The MAS, therefore, recommends that where there are reasons to suspect that a customer is using trade-finance transactions to conduct TBML schemes, then it is necessary to submit a suspicious transaction report to the STRO promptly.¹⁷⁰ To compliment banks' efforts in combatting TBML in trade-finance transactions, traders and freight forwarders in Singapore are also obliged under the CDSA to file suspicious transaction reports with the STRO.¹⁷¹ This is a step in the right direction, which should be emulated by the FIC in South Africa, considering that TBML usually goes beyond the reach of banks. Therefore, an all-stakeholders approach to complement the banks'

¹⁶⁴ Yeo & Tan 'Singapore' 1297.

¹⁶⁵ Ibid.

¹⁶⁶ See s 45(3) of the CDSA.

¹⁶⁷ See Lee 'AML in Singapore' 94; MAS Notice 626 para 14 and Appendix B.

¹⁶⁸ See Yeo & Tan 'Singapore' 1296.

¹⁶⁹ See MAS (2015) *AML Guidance for Trade Finance* 17.

¹⁷⁰ Ibid.

¹⁷¹ See s39 of the CDSA.

AML efforts would be welcome. In addition, the MAS notes that it will be good banking practice to subject the customer account, through which a trade-finance transaction is being processed, to enhanced monitoring.¹⁷² Where the account is found to be a conduit of TBML through trade-finance transactions, the MAS recommends that such transactions be discontinued.

To assist banks in their reporting obligations, the MAS provides a few examples of potential red flags of TBML in trade-finance transactions.¹⁷³ It notes that banks should pay attention to such red flags since they may indicate that TBML is occurring. However, the MAS notes that its list of red flags is not exhaustive and that the presence of a red flag alone does not necessarily indicate that a customer is transacting illegally.¹⁷⁴ Thus, a bank has to consider various factors before concluding to file a report for a suspicious trade-finance transaction.¹⁷⁵

Some of the red-flag indicators a bank should consider before raising suspicion for TBML include inconsistencies and failing to make economic sense in a transaction.¹⁷⁶ In addition, transactions involving related or third parties should, *prima facie*, be regarded as suspicious since they usually involve collusion for illegal activities. Further red flags for TBML in trade-finance transactions provided by the MAS include transactions with frequent or unexplained documentary changes.¹⁷⁷ Having multiple discrepancies or missing information in documents supporting a transaction may also be a red-flag indicator for TBML in trade-finance transactions.¹⁷⁸ The MAS also warns that banks should be suspicious of transactions, which rely on shell, or front companies and those with complex structures since these may also be potential indicators of TBML in trade-finance transactions.¹⁷⁹

In considering whether a bank should file a suspicious transaction report for TBML, it should at least review trade-finance documents such as bills of lading and related commercial invoices.¹⁸⁰ The bank should also verify the existence of companies

¹⁷² See MAS (2015) *AML Guidance for Trade Finance* 17.

¹⁷³ *Idem* at 19. See also ABS (2015) *AML Principles for Trade Finance* para 10.

¹⁷⁴ See MAS (2015) *AML Guidance for Trade Finance* 19.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ *Idem* at 20.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Idem* at 21.

¹⁸⁰ See ACIP (2018) *Best Practices for Countering TBML* 20.

involved through media searches. Furthermore, the bank should conduct reviews of the customer's activities on the account to establish if there are any deviations.¹⁸¹

8.3.4.12 *Obligation to Train Staff on Money-Laundering Issues*

The provision of AML training to employees on a regular basis is an important obligation for banks in Singapore.¹⁸² Such training should focus on AML measures and current money-laundering trends.¹⁸³ It is good practice for the bank to align AML training with the bank's policies.¹⁸⁴ Thus, the training should also focus on the bank's internal policies against money laundering, and the AML roles and responsibilities of employees.¹⁸⁵ Significantly, such training should consider circumstances peculiar to the bank's operations, products and types of customers the bank usually deals with.¹⁸⁶

It is also a standard requirement for a bank to establish a point of contact in the form of a compliance officer to handle all AML issues within the bank before referral to the STRO.¹⁸⁷ Such a compliance officer, should therefore, spearhead the AML training in the bank. The MAS recommends that different levels of training be offered to staff depending on their hierarchy and field of specialisation within the bank.¹⁸⁸

8.3.4.13 *Scope of the Staff Training Duty for TBML in Trade-Finance Instruments*

The Singapore AML legislation does not specifically require banks to offer training on TBML in trade-finance instruments. However, the ACIP and the MAS provide guidance on how training should be targeted at TBML in trade-finance transactions. The MAS recommends that banks should allocate more resources towards training of staff about the risks of TBML in trade-finance transactions.¹⁸⁹ The training should be relevant, specific and targeted.¹⁹⁰ In this regard, the training ought to be provided to both staff involved in customer-relationship management and those in the trade-finance

¹⁸¹ Ibid.

¹⁸² See Sin Liang (2002) 9 *Journal of Fin Crime* 380 at 381; Lee 'AML in Singapore' 94.

¹⁸³ See Yeo & Tan 'Singapore' 1292.

¹⁸⁴ See Theng & Wong 'Singapore' 673.

¹⁸⁵ See Yeo & Tan 'Singapore' 1292.

¹⁸⁶ See ACIP (2018) *Best Practices for Countering TBML* 21.

¹⁸⁷ See para 8.3.4.10 above. See also Yeo & Tan 'Singapore' 1292.

¹⁸⁸ See MAS Notice 626 para 15.4. See also Lee 'AML in Singapore' 94; Theng & Wong 'Singapore' 673.

¹⁸⁹ See MAS (2015) *AML Guidance for Trade Finance* 18.

¹⁹⁰ See ACIP (2018) *Best Practices for Countering TBML* 21.

processing division.¹⁹¹ Its purpose should be the raising of awareness about the risk of TBML in trade-finance transactions.¹⁹² The MAS further encourages that the AML training be aimed at improving the competences of staff to deal with such money-laundering risks.¹⁹³ It should also highlight regulatory changes and emerging risks relevant to TBML in trade-finance transactions.¹⁹⁴

In providing training, the ACIP encourages banks to use case studies and relevant publications on TBML such as those from the FATF, the Wolfsberg Group, the ICC and the BAFT, to raise awareness about common typologies of TBML in trade-finance transactions.¹⁹⁵ Besides relying on these already published guidelines, the ACIP recommends that banks should develop their own case studies based on the suspicious transaction reports they file with the MAS and the STRO.¹⁹⁶ Where red-flag indicators are used in the training, these should be modified to capture and reflect the trade environment in Singapore and/or the relevant bank's own experience in dealing with trade-finance transactions.¹⁹⁷

Furthermore, the ACIP not only recommends that the training be refreshed periodically, but also encourages a bank to align the training with its risk profile as per its AML policies and procedures.¹⁹⁸ Significantly, the training should be on an RBA taking into consideration the bank's type of customers, its operational locations and the types of products it offers.¹⁹⁹ Thus, where the bank is involved in trade-finance transactions, such as the offering of documentary credits to its international customers, this should be factored in the training. In addition, the ACIP encourages banks to not only offer regular training, but to also conduct such training when there is a new trade-related product or some changes to the existing trade-related products offered by the bank.²⁰⁰ To cap it all, the ACIP, presents a list of its best practices regarding training on TBML risks in trade-finance transactions.²⁰¹ This is a commendable gesture from

¹⁹¹ Ibid.

¹⁹² See MAS (2015) *AML Guidance for Trade Finance* 18.

¹⁹³ See ACIP (2018) *Best Practices for Countering TBML* 20.

¹⁹⁴ Idem at 21.

¹⁹⁵ See MAS (2015) *AML Guidance for Trade Finance* 21; ACIP (2018) *Best Practices for Countering TBML* 21. On these publications see, Ch 4 para 4.3.2 above; Ch 4 para 4.4.2 above; Ch 4 para 4.4.5 above; and Ch 4 4.4.6 above.

¹⁹⁶ See ACIP (2018) *Best Practices for Countering TBML* 22.

¹⁹⁷ Ibid.

¹⁹⁸ Idem at 21.

¹⁹⁹ Ibid.

²⁰⁰ Idem at 22.

²⁰¹ Ibid.

the ACIP, which helps banks to customise their own AML training manuals as per their risk profiles. Thus, although the CDSA and the MAS Act are silent on how banks in Singapore should proceed on the training of staff regarding TBML in trade-finance transactions, the ACIP and the MAS filled that gap through the provision of AML guidance in this regard.

8.3.5 Conclusion

The preventive obligations under the Singapore AML regime come from various sources, which include the CDSA, the MAS Act, the MAS Notice 626 and the ACIP AML guidelines.²⁰² There seems to be a comprehensive coverage of the AML obligations of banks in these various sources with regards to the AML governance, the RBA, CDD measures, record keeping, reporting of suspicious transactions and the training of staff on money-laundering control.²⁰³ These are the general standard AML measures recommended by the FATF for any given country.²⁰⁴

The Singapore AML legislation, just like the POCA and the FICA under the South African AML regime, does not expressly provide for measures to curb TBML in trade-finance instruments.²⁰⁵ However, unlike under the South African AML regime, the MAS, the ACIP and the ABS in Singapore have all issued specific guidelines on how to tackle the risk of TBML in trade-finance transactions.²⁰⁶ The issuance of specific guidance to govern the risk of TBML in trade-finance instruments is something that should be emulated by AML institutions in South Africa such as the FIC and the SARB's Prudential Authority. Although the AML legislation in Singapore does not specifically address TBML in trade-finance instruments, the various guidelines issued by AML institutions in Singapore do so. These guidelines assist banks on how to comply with their AML obligations in the context of trade-finance transactions.²⁰⁷ Institutions in South Africa such as the FIC, the SARB's Prudential Authority, and the

²⁰² See para 8.3.2 above.

²⁰³ See para 8.3.4 et seq above.

²⁰⁴ See Ch 4 para 4.3.2 et seq above on the FATF and its AML Standards.

²⁰⁵ See again para 8.3.2 above.

²⁰⁶ See again para 8.3.4 et seq above.

²⁰⁷ See again para 8.3.4 et seq above.

SAMLIT may also improve South Africa's AML regime through issuance of similar guidelines to combat TBML under the FICA.²⁰⁸

For each AML obligation under the CDSA, the MAS Act or the MAS Notice 626, there is specific guidance from either the MAS, the ABS or the ACIP in the context of trade-finance transactions. Thus, there is guidance on how to apply the RBA and internal policies in trade-finance transactions in order to reduce the risk of TBML.²⁰⁹ There is also further guidance on how to specifically report suspicious transactions, conduct CDD, keep records, and train staff in relation to TBML in trade-finance transactions.²¹⁰ This is a commendable development under the Singapore AML regime in that banks have enough guidance from the authorities on how best they can manage TBML in trade-finance instruments in the context of locally published practice guidance.

8.4 INSTITUTIONAL AML FRAMEWORK FOR TBML IN TRADE FINANCE

8.4.1 General

To effectively combat TBML, there is a need to have strong institutions at the national level. Singapore's AML authorities have responded to the problem of TBML in trade-finance instruments through various means, including private-public partnerships, and the issuance of guidelines by the MAS specifically targeted at the problem. These guidelines have greatly aided financial institutions in meeting their AML requirements under the CDSA and the MAS Act in the context of trade-finance transactions. The AML institutions in Singapore work together in joint efforts aimed at combatting TBML and they are briefly explained below.

8.4.2 Suspicious Transactions Reporting Office (STRO)

The STRO was established in 2000 under the CDSA.²¹¹ It is a part of the Egmont Group, and has been recognised as such since 2002.²¹² Under the South African AML

²⁰⁸ See recommendations under Ch 9 below and Ch 10 below generally.

²⁰⁹ See again para 8.3.4 et seq above.

²¹⁰ See again para 8.3.4 et seq above.

²¹¹ See s 5(1) (a) of the CDSA. See also Singapore (2013) *National Money Risk Assessment Report* 14; FATF & APG (2016) *Singapore Mutual Evaluation Report* 181; and Silathong *FIUs in the United Kingdom, Singapore and Thailand* 238.

²¹² See Lee 'AML in Singapore' 74-75; Dennis Tan Chin Wei *The Practitioner's Guide for Asset Recovery in Singapore* (2016) (hereinafter *Wei Asset Recovery in Singapore*) 7; FATF & APG (2016) *Singapore Mutual Evaluation Report* 183.

regime, it is the equivalent of the FIC.²¹³ Since 2013, it is housed under the Commercial Affairs Division's (CAD)²¹⁴ Intelligence Group where it acts as Singapore's FIU.²¹⁵ As Singapore's FIU, the STRO receives and analyses suspicious transaction reports for onward transmission to the CAD and other law enforcement agencies.²¹⁶ The obligation to receive reports of suspicious transactions includes the duty to receive reports on suspicious TBML transactions.²¹⁷ The STRO converts raw data in filed suspicious transaction reports into financial intelligence, which the CAD and other law enforcement agencies may use to investigate the laundering of illegal funds and other financial crimes.²¹⁸

The location of the STRO within the CAD enables a smooth coordination of financial intelligence processes.²¹⁹ It also ensures that the FIU can communicate using the Singapore Police Force's (SPF) secure protocol where the exchange of information with partners is done with utmost confidentiality.²²⁰ The STRO's position within the SPF also gives it direct online access to all law enforcement information, including the SPF's case management system called CRIMES II.²²¹ Furthermore, the STRO can also access databases of government agencies and other public information sites.²²² To improve its data analytics, the STRO has developed a specialised analytical tool called Web-based Intelligence Analytical and Graphical Visualisation Systems (WINGS). WINGS is used to examine and prioritise reports received by the STRO.²²³ Through WINGS, various intelligence databases accessible to the STRO are

²¹³ See Ch 5 para 5.4.2 above. See also Ch 6 para 6.4.2 above and Ch 7 para 7.4.2 above for similar FIUs in the other comparative jurisdictions.

²¹⁴ For the CAD's role and its contribution against TBML control in trade-finance transactions, see para 8.4.8 below.

²¹⁵ See s 5(1) of the CDSA. See also Theng & Wong 'Singapore' 674; Singapore (2013) *National Money Risk Assessment Report* 13; FATF & APG (2016) *Singapore Mutual Evaluation Report* 23; Yeo & Tan 'Singapore' 1284; and Wei *Asset Recovery in Singapore* 7.

²¹⁶ See ss 5(3) and 45(1) of the CDSA. See also Lee 'AML in Singapore' 91; Lawrence Ang 'Effective Measures against Corporate Crime and Corporate Liability in Singapore' (2008) 76 *UNAFEI Resource Material* 17-46 at 30; Singapore (2013) *National Money Risk Assessment Report* 13; Wei *Asset Recovery in Singapore* 7; and Yeo & Tan 'Singapore' 1283.

²¹⁷ See para 8.3.4.11 above.

²¹⁸ See s 5 (1)(b) of the CDSA. See also Lee 'AML in Singapore' 91; Ang (2008) 76 *UNAFEI Resource Material* 17 at 30; Singapore (2013) *National Money Risk Assessment Report* 13; and Yeo & Tan 'Singapore' 1283.

²¹⁹ See FATF & APG (2016) *Singapore Mutual Evaluation Report* 54. See also Theng & Wong 'Singapore' 674.

²²⁰ See FATF & APG (2016) *Singapore Mutual Evaluation Report* 54.

²²¹ *Idem* at 182. See also Silathong *FIUs in the United Kingdom, Singapore and Thailand* 239.

²²² See FATF & APG (2016) *Singapore Mutual Evaluation Report* 54.

²²³ *Ibid.* See also Silathong *FIUs in the United Kingdom, Singapore and Thailand* 239.

integrated. Thus, all reports the STRO receives are screened automatically against, not only its databases, but also commercial and CRIMES II databases.²²⁴ Although the STRO has not made any publication to this effect, the use of data analytics such as CRIMES II and WINGS has the potential to increase its capacity to combat TBML in trade-finance transactions. These two systems could be used to screen quoted prices for anomalies in trade transactions that may be red flags for TBML.

Despite its location within the CAD, the STRO has a distinct structure and function. The officers of the STRO are not allowed to perform non-FIU activities and the unit's budget is, as allocated from the SPF's overall budget, also distinct.²²⁵ The STRO is also independent in terms of managing its resources and conducting its functions.²²⁶ The independence of the STRO is significant considering the central AML role it plays in Singapore. Such independence is also as per the FATF's recommendations and the Egmont Group's principles regarding FIUs operational efficiency across jurisdictions.²²⁷

In conducting its AML role, the STRO collaborates with banks in Singapore, the CAD and the MAS.²²⁸ A bank is required under the MAS Notices to file a suspicious transaction report with the STRO and simultaneously with the MAS.²²⁹ This dual filing allows for a smooth coordination and monitoring between the two institutions.²³⁰ As part of the CAD, the STRO is automatically a partner to the ACIP, which has issued guidelines on how to combat TBML in trade-finance transactions.²³¹ The STRO also collaborates with other foreign FIUs in the Egmont Group family to combat money laundering.²³² The STRO has a duty under the CDSA to share information it gathers with fellow FIUs on the principle of reciprocity and confidentiality.²³³

²²⁴ See FATF & APG (2016) *Singapore Mutual Evaluation Report* 54.

²²⁵ See *Idem* at 183. See also Silathong *FIUs in the United Kingdom, Singapore and Thailand* 240.

²²⁶ See Silathong *FIUs in the United Kingdom, Singapore and Thailand* 240.

²²⁷ See Recommendation 29 of the FATF (2012) *Standards*; and Ch 4 para 4.4.4 et seq above.

²²⁸ On the AML roles of the CAD and the MAS and their contributions against TBML in trade-finance transactions, see para 8.4.8 and para 8.5.2 below respectively.

²²⁹ See s 5(1) - (3) and 45(1) of the CDSA and s 23(10) of the MAS Act. See also para 8.3.4.10 above.

²³⁰ See Lee 'AML in Singapore' 92.

²³¹ See para 8.4.4 below on the role of the ACIP against TBML in trade-finance transactions.

²³² See SPF 'Suspicious Transaction Reporting Office-STRO' www.police.gov.sg [Accessed on 3 June 2023].

²³³ See Lee 'AML in Singapore' 92. See also Ch 4 para 4.4.4 et seq above.

Generally, the STRO has no access to trade data from Singapore Customs to use for intelligence purposes.²³⁴ This is a hindrance in efforts to combat TBML given the significant role that customs authorities play in money-laundering control.²³⁵ The STRO usually accesses trade data through administrative or court orders, which procedures it rarely uses according to the FATF and the APG.²³⁶ Thus, the STRO's analysis of reports for possible TBML discovery is limited due to the insufficiency of trade data it can access from relevant authorities such as Singapore Customs.²³⁷ Furthermore, the STRO could not also access general tax information from Singapore Customs unless it is for investigating money laundering or has been released under a court order.²³⁸ It should be noted that Singapore included tax crimes as predicate offences for money-laundering purposes in 2013.²³⁹ The idea of allowing the STRO to access tax information for money-laundering control purposes is a welcome development in the combatting of TBML. Under the South African AML regime, the SARS has a duty under the FICA to report any cases of money laundering it encounters to the FIC.²⁴⁰ However, in pursuing complex cases of money laundering such as TBML in trade-finance instruments, it would be a move in the right direction for the FIC to access tax information within the SARS system on a proactive basis just like what the STRO is doing to Singapore Customs. In any case, there is a need for smooth cooperation between a country's FIU and its customs authority especially for TBML control purposes.²⁴¹

The MAS has noted that financial institutions are filing few suspicious transaction reports with the STRO, which are related to trade-finance transactions.²⁴² To assist in this regard, the MAS provides a non-exhaustive list of red flags that financial institutions could use to scrutinise trade-finance transactions for possible clues of TBML.²⁴³ A similar arrangement is absent between either the FIC or the SARB's

²³⁴ See FATF & APG (2016) *Singapore Mutual Evaluation Report* 52.

²³⁵ See Ch 4 para 4.4.3 et seq above.

²³⁶ See FATF & APG (2016) *Singapore Mutual Evaluation Report* 52.

²³⁷ Ibid. Regarding the role of Singapore Customs in relation to the challenge of TBML in trade-finance transactions, see para 8.4.10 below.

²³⁸ See FATF & APG (2016) *Singapore Mutual Evaluation Report* 52.

²³⁹ Idem at 70. See also MAS (2012) 'MAS to Designate Tax Crimes as Money Laundering Predicate Offences' <https://www.mas.gov.sg/news> [Accessed 14 October 2023].

²⁴⁰ See Ch 5 para 5.4.10 above.

²⁴¹ See again Ch 4 para 4.4.3 et seq above.

²⁴² See MAS (2015) *AML Guidance for Trade Finance* 17.

²⁴³ Ibid.

Prudential Authority and financial institutions under the South African regime.²⁴⁴ It will be a good international best practice for the FIC and the SARB's Prudential Authority to issue a similar list of red flags for TBML detection by financial institutions in South Africa.²⁴⁵

By issuing a list of red flags for TBML, the MAS hopes that such red flags could prompt compliance officers and other bank officials to quickly identify problematic transactions that could warrant the generation of suspicious transaction reports for filing with the STRO.²⁴⁶ Some of the MAS red flags financial institutions could take into account in generating reports for the STRO can be stated here. These include, first, transactions with higher financial-crime risk, for example, those involving a commodity being shipped from a jurisdiction classified as high risk by the FATF or the UN.²⁴⁷ Second, transactions with inconsistencies and those that do not make economic sense.²⁴⁸ For example, where such transaction involves unexplained or unnecessary last-minute changes to payment instructions.²⁴⁹ Third, transactions involving related or third parties raising the possibility of collusion.²⁵⁰ Fourth, transactions with multiple discrepancies, missing information or frequent documentary changes.²⁵¹ The MAS warns that although these red flags may be helpful to financial institutions in generating suspicious transaction reports, they do not necessary indicate the illegality of a transaction.²⁵² However, their presence should prompt a possible filing of the suspicious transaction report with the STRO.²⁵³

²⁴⁴ See Ch 5 para 5.4.2 and para 5.5.2 above. See also Ch 9 para 9.12 and para 9.15 below; Ch 10 para 10.2.9 and para 10.2.16 below.

²⁴⁵ See Ch 4 para 4.3.2 et seq; para 4.4.5 and 4.4.6 above. See also Ch 9 below generally for a comparative analysis of this and other aspects and Ch 10 for a list of findings or shortcomings under the South African AML regime for which recommendations are being made.

²⁴⁶ See MAS (2015) *AML Guidance for Trade Finance* 17.

²⁴⁷ Idem at 19. See also ABS (2015) *AML Principles for Trade Finance* Appendix 5.

²⁴⁸ See MAS (2015) *AML Guidance for Trade Finance* 19.

²⁴⁹ Ibid. See also ABS (2015) *AML Principles for Trade Finance* Appendix 5.

²⁵⁰ See MAS (2015) *AML Guidance for Trade Finance* 20. See also ABS (2015) *AML Principles for Trade Finance* Appendix 5.

²⁵¹ See MAS (2015) *AML Guidance for Trade Finance* 20. See also ABS (2015) *AML Principles for Trade Finance* Appendix 5.

²⁵² See MAS (2015) *AML Guidance for Trade Finance* 19. See also ABS (2015) *AML Principles for Trade Finance* Appendix 5.

²⁵³ See MAS (2015) *AML Guidance for Trade Finance* 19. See also ABS (2015) *AML Principles for Trade Finance* Appendix 5.

8.4.3 Conclusion

The STRO is the FIU of Singapore.²⁵⁴ It receives and analyses suspicious transaction reports from banks and other entities required by the law to file such reports in Singapore.²⁵⁵ As the FIU, the STRO is central to the combatting of TBML through the analysis of red flags that may indicate the occurrence of the problem in trade-finance transactions. As part of the CAD, the STRO is a member of the ACIP, which has issued AML guidelines specifically targeted at combatting TBML in trade-finance instruments.

Although the STRO has not instituted initiatives aimed at TBML control in trade-finance transactions, it has various programmes such as WINGS and CRIME II, which can be applied in TBML situations.²⁵⁶ These crime data-analytics programmes may prove to be useful in analysing suspicious transactions for the detection of TBML.

8.4.4 Anti-Money Laundering/Counter Financing of Terrorism Industry Partnership (ACIP)

For AML authorities to successfully address the issue of money laundering, collaborations between the public and private sectors are essential.²⁵⁷ They are necessary in sharing information and strategies between institutions on how to combat money laundering.²⁵⁸ Thus, in April 2017, the MAS and the CAD established the ACIP in order to strengthen Singapore's fight against financial crime, including TBML in trade-finance transactions.²⁵⁹ Thus, the ACIP is a partnership against money laundering in Singapore that brings together selected law enforcement agencies, regulators, industry participants and other government entities.²⁶⁰ Under the South African AML regime, the ACIP is the equivalent of the SAMLIT.²⁶¹ The ACIP seeks to improve the national AML mechanism to detect and mitigate money-laundering risks

²⁵⁴ See para 8.4.2 above.

²⁵⁵ See again para 8.4.2 above.

²⁵⁶ See again para 8.4.2 above.

²⁵⁷ See 'speech by Mr David Chew, Director, Commercial Affairs Department, Singapore Police Force, at the AML/CFT Industry Partnership (ACIP) Dialogues on Monday, 14 May 2018,' <https://www.abs.org.sg> [Accessed on 3 June 2023].

²⁵⁸ See Silathong *FIUs in the United Kingdom, Singapore and Thailand* 235.

²⁵⁹ See ACIP (2018) *Best Practices for Countering TBML* 2; Yeo & Tan 'Singapore' 1303; and Silathong *FIUs in the United Kingdom, Singapore and Thailand* 235-236.

²⁶⁰ See Yeo & Tan 'Singapore' 1303; Silathong *FIUs in the United Kingdom, Singapore and Thailand* 236.

²⁶¹ See Ch 5 para 5.4.4 above. See also Ch 6 para 6.4.6 above and Ch 7 para 7.4.6 above for similar AML information-sharing platforms in the other comparative jurisdictions.

that are likely to affect Singapore at an international level due to its status as a regional transport and financial centre.²⁶²

To conduct its operations, the ACIP has a steering group, which is co-chaired by the MAS and the CAD and is made up of eight banks and the ABS.²⁶³ The steering group is supported in its activities by working groups, which examine risky areas, and topics, which are relevant to money laundering.²⁶⁴ It considers specific money-laundering risks in various areas, including in trade-finance transactions.²⁶⁵

As part of the ACIP's mandate, a working group was set up to specifically tackle TBML in trade-finance transactions.²⁶⁶ The TBML working group invited banks whose operations also include trade-finance instruments and other stakeholders to contribute towards the outcome of the best practices paper against TBML in Singapore.²⁶⁷ Consequently, the ACIP came up with an industry guidance paper, namely, the *Best Practices for Countering TBML* in May 2018.²⁶⁸ The aim of the paper is to provide practical guidance on how to implement the standards and recommendations of the MAS in the MAS (2015) *AML Guidance for Trade Finance*, published in October 2015 and the Wolfsberg Group *Trade Finance Principles against TBML*.²⁶⁹

The ACIP's paper on *Best Practices for Countering TBML* does not intend to modify or supersede any laws of Singapore applicable to the situations it covers.²⁷⁰ The paper compliments similar publications on TBML control in trade-finance transactions from the MAS and the ABS.²⁷¹ The ACIP recommends that banks in Singapore should implement the best practice paper on an RBA basis taking into account specific risks affecting them from their customers and transactions.²⁷²

²⁶² See ACIP (2018) *Best Practices for Countering TBML 2*; Silathong *FIUs in the United Kingdom, Singapore and Thailand* 236.

²⁶³ See Yeo & Tan 'Singapore' 1303; Silathong *FIUs in the United Kingdom, Singapore and Thailand* 236.

²⁶⁴ See Yeo & Tan 'Singapore' 1303; Silathong *FIUs in the United Kingdom, Singapore and Thailand* 236.

²⁶⁵ See ACIP (2018) *Best Practices for Countering TBML 2*; Yeo & Tan 'Singapore' 1303; and Silathong *FIUs in the United Kingdom, Singapore and Thailand* 236.

²⁶⁶ See ACIP (2018) *Best Practices for Countering TBML 2*.

²⁶⁷ Ibid.

²⁶⁸ See <https://www.mas.gov.sg> [Accessed on 2 June 2023].

²⁶⁹ See ACIP (2018) *Best Practices for Countering TBML 2*. See also, Ch 4 para 4.4.5 et seq above.

²⁷⁰ See ACIP (2018) *Best Practices for Countering TBML 2*.

²⁷¹ See para 8.5.2 and 8.5.4 below.

²⁷² See ACIP (2018) *Best Practices for Countering TBML 2*.

8.4.5 Conclusion

The ACIP is Singapore's private-public partnership in the fight against TBML in trade-finance transactions.²⁷³ The partnership is Singapore's way of instituting a platform for AML information sharing similar to those of other jurisdictions across the world.²⁷⁴ The membership of the ACIP is broad, incorporating regulators, law enforcement authorities and banks, among others. The broad-based nature of the partnership is significant in that it offers an information-sharing platform on how to best deal with TBML in the context of Singapore.

The ACIP has directly engaged the problem of TBML in trade-finance transactions. It has done so by issuing the best practices guidance for countering TBML.²⁷⁵ The best practices guidance assists banks to manage the risk of TBML in trade-finance transactions through suggesting ways of implementing the CDSA provisions. In this regard, it provides specific information on how to conduct CDD and report suspicious transactions in the context of trade-finance transactions.²⁷⁶ This is a good initiative because banks and other stakeholders in Singapore are given context-specific guidance by the ACIP on how to manage the risk of TBML in trade-finance transactions.

8.4.6 Attorney General's Chambers (AGC)

The AGC is an autonomous arm of state responsible for prosecuting criminal offences in Singapore, among other functions.²⁷⁷ The NPA under the South African AML regime is the equivalent institution to the AGC.²⁷⁸ Besides prosecuting matters, the AGC is also Singapore's authority for mutual legal assistance in criminal cases.²⁷⁹ The AGC also prosecutes money-laundering offences in Singapore through its specialist division

²⁷³ See para 8.4.4 above.

²⁷⁴ See for example SAMLIT for South Africa Ch 5 para 5.4.4 above; JMLIT for England Ch 6 para 6.4.6 above; and FinCEN Exchange for the US Ch 7 para 7.4.6 above.

²⁷⁵ See again para 8.4.4 above.

²⁷⁶ See para 8.3.4 et seq above.

²⁷⁷ See Article 35(8) of the Constitution of Singapore; S 11 of the Criminal Procedure Code 2010. See also Singapore (2013) *National Money Risk Assessment Report* 18; Silathong *FIUs in the United Kingdom, Singapore and Thailand* 230.

²⁷⁸ See Ch 5 para 5.4.6 above. See also Ch 6 para 6.4.8 above and Ch 7 para 7.4.8 above for similar prosecutorial authorities in the other comparative jurisdictions.

²⁷⁹ See Singapore (2013) *National Money Risk Assessment Report* 18; FATF & APG (2016) *Singapore Mutual Evaluation Report* 22

called the Financial and Technology Crime Division.²⁸⁰ All its prosecutors are trained in AML issues as part of their induction in order to increase their expertise when dealing with money laundering cases.²⁸¹ To speed up the coordination in the management of cases, the AGC has public prosecutors placed within the CAD.²⁸² These officials assess money-laundering cases to establish if they can be prosecuted on a prompt basis.²⁸³

The FATF and the APG observe that Singapore has significantly increased the amount of AML investigations and prosecutions since 2008.²⁸⁴ Although the AGC prosecutes almost all forms of money laundering, it has not made any statement regarding the prosecution of TBML cases.²⁸⁵ The FATF and the APG state, in their joint evaluation report, that the AGC supplied twelve instances of intricate money-laundering cases that they had handled, including TBML and tax-money laundering.²⁸⁶ However, of these twelve cases, only four were prosecuted and three led to convictions.²⁸⁷ The report does not indicate in specific terms whether the prosecutions were for TBML or tax-money laundering. It does not also indicate whether the convictions were for TBML or tax-related crimes.²⁸⁸

8.4.7 Conclusion

The AGC is the prosecuting authority for criminal offences in Singapore. It also prosecutes money-laundering cases.²⁸⁹ However, although it conducts such prosecutions, it has not reported any case of TBML in trade-finance instruments it has dealt with.²⁹⁰ The organisation has reported to the FATF and the APG that it deals with complex cases of money laundering such as TBML. The AGC, however, does not

²⁸⁰ See Singapore (2013) *National Money Risk Assessment Report* 18; FATF & APG (2016) *Singapore Mutual Evaluation Report* 62. The Attorney-General's Chambers' (AGC) Financial and Technology Crime Division was formed on 1 January 2011 as the Economic Crimes and Governance Division which was renamed the Financial and Technology in October 2014, see <https://www.agc.gov.sg/newsroom/newsitem2temp/agc-media-statement-organisational-changes-in-agc's-crime-cluster> [Accessed on 2 June 2023].

²⁸¹ See FATF & APG (2016) *Singapore Mutual Evaluation Report* 62.

²⁸² On the role of the CAD, see para 8.4.8 below.

²⁸³ See FATF & APG (2016) *Singapore Mutual Evaluation Report* 62.

²⁸⁴ See Yeo & Tan 'Singapore' 1270.

²⁸⁵ See FATF & APG (2016) *Singapore Mutual Evaluation Report* 63.

²⁸⁶ Ibid.

²⁸⁷ Ibid.

²⁸⁸ Ibid.

²⁸⁹ See para 8.4.6 above.

²⁹⁰ See again para 8.4.6 above.

specifically state whether it has successfully prosecuted and convicted a person on a charge of TBML more so in trade-finance transactions.²⁹¹ It appears that the Singapore government is still at the sensitising stage of the challenge of TBML where more still needs to be done in terms of research and training of staff in the AGC. This would likely lead to increased prosecution of such types of money laundering cases.

8.4.8 Commercial Affairs Department (CAD)

The CAD is a special department of the Singapore Police Force (SPF) whose focus is the investigation of commercial crimes in Singapore.²⁹² It was established in 1984 under the Revenue Division of the Ministry of Finance with the aim of combatting complex commercial fraud.²⁹³ The SAPS, under the South African AML regime, is the equivalent law enforcement authority to the CAD.²⁹⁴ Before the CAD's creation, there was no specialised enforcement agency with the mandate of tackling complex commercial crimes in Singapore.²⁹⁵ Thus, the CAD's role in Singapore is to combat economic crimes and to preserve the reputation of the country as a financial and commercial centre.²⁹⁶ It has specialised divisions dedicated to particular forms of commercial and financial crimes.²⁹⁷ To this end, there is a specific division within the CAD, which is responsible for money-laundering investigation.²⁹⁸ In 2000, the CAD was removed from the Ministry of Finance and reconstituted, under the same name, to become a department of the SPF.²⁹⁹

²⁹¹ See again para 8.4.6 above.

²⁹² See Theng & Wong 'Singapore' 674; FATF & APG (2016) *Singapore Mutual Evaluation Report* 22; and Yeo & Tan 'Singapore' 1284.

²⁹³ See Lee 'AML in Singapore' 91. See also Wei *Asset Recovery in Singapore* 13.

²⁹⁴ See Ch 5 para 5.4.8 above. See also Ch 6 para 6.4.10 above and para 6.4.4 above and Ch 7 para 7.4.10 above for similar law enforcement authorities in the other comparative jurisdictions.

²⁹⁵ See Lee 'AML in Singapore' 91.

²⁹⁶ See Lee 'AML in Singapore' 91; Wei *Asset Recovery in Singapore* 13; and Yeo & Tan 'Singapore' 1284.

²⁹⁷ See Ang (2008) 76 *UNAFEI Resource Material* 17 at 29; Yeo & Tan 'Singapore' 1283.

²⁹⁸ See Lee 'AML in Singapore' 91; FATF & APG (2016) *Singapore Mutual Evaluation Report* 62; and Yeo & Tan 'Singapore' 1283.

²⁹⁹ See Lee 'AML in Singapore' 91; Ang (2008) 76 *UNAFEI Resource Material* 17 at 29; Theng & Wong 'Singapore' 674; and Yeo & Tan 'Singapore' 1283.

The CAD operates through three groups namely, the Enforcement Group,³⁰⁰ the Financial Investigation Group, and the Intelligence and Administration Group.³⁰¹ The latter two groups conduct functions closely linked to the subject of money laundering, hence will be described briefly. The Financial Investigation Group conducts money-laundering investigations and other breaches of the CDSA.³⁰² It plays a key role in ensuring that money-laundering cases are efficiently investigated.³⁰³ Furthermore, it also provides mutual legal assistance to other jurisdictions on matters to do with money laundering.³⁰⁴ In its AML operations, the Financial Investigation Group is mainly supported by the Intelligence and Administration Group, which has three further divisions namely, the Corporate Services Group,³⁰⁵ the Intelligence Division and the STRO.³⁰⁶ The Intelligence Division supports the CAD through providing field intelligence. It gathers and exchanges information with local and international intelligence agencies in order to solve transnational commercial crimes, including money laundering.³⁰⁷

In its broad mandate of investigating crime, the SPF generally defers complex commercial crimes such as TBML to the CAD through outlined standard operating procedures.³⁰⁸ Where the CAD perceives or discovers higher money-laundering threats, it engages foreign law enforcement partners to help establish links with Singapore. It has adopted this approach in dealing with threats of TBML the outcome of which has been the generation of TBML red-flag indicators for the benefit of stakeholders in Singapore.³⁰⁹ Due to its small geographic size, Singapore's law

³⁰⁰ The Enforcement Group operates through two further divisions namely the Investment Fraud and the Securities Fraud Divisions whose roles are to investigate complex investment frauds, insider trading, market manipulation and other breaches of the Securities and Futures Act and the Multi-Level Marketing and Pyramid Selling (Prohibition) Act 42 of 2001.

³⁰¹ See www.police.gov.sg/who-we-are [Accessed on 30 June 2023].

³⁰² See Lee 'AML in Singapore' 91. See FATF & APG (2016) *Singapore Mutual Evaluation Report* 22.

³⁰³ See FATF & APG (2016) *Singapore Mutual Evaluation Report* 22.

³⁰⁴ *Idem* at 23.

³⁰⁵ It is part of the CAD's Intelligence and Administration Group responsible for finance, manpower and corporate planning, see www.police.gov.sg/who-we-are [Accessed on 30 June 2023].

³⁰⁶ See para 8.4.2 above on the role of STRO.

³⁰⁷ See www.police.gov.sg/who-we-are [Accessed on 30 June 2023].

³⁰⁸ See FATF & APG (2016) *Singapore Mutual Evaluation Report* 54.

³⁰⁹ *Idem* at 41.

enforcement agencies are able to cooperate closely. The FATF and the APG consider this aspect to be an inherent strength of Singapore's AML enforcement regime.³¹⁰

The CAD also conducts outreach programmes to educate the public about money laundering and how to manage this challenge. It also takes advantage of its outreach programmes to get feedback from various industry sectors about the types of financial crimes threatening them.³¹¹ Since 2011, the CAD has conducted at least fifteen investigations into TBML although these have not resulted in any prosecutions or convictions.³¹² The FATF and the APG recommend that the CAD engages Singapore Customs in order to improve its understanding of TBML and better the integration of customs' operations into Singapore's AML regime.³¹³ It should be noted that the CAD is part of the ACIP, which has published guidelines on how to combat TBML in trade-finance transactions.³¹⁴ This gives it an idea of how TBML in trade-finance instruments may be committed and how it could be investigated.

8.4.9 Conclusion

The CAD is the crime-investigative unit devoted to tackling commercial crimes in Singapore.³¹⁵ It is the equivalent of the SAPS under the South African AML regime.³¹⁶ The CAD is alive to the challenge of TBML. Through its Financial Investigation Group, it has conducted investigations into this type of money laundering but no prosecutions or convictions have been secured for it.³¹⁷ The CAD is also a member of the ACIP, which is a partnership for dealing with money laundering in Singapore. To that end, the ACIP has issued industry best practice specifically targeted at TBML in trade-finance transactions.³¹⁸ The CAD has not issued guidelines of its own on how to investigate TBML. However, its membership in the ACIP, which is devoted to combatting the challenge, would likely improve its appreciation of this type of money laundering.

³¹⁰ Idem at 55.

³¹¹ See Yeo & Tan 'Singapore' 1303.

³¹² See FATF & APG (2016) *Singapore Mutual Evaluation Report* 60.

³¹³ Ibid.

³¹⁴ See para 8.4.4 above.

³¹⁵ See para 8.4.8 above.

³¹⁶ See Ch 5 para 5.4.8 above.

³¹⁷ See again para 8.4.8 above.

³¹⁸ See again para 8.4.4 above.

8.4.10 Singapore Customs

Singapore Customs is a government agency responsible for facilitating trade and enforcing revenue laws in Singapore.³¹⁹ Under the South African AML regime, the equivalent organisation to Singapore Customs is the SARS.³²⁰ Singapore Customs falls under the Ministry of Finance and was formerly known as the Customs and Excise Department until 1 April 2003 when it was reconstituted into Singapore Customs through a merger of the Customs and Excise Department, the Trade Facilitation Division and the Statistics Audit Unit of International Enterprise Singapore.³²¹ Singapore Customs is also a member of the WCO having joined the organisation in 1975.³²² As such, it is also bound by the WCO's recommendations to customs authorities across the world on combatting money laundering, including TBML in trade-finance transactions.³²³

In the 2015 mutual assessment report, the FATF and the APG note that Singapore Customs has limited understanding of the risks of TBML.³²⁴ The customs authority has not conducted assessments on the vulnerabilities of trade in services to TBML — which activities are likely to be affected — considering that Singapore plays a significant role as a regional financial hub.³²⁵ However, Singapore Customs is aware of its responsibility to keep illicit trade activities out of the trade system. In this regard, it closely collaborates with other law enforcement agencies in Singapore to combat TBML and other forms of illegal activities in the trade-finance sector.³²⁶

To support its efforts in combatting organised crime linked to international trade operations, Singapore Customs launched the Networked Trade Platform (NTP).³²⁷

³¹⁹ See <https://www.customs.gov.sg/about> [Accessed on 28 January 2023].

³²⁰ See Ch 5 para 5.4.10 above. See also Ch 6 para 6.4.12 above and Ch 7 para 7.4.12 above for similar customs authorities with AML roles to play in the other comparative jurisdictions.

³²¹ See <https://www.customs.gov.sg/about> [Accessed on 28 January 2023].

³²² See Singapore Customs 'Our International Participation' <https://customs.gov.sg> [Accessed on 3 June 2023].

³²³ See Ch 4 para 4.4.3 above.

³²⁴ See FATF & APG (2016) *Singapore Mutual Evaluation Report* 37.

³²⁵ *Idem* at 37-38.

³²⁶ *Idem* at 38.

³²⁷ See International Finance (2019) Singapore's TFC to Mitigate Risk of Trade-Based Money laundering <https://internationalfinance.com/singapores-tfc-to-mitigate-risk-of-trade-based-money-laundering/> [Accessed on 3 June 2023]; and Singapore Customs (2020) 'Leaning Forward: Singapore Leverages Digital Data to Help Financial Institutions Augment Trade Finance Compliance' <https://mag.wcoomd.org/magazine/wco-news-92-june-2020/> [Accessed on 3 June 2023].

The NTP is a joint effort between government and industry players, which include Singapore Customs, the Monetary Authority of Singapore, and major banks in Singapore.³²⁸ It is a one-stop digital platform, which connects various players across the international-trade value chain both in Singapore and abroad.³²⁹ The platform supports efforts to combat TBML in trade-finance transactions through an e-service facility called Trade-Finance Compliance (TFC), which was added to the NTP on 5 September 2019.³³⁰ The TFC service supports the work of bank compliance officers through the detection of TBML techniques.³³¹ To ensure proper data governance, traders on the NTP have to consent to have their data shared with banks of their choice participating on the platform.³³² The TFC also analyses prices of non-commodity goods for possible anomalies that may be indicative of trade fraud and TBML.³³³ The

³²⁸ See International Finance (2019) Singapore's TFC to Mitigate Risk of Trade-Based Money laundering <https://internationalfinance.com/singapores-tfc-to-mitigate-risk-of-trade-based-money-laundering/> [Accessed on 3 June 2023]; and Singapore Customs (2020) 'Leaning Forward: Singapore Leverages Digital Data to Help Financial Institutions Augment Trade Finance Compliance' <https://mag.wcoomd.org/magazine/wco-news-92-june-2020/> [Accessed on 3 June 2023].

³²⁹ See International Finance (2019) Singapore's TFC to Mitigate Risk of Trade-Based Money laundering <https://internationalfinance.com/singapores-tfc-to-mitigate-risk-of-trade-based-money-laundering/> [Accessed on 3 June 2023]; and Singapore Customs (2020) 'Leaning Forward: Singapore Leverages Digital Data to Help Financial Institutions Augment Trade Finance Compliance' <https://mag.wcoomd.org/magazine/wco-news-92-june-2020/> [Accessed on 3 June 2023].

³³⁰ See International Finance (2019) Singapore's TFC to Mitigate Risk of Trade-Based Money laundering <https://internationalfinance.com/singapores-tfc-to-mitigate-risk-of-trade-based-money-laundering/> [Accessed on 3 June 2023]; and Singapore Customs (2020) 'Leaning Forward: Singapore Leverages Digital Data to Help Financial Institutions Augment Trade Finance Compliance' <https://mag.wcoomd.org/magazine/wco-news-92-june-2020/> [Accessed on 3 June 2023].

³³¹ See International Finance (2019) Singapore's TFC to Mitigate Risk of Trade-Based Money laundering <https://internationalfinance.com/singapores-tfc-to-mitigate-risk-of-trade-based-money-laundering/> [Accessed on 3 June 2023]; and Singapore Customs (2020) 'Leaning Forward: Singapore Leverages Digital Data to Help Financial Institutions Augment Trade Finance Compliance' <https://mag.wcoomd.org/magazine/wco-news-92-june-2020/> [Accessed on 3 June 2023].

³³² Currently, main banks in Singapore that are signed to the TFC e-service, include BNP Paribas, Commerzbank AG DBS Bank, ICBC, MUFG Bank, OCBC Bank and UOB, see International Finance (2019) Singapore's TFC to Mitigate Risk of Trade-Based Money laundering <https://internationalfinance.com/singapores-tfc-to-mitigate-risk-of-trade-based-money-laundering/> [Accessed on 3 June 2023]; and Singapore Customs (2020) 'Leaning Forward: Singapore Leverages Digital Data to Help Financial Institutions Augment Trade Finance Compliance' <https://mag.wcoomd.org/magazine/wco-news-92-june-2020/> [Accessed on 3 June 2023].

³³³ See International Finance (2019) Singapore's TFC to Mitigate Risk of Trade-Based Money laundering <https://internationalfinance.com/singapores-tfc-to-mitigate-risk-of-trade-based-money-laundering/> [Accessed on 3 June 2023]; and Singapore Customs (2020) 'Leaning Forward: Singapore Leverages Digital Data to Help Financial Institutions Augment Trade Finance Compliance' <https://mag.wcoomd.org/magazine/wco-news-92-june-2020/> [Accessed on 3 June 2023].

exercise also verifies if the trade price involved in a trade-finance transaction is consistent with the trader's historical prices to detect any deviations.³³⁴ Singapore Customs argues that the price checks through the TFC platform increases accuracy, which is necessary in the prevention of trade-finance fraud and TBML.³³⁵ At best, therefore, the TFC should be regarded as a risk-management tool that is necessary in reducing financial crime in trade-finance transactions. Although its effectiveness to curb TBML and other forms of customs-related crimes could not be ascertained, officials from Singapore Customs believe that the mere existence of the TFC platform is enough to deter companies and individuals from engaging in illicit activities like TBML.³³⁶

8.4.11 Conclusion

Singapore Customs is the revenue and customs authority in Singapore.³³⁷ Although its remit is beyond the combatting of money laundering, including TBML, it has demonstrated interest in tackling such problems. The WCO has stated that customs authorities have a role to play in the combatting of money laundering.³³⁸ Thus, Singapore Customs has initiated a few programmes targeted at dealing with TBML in trade-finance transactions. Such programmes are the NTP and the TFC, which demonstrate the customs authority's commitment to fighting TBML in trade-finance transactions in Singapore.³³⁹ The NTP and TFC are platforms on which traders, banks and the customs authority, exchange data, for the purposes, among other things, of combatting TBML in trade-finance transactions.³⁴⁰ These platforms are significant in that they give financial institutions direct access to trade data, which they may use in their CDD measures and the reporting of suspicious trade-finance transactions.

³³⁴ See International Finance (2019) Singapore's TFC to Mitigate Risk of Trade-Based Money laundering <https://internationalfinance.com/singapores-tfc-to-mitigate-risk-of-trade-based-money-laundering/> [Accessed on 3 June 2023].

³³⁵ See International Finance (2019) Singapore's TFC to Mitigate Risk of Trade-Based Money laundering <https://internationalfinance.com/singapores-tfc-to-mitigate-risk-of-trade-based-money-laundering/> [Accessed on 3 June 2023].

³³⁶ See International Finance (2019) Singapore's TFC to Mitigate Risk of Trade-Based Money laundering <https://internationalfinance.com/singapores-tfc-to-mitigate-risk-of-trade-based-money-laundering/> [Accessed on 3 June 2023].

³³⁷ See para 8.4.10 above.

³³⁸ See again Ch 4 para 4.4.3 above.

³³⁹ See again para 8.4.10 above.

³⁴⁰ See again para 8.4.10 above.

8.5 SOME INITIATIVES BY THE FINANCIAL-SECTOR BODIES AGAINST TBML

8.5.1 General

The government of Singapore recognises that the financial sector is a key partner in the combatting of money laundering.³⁴¹ Thus, in addition to the legal and institutional AML framework, there are some financial-sector bodies that have also contributed to the combatting of TBML in trade-finance transactions in Singapore. These institutions aid in the totality of efforts to strengthen the country's AML regime through policy pronouncements and publications aimed at minimising the risk of TBML in Singapore. Two of these institutions, namely, the MAS and the ABS, are briefly explained below.³⁴² I have selected them due to their representative capacities in the Singapore regulatory financial system and the relevance of their contributions to the challenge of TBML in trade-finance transactions.

8.5.2 Monetary Authority of Singapore (MAS)

The MAS was established in 1970 under the MAS Act.³⁴³ It is the central bank of Singapore, which carries out almost every function carried out by central banks globally.³⁴⁴ The SARB's Prudential Authority under the South African AML regime is the equivalent regulatory authority to the MAS in Singapore.³⁴⁵ Besides acting as banker to the government of Singapore, the MAS also regulates and supervises banks in Singapore.³⁴⁶ The MAS also has power to supervise and monitor banks for compliance with AML requirements.³⁴⁷ In supervising banks in Singapore, the MAS

³⁴¹ See Yeo & Tan 'Singapore' 1290. See also Theng & Wong 'Singapore' 671 who argue that there is a need to strike a balance between avoidance of over-regulation to enable smooth business processes and adequate regulation to prevent criminals from abusing the financial system through money-laundering activities.

³⁴² See para 8.5.2 and para 8.5.4 below.

³⁴³ See s 3(1) of the MAS Act. See also Lee 'AML in Singapore' 70; Ang 76 (2008) *UNAFEI Resource Material* 17 at 31; Chan 'Singapore' 637; and Neo 'Inside the Singapore Financial Centre' 28.

³⁴⁴ See s 4(2) of the CDSA. See also Lee 'AML in Singapore' 71; Chan 'Singapore' 636; Neo 'Inside the Singapore Financial Centre' 28.

³⁴⁵ See Ch 5 para 5.5.2 above. See also Ch 6 para 6.5.2 above and Ch 7 para 7.5.2 above and para 7.5.4 above for similar banking-sector regulatory authorities in the other comparative jurisdictions.

³⁴⁶ See s 21 of the MAS Act. See also Lee 'AML in Singapore' 71; Theng & Wong 'Singapore' 671; Ang (2008) 76 *UNAFEI Resource Material* 17 at 31; Chan 'Singapore' 636; Neo 'Inside the Singapore Financial Centre' 28; FATF & APG (2016) *Singapore Mutual Evaluation Report* 23; Tan (2018) 25 *Journal of Fin Crime* 471; and Yeo & Tan 'Singapore' 1290.

³⁴⁷ See ss 27B, 27C and 27D of the MAS Act. See also FATF & APG (2016) *Singapore Mutual Evaluation Report* 31; Silathong *FIUs in the United Kingdom, Singapore and Thailand* 214-214.

applies the RBA.³⁴⁸ This means that the regulator implements supervisory standards according to the category of risk to which it has assigned the bank after assessment.³⁴⁹ Some of the factors the MAS takes into account in determining the level of money laundering within a particular industry are the bank's activities, its type of customers, products and services it offers and geographical areas affected by its operations.³⁵⁰ Further factors are the bank's internal risk-management systems and the processes it applies to mitigate money-laundering threats.³⁵¹

In addition, the MAS has the power to issue AML directions and regulations to prevent money laundering within banks in Singapore.³⁵² For example, in March 2015 the MAS issued MAS Notice 626 whose objective is the protection of Singapore's banking system from being used for money-laundering activities.³⁵³ The MAS has subsequently issued guidelines to help banks implement the Notice 626.³⁵⁴ The guidelines provide best AML practice for financial institutions to follow and non-compliance with them is not a criminal offence.³⁵⁵ However, the MAS AML directions, and regulations have legal binding effect and they are enforceable in three different ways namely, sanctions, penalties and prosecution.³⁵⁶ Thus, failure by a bank to comply with the direction or regulation may render the financial institution liable for a fine.³⁵⁷ It may also lead to the withdrawal of a bank's operational licence for non-compliance.³⁵⁸ The MAS regularly updates its guidelines and notices to be in line with

³⁴⁸ See Singapore (2013) *National Money Risk Assessment Report* 43; MAS 'Framework for Impact and Risk Assessment of Financial Institutions' <https://www.mas.gov.sg/publications> [Accessed on 15 October 2023].

³⁴⁹ See Chan 'Singapore' 636; Yeo & Tan 'Singapore' 1292.

³⁵⁰ See Yeo & Tan 'Singapore' 1293. See also FATF & APG (2016) *Singapore Mutual Evaluation Report* 158.

³⁵¹ See Yeo & Tan 'Singapore' 1293. See also MAS (2015) *AML Guidance for Trade Finance* 29.

³⁵² See ss 27A, 27B; and 28(4) of the MAS Act. See also Lee 'AML in Singapore' 74; Neo 'Inside the Singapore Financial Centre' 32; Foo (2017) 29 *SAC L J* 163 at 165; and Tan (2018) 25 *Journal of Fin Crime* 471.

³⁵³ See Lee 'AML in Singapore' 93; Theng & Wong 'Singapore' 673; and Neo 'Inside the Singapore Financial Centre' 32. See also Preamble to the MAS Notice 626 and para 8.3.2.3 above.

³⁵⁴ See for example, the MAS *AML Guidelines*. See also Neo 'Inside the Singapore Financial Centre' 33.

³⁵⁵ See Neo 'Inside the Singapore Financial Centre' 33.

³⁵⁶ See s 27B of the MAS Act. See also Tan (2018) 25 *Journal of Fin Crime* 471. See ss 27A, 27B and 28(4) of the MAS Act. See also Lee 'AML in Singapore' 74; Singapore (2013) *National Money Risk Assessment Report* 44; and Yeo & Tan 'Singapore' 1291.

³⁵⁷ See s 27B(2) of the MAS Act. See also Neo 'Inside the Singapore Financial Centre' 33; Tan (2018) 25 *Journal of Fin Crime* 471; and Yeo & Tan 'Singapore' 1292.

³⁵⁸ See s 28(5) of the MAS Act. See also Lee 'AML in Singapore' 73; Singapore (2013) *National Money Risk Assessment Report* 44.

developments in the affected sectors.³⁵⁹ During the mutual evaluation of Singapore's AML regime, the FATF and the APG found that the MAS' notices, regulations and guidelines were sufficient in guiding banks about their AML obligations.³⁶⁰

Besides issuance of AML regulations, notices and directions, the MAS also uses other means to promote the understanding of money laundering and AML obligations by banks in Singapore.³⁶¹ These include joint papers with other industry regulators, for example, together with the ABS; the MAS issued *Guidelines on Tax Crimes and the Private Banking Industry Group's Sound Practices*. To further complement its efforts, the MAS also engages the industry through conferences and joint exercises with AML authorities such as the STRO.³⁶² As part of its broader role, the MAS conducts on-site inspections of each bank in order to assess the bank's compliance with the regulator's AML prescriptions.³⁶³

Furthermore, in October 2021 the MAS initiated an idea of a digital platform for banks to share information about TBML in trade-finance transactions called the Collaborative Sharing of Money laundering/terrorism Financing Information and Cases (COSMIC).³⁶⁴ The COSMIC has since been launched as of May 2023 through the Financial Services and Markets (Amendment) Act of 2023.³⁶⁵ It is a collaborative platform between the MAS and six major commercial banks operating in Singapore, which are the DBS, OCBC, UOB, SCB, Citibank and HSBC.³⁶⁶ There is no equivalent platform under the South African AML regime.³⁶⁷ The SABRIC is the only institution that comes closer to the COSMIC in terms of its functions.³⁶⁸ The rationale behind the COSMIC is that banks and other financial institutions are not able to warn each other

³⁵⁹ See Yeo & Tan 'Singapore' 1291. For example, on 3 March 2023 the MAS issued an updating Circular on Money Laundering and Terrorism Financing Risks in the Wealth Management Sector www.mas.gov.sg [Accessed on 7 October 2023]. See also Yeo & Tan 'Singapore' 1291.

³⁶⁰ See FATF & APG (2016) *Singapore Mutual Evaluation Report* 28.

³⁶¹ *Idem* at 113.

³⁶² *Ibid.* See also Yeo & Tan 'Singapore' 1302.

³⁶³ See s 27C (1) of the CDSA. See also Yeo & Tan 'Singapore' 1303.

³⁶⁴ Asian Banking & Finance (2022) 'MAS COSMIC Platform' <https://asianbankingandfinance.net> [Accessed on 3 June 2023].

³⁶⁵ See s 28F of the Financial Services and Markets (Amendment) Act, 2023.

³⁶⁶ Asian Banking & Finance (2022) 'MAS COSMIC Platform' <https://asianbankingandfinance.net> [Accessed on 3 June 2023]; and MAS (2023) 'COSMIC-Monetary Authority of Singapore' <https://www.mas.gov.sg> [Accessed on 3 June 2023].

³⁶⁷ See Ch 5 above generally.

³⁶⁸ See Ch 5 para 5.5.6 above.

about unusual activities in customers' accounts.³⁶⁹ Such a loophole is thereby exploited by criminals to conduct illicit transactions through a web of banks taking advantage of the fact that each financial institution, on its own, does not have adequate information to detect the transactions timeously.³⁷⁰

The initial focus of the COSMIC is on three major financial-crime risks, which are of concern to the operations of commercial banks in Singapore. These are, first, the misuse of legal persons.³⁷¹ Secondly, the use of trade-finance transactions for illicit purposes.³⁷² Thirdly, the financing of proliferation activities.³⁷³ To this end, the COSMIC digital platform allows banks to share information on customers who portray red flags for potential financial-crime activities.³⁷⁴ The intention of sharing such information is to detect and deter such criminal activities at the earliest opportunity thereby preserving the integrity of the entire financial system.³⁷⁵

It is submitted that the COSMIC is a well-thought out initiative, which should be emulated under the South African AML regime for purposes of controlling TBML in trade-finance transactions.³⁷⁶ The initiative does not only focus on the misuse of legal persons, which are critical in TBML offences, but is also specific to the trade-finance sector.

In addition to the COSMIC initiative, the MAS has also issued guidelines that directly speak to the problem of TBML in trade-finance transactions.³⁷⁷ For example, in October 2015, the MAS published a position paper titled *Guidance on Anti-Money Laundering and Countering the Financing of Terrorism Controls in Trade Finance and Correspondent Banking (AML Guidance for Trade Finance)* to guide banks on the

³⁶⁹ See MAS (2023) 'COSMIC-Monetary Authority of Singapore' <https://www.mas.gov.sg> [Accessed on 3 June 2023].

³⁷⁰ Asian Banking & Finance (2022) 'MAS COSMIC Platform' <https://asianbankingandfinance.net> [Accessed on 3 June 2023]; and MAS (2023) 'COSMIC-Monetary Authority of Singapore' <https://www.mas.gov.sg> [Accessed on 3 June 2023].

³⁷¹ See MAS (2023) 'COSMIC-Monetary Authority of Singapore' <https://www.mas.gov.sg> [Accessed on 3 June 2023].

³⁷² See s 28A (1)(a) of the Financial Services and Markets (Amendment) Act, 2023.

³⁷³ See s 28A1(c) of the Financial Services and Markets (Amendment) Act, 2023.

³⁷⁴ See s 28A, as read with ss 28E and 28F of the Financial Services and Markets (Amendment) Act, 2023.

³⁷⁵ See MAS (2023) 'COSMIC-Monetary Authority of Singapore' <https://www.mas.gov.sg> [Accessed on 3 June 2023].

³⁷⁶ See Ch 10 para 10.10.2 below.

³⁷⁷ See s 27B (1) of the CDSA; Lee 'AML in Singapore' 74; and Yeo & Tan 'Singapore' 1292.

money-laundering risks in trade-finance transactions and correspondent banking.³⁷⁸ This *AML Guidance for Trade Finance*, notes that as per Singapore's money-laundering national risk assessment, the trade-finance sector and correspondent banking, are areas where AML controls could be improved.³⁷⁹ In this regard, the MAS is of the view that strong controls in trade-finance transactions and correspondent banking would enable better understanding of risks related to TBML among other compliance issues.³⁸⁰ Thus, the MAS *AML Guidance for Trade Finance* aims to assist banks in benchmarking industry norms and risk-management practices as well as AML deficiencies banks may have.³⁸¹ Its purpose is to provide guidance to banks on AML control in trade-finance transactions in order to enable them to benchmark their controls with industry best practices.³⁸² The MAS *AML Guidance for Trade Finance* also assists banks to implement good risk-management practices and to identify gaps in the AML control systems relevant to TBML in trade-finance transactions.³⁸³ It does not amend or override any laws or regulations in Singapore that may be applicable to similar situations provided for in the guidance.³⁸⁴

The MAS *AML Guidance for Trade Finance* is a product of observations made by the MAS through on and off inspections and reviews.³⁸⁵ Therefore, the MAS cautions that the examples and red flags for TBML it provides in the *AML Guidance for Trade Finance* are not exhaustive.³⁸⁶ Thus, banks should adopt an RBA when applying the guidance.³⁸⁷ This means each bank has to consider the complexity of its trade-finance transactions and the risks posed by its customers when applying the recommendations made in the guidance by the MAS.³⁸⁸ Through interviews, the FATF and the APG gathered that most banks in Singapore found the MAS *AML Guidance for Trade Finance* quite enlightening when managing risks of TBML in trade-finance

³⁷⁸ See MAS (2015) *Guidance on Anti-Money Laundering and Countering the Financing of Terrorism Controls in Trade Finance and Correspondent Banking*, on <https://www.mas.gov.sg> [Accessed on 2 June 2023].

³⁷⁹ See MAS (2015) *AML Guidance for Trade Finance* 3.

³⁸⁰ Ibid.

³⁸¹ See Yeo & Tan 'Singapore' 1292.

³⁸² See MAS (2015) *AML Guidance for Trade Finance* 3; Yeo & Tan 'Singapore' 1292.

³⁸³ See MAS (2015) *AML Guidance for Trade Finance* 3.

³⁸⁴ Ibid.

³⁸⁵ Ibid.

³⁸⁶ See FATF & APG (2016) *Singapore Mutual Evaluation Report* 98.

³⁸⁷ See MAS (2015) *AML Guidance for Trade Finance* 3.

³⁸⁸ Ibid.

transactions.³⁸⁹ To further add to the MAS' efforts against TBML, the MAS is a member of the ACIP which has also addressed the challenge through a specific AML guideline.³⁹⁰

8.5.3 Conclusion

The MAS is the regulator and supervisor of financial institutions in Singapore.³⁹¹ Pursuant to its AML roles, the MAS has the power to issue guidelines and notices in terms of the MAS Act to combat money laundering in the country.³⁹² The MAS has issued several such guidance notes to help banks implement various AML obligations under the laws of Singapore. The MAS is also conscious of the problem of TBML in trade-finance transactions. It has, therefore, published a guidance note specifically directed at mitigating the risk of TBML in trade-finance instruments.³⁹³ It should be noted, however, that the MAS *AML Guidance for Trade Finance* largely mirrors the AML principles for the trade-finance sector, which were published by the Wolfsberg Group and the FATF among other international organisations.³⁹⁴ Thus, whereas the CDSA is silent on the issue of TBML in trade-finance transactions, the MAS addresses that shortfall through the *AML Guidance for Trade Finance*.

8.5.4 Association of Banks in Singapore (ABS)

The ABS is a non-profit organisation whose mandate is to represent the interests of the banking community in Singapore.³⁹⁵ It was established in October 1973 after the dissolution of the Association of Banks in Singapore and Malaysia. Under the South African AML regime, the BASA is the equivalent association to the ABS in Singapore.³⁹⁶ The ABS plays four major roles. First, it represents the commercial and investment banking industry of Singapore. Through this role, the ABS engages regulators, customers and other stakeholders in order to voice the interests of its

³⁸⁹ See FATF & APG (2016) *Singapore Mutual Evaluation Report* 96.

³⁹⁰ See para 8.4.4 above.

³⁹¹ See para 8.5.2 above.

³⁹² See again para 8.5.2 above.

³⁹³ See again para 8.5.2 above.

³⁹⁴ See Ch 4 para 4.4.5 et seq above.

³⁹⁵ See www.abs.org.sg/about-us [Accessed on 14 March 2023]; Silathong *FIUs in the United Kingdom, Singapore and Thailand* 233.

³⁹⁶ See Ch 5 para 5.5.4 above. See also Ch 6 para 6.5.6 above and Ch 7 para 7.5.6 above for similar associations in the other comparative jurisdictions.

members.³⁹⁷ Secondly, the ABS upholds the integrity of its members through developing and implementing a code of conduct that is in line with international best practice.³⁹⁸ Thirdly, the ABS builds relationships within the banking industry through encouraging consensus among differing opinions of member banks for the mutual benefit of all.³⁹⁹ Fourthly, the ABS collaborates with regional and international associations and organisations in order to strengthen the interests of its members in Singapore.⁴⁰⁰

The ABS intends to establish a sound structure in Singapore, which can cooperate with and consult the MAS on various issues, including money laundering.⁴⁰¹ In this regard, the ABS also issues AML guidelines to complement those of the MAS.⁴⁰² For example in September 2001, it issued guidelines on combatting money laundering titled, *Guidelines: Prevention of the Misuse of the Singapore Banking System for Money-Laundering Purposes*. Much of the guideline is similar to the MAS Notice 626 with differences being additions on issues to do with private banking and references to the Wolfsberg Group *Trade Finance Principles*.⁴⁰³ It should be noted that the ABS AML guidelines are not legally binding but the ABS Council has the power to penalise non-compliant members.⁴⁰⁴ Most importantly, the ABS AML guidelines are regularly updated to take into account developments in international best practice and the laws of Singapore.⁴⁰⁵

³⁹⁷ See www.abs.org.sg/about-us [Accessed on 14 March 2023]; Silathong *FIUs in the United Kingdom, Singapore and Thailand* 233.

³⁹⁸ See www.abs.org.sg/about-us [Accessed on 14 March 2023]; Examples of such codes are Private Banking Code of Conduct and Code of Consumer Banking, see also Neo 'Inside the Singapore Financial Centre' 34.

³⁹⁹ See Silathong *FIUs in the United Kingdom, Singapore and Thailand* 233.

⁴⁰⁰ See www.abs.org.sg/about-us [Accessed on 14 March 2023]; Silathong *FIUs in the United Kingdom, Singapore and Thailand* 233.

⁴⁰¹ See Lee 'AML in Singapore' 96. For example, the ABS and the MAS cooperated in 2015 to produce the ABS *Guidelines on Anti-Money Laundering and Countering the Financing of Terrorism* on 13 November 2015, and the ABS's *Guidelines on Tax Crimes and the Private Banking Industry Group's Industry Sound Practices*, see Silathong *FIUs in the United Kingdom, Singapore and Thailand* 234.

⁴⁰² See Sin Liang (1997) 1 *JMLC* 184 at 185; Theng & Wong 'Singapore' 674. See also para 8.5.2 above.

⁴⁰³ See Lee 'AML in Singapore' 96. See also ABS (2015) *AML Principles for Trade Finance* and MAS (2015) *AML Guidance for Trade Finance* generally for comparative purposes.

⁴⁰⁴ See Theng & Wong 'Singapore' 674.

⁴⁰⁵ See Lee 'AML in Singapore' 96; ABS (2015) *AML Principles for Trade Finance* 2.

The ABS has specifically addressed the challenge of TBML in trade-finance transactions in Singapore through the *AML Principles for Trade Finance* of 2015.⁴⁰⁶ The principles supplement the MAS guidance on AML control in trade-finance transactions and were issued as part of the *ABS Guidelines on Anti-Money Laundering and Countering the Financing of Terrorism*.⁴⁰⁷ The ABS encourages banks through the *AML Principles for Trade Finance*, to apply the RBA in order to detect areas of vulnerability such as TBML in trade-finance transactions.⁴⁰⁸

Furthermore, the ABS observes that some banks in Singapore find it difficult to reconcile the conflicting interests between money-laundering control and their commercial obligations under the ICC rules.⁴⁰⁹ This is especially so when banks try to combat TBML in trade-finance transactions. Consequently, the ABS recommends that a bank's policies and procedures should make it clear that AML obligations under the law take precedence over the commercial obligations under the ICC rules.⁴¹⁰

The ABS *AML Principles for Trade Finance* also provide for CDD measures to be taken into consideration when establishing a trade-finance transaction.⁴¹¹ The principles further provide for the identification and reporting of suspicious trade-finance transactions.⁴¹² Furthermore, the ABS provides a list of red flags of potential TBML in trade-finance transactions and for the need to train staff to be able to identify cases of TBML.⁴¹³ Most of the preventative information for TBML from the ABS have been referred to under the relevant paragraphs on how banks can deal with the problem above.⁴¹⁴ As recent as June 2023 the ABS launched a Trade Finance Registry (TFR) to facilitate the sharing of trade-finance information between and/or among participant financial institutions in Singapore.⁴¹⁵ The MAS, traders and major banks in Singapore

⁴⁰⁶ See ABS (2015) *AML Principles for Trade Finance* generally.

⁴⁰⁷ See ABS (2015) *AML Principles for Trade Finance* para 1. See also ABS (2015) *Guidelines on Anti-Money Laundering and Countering the Financing of Terrorism* 50 et seq.

⁴⁰⁸ See ABS (2015) *AML Principles for Trade Finance* para 5. See also MAS Notice 626 para 4; and MAS (2015) *AML Guidance for Trade Finance* 5-6.

⁴⁰⁹ See ABS (2015) *AML Principles for Trade Finance* para 5. See also Ch 3 para 3.3 et seq above, for similar arguments under the respective trade-finance instruments and Ch 4 para 4.4.2 et seq above for the role of the ICC against TBML in trade-finance transactions.

⁴¹⁰ See ABS (2015) *AML Principles for Trade Finance* para 5.

⁴¹¹ Idem at para 7. See also para 8.3.4.6 above.

⁴¹² See ABS (2015) *AML Principles for Trade Finance* para 8. See also para 8.3.4.10 above.

⁴¹³ See ABS (2015) *AML Principles for Trade Finance* paras 10 and 11.

⁴¹⁴ See para 8.3.4 et seq above.

⁴¹⁵ See ABS (2023) 'Trade Finance Registry' <https://www.abs.org.sg> [Accessed on 15 October 2023]; Jovi Ho (June 2023) 'ABS Launches Central Registry for Banks' Trade Financing Deals

in the trade financing business support this initiative.⁴¹⁶ Among other things, the TFR will serve three purposes. First, it will securely maintain a record of trade-finance transactions between and/or among banks in Singapore.⁴¹⁷ Secondly, it will allow banks to mitigate the risk of duplicate financing of the underlying trade transaction.⁴¹⁸ This will remove information asymmetry and increase transparency among participating banks when dealing with trade-finance transactions.⁴¹⁹ Thus, I hope this will also minimise occasional documentary fraud in such transactions. Thirdly, the TFR platform complements similarly structured platforms in Singapore such as the TFC by Singapore Customs.⁴²⁰ Thus, it has the potential to increase information sharing between and/or among financial institutions and traders for purposes of combatting TBML in trade finance.

Besides its own initiatives, the ABS is also a member of the ACIP, which is a private-public partnership against TBML in trade-finance transactions.⁴²¹ Its presence in the ACIP amplifies its voice for the banking industry and is likely to yield meaningful contributions for the combatting of TBML in trade-finance transactions in Singapore. As the banking industry representative in Singapore, the ABS should contribute to the combatting of TBML from its own angle in ways that may get buy-in from its members.

to Avoid Duplicates' www.sg.finance.yahoo.com [Accessed 15 October 2023]; Eleanor Wragg (2022) 'MonetaGo Picked to Deliver Singapore's Trade Finance Registry' <https://www.gtreview.com/news> [Accessed on 15 October 2023].

⁴¹⁶ See ABS (2023) 'Trade Finance Registry' <https://www.abs.org.sg> [Accessed on 15 October 2023]; Jovi Ho (June 2023) 'ABS Launches Central Registry for Banks' Trade Financing Deals to Avoid Duplicates' www.sg.finance.yahoo.com [Accessed 15 October 2023].

⁴¹⁷ See ABS (2023) 'Trade Finance Registry' <https://www.abs.org.sg> [Accessed on 15 October 2023]; Jovi Ho (June 2023) 'ABS Launches Central Registry for Banks' Trade Financing Deals to Avoid Duplicates' www.sg.finance.yahoo.com [Accessed 15 October 2023].

⁴¹⁸ See ABS (2023) 'Trade Finance Registry' <https://www.abs.org.sg> [Accessed on 15 October 2023]; Jovi Ho (June 2023) 'ABS Launches Central Registry for Banks' Trade Financing Deals to Avoid Duplicates' www.sg.finance.yahoo.com [Accessed 15 October 2023].

⁴¹⁹ See ABS (2023) 'Trade Finance Registry' <https://www.abs.org.sg> [Accessed on 15 October 2023]; Jovi Ho (June 2023) 'ABS Launches Central Registry for Banks' Trade Financing Deals to Avoid Duplicates' www.sg.finance.yahoo.com [Accessed 15 October 2023]; Eleanor Wragg (2022) 'MonetaGo Picked to Deliver Singapore's Trade Finance Registry' <https://www.gtreview.com/news> [Accessed on 15 October 2023].

⁴²⁰ See para 8.4.10 above.

⁴²¹ See again para 8.4.4 above.

8.5.5 Conclusion

The ABS is a non-profit organisation representing the interests of the banking community in Singapore.⁴²² It cooperates with other stakeholders such as the MAS to promote the integrity of the financial sector in the country. The ABS is aware of the threat of money laundering to the operations of its member banks. It has, therefore, issued AML guidelines to help its membership deal with the money-laundering threat to the economy of Singapore.⁴²³ The ABS has also specifically dealt with the challenge of TBML in trade-finance instruments through the issuance of *AML Principles for Trade Finance*.⁴²⁴ In this regard, the *ABS AML Principles for Trade Finance* complement those issued by the MAS. They also help banks to comply with their AML obligations when conducting trade-finance transactions. As part of its wider cooperation strategy, the ABS is a member of the ACIP, which has also actively engaged stakeholders in Singapore over the issue of TBML in trade-finance instruments.⁴²⁵ This has helped it voice the concerns and interests of its member banks in the ACIP on how best to combat TBML.

8.6 CONCLUSION

As a transport, trade and financial hub, Singapore is vulnerable to TBML. In both its *National Money-Laundering Risk Assessment* and *Mutual Evaluation Reports*, the government of Singapore identifies TBML as one of the various forms of money laundering threatening its economy.⁴²⁶ To its credit, the country has made various legal and institutional responses to the challenge. Generally, Singapore's AML regime has been rated as robust by the FATF and the APG.⁴²⁷ The jurisdiction has passed AML laws, which largely comply with the recommendations of the FATF in terms of criminalising money laundering in general. Although the CDSA, which is the primary AML legislation in Singapore, does not mention money laundering in specific terms, it provides for it in a broad manner.⁴²⁸ This is progressive in that the offence of money

⁴²² See para 8.5.4 above.

⁴²³ See again para 8.5.4 above.

⁴²⁴ See again para 8.5.4 above.

⁴²⁵ See again para 8.4.4 above.

⁴²⁶ See para 8.2 above.

⁴²⁷ See para 8.3 above.

⁴²⁸ See para 8.3.2 above.

laundering is all-encompassing under the provisions of the CDSA. The CDSA does not also cover TBML in trade-finance instruments in specific terms. However, the wide nature of its provisions can adequately address TBML under the banner of money laundering in general.⁴²⁹ This is not surprising considering that most jurisdictions, including South Africa, have not made AML laws specifically dealing with TBML. The norm has been to employ the general AML legislation to any type of money laundering, including TBML.⁴³⁰

The CDSA, as complimented by the MAS Notice 626, provides for the standard AML obligations to be followed by financial institutions in combatting money laundering in Singapore.⁴³¹ The AML obligations under the CDSA generally cover the CDD measures, reporting of suspicious transactions, record keeping and the training of staff.⁴³² These are standard AML duties necessary in a country's AML defence framework as per the FATF's recommendations. In following these obligations when preventing TBML in trade-finance transactions, financial institutions in Singapore rely on guidance from the MAS, the ACIP and the ABS.⁴³³ The guidance reports from these institutions are designed with TBML in mind, to assist banks in managing this type of money laundering. This is a commendable initiative on the part of the AML institutions in Singapore, which is worth emulating by South African AML institutions.

In terms of the AML institutional response, the government of Singapore has also made great strides in terms of new policy formulation directed at TBML in trade-finance instruments. In this regard, there is a general jurisdictional consciousness about TBML from various AML institutions in Singapore. The MAS, the ACIP, and the ABS have all made pronouncements on TBML and how it should be managed through guidelines.⁴³⁴ This demonstrates that these institutions are aware of the risks of TBML that may befall the country's economy and they are being proactive in addressing them.⁴³⁵

Other AML authorities in Singapore, such as the CAD and Singapore Customs are also alive to the problem of TBML. These, either have participated in partnerships

⁴²⁹ See para 8.3.2.5 above.

⁴³⁰ See Ch 5 para 5.3.2.5; Ch 6 para 6.3.2.5; and Ch 7 para 7.3.2.6.4 above.

⁴³¹ See para 8.3.4 et seq above.

⁴³² See again para 8.3.4 et seq above.

⁴³³ See again para 8.3.4 et seq above.

⁴³⁴ See para 8.4 et seq above.

⁴³⁵ See again para 8.4 et seq above.

dealing with the problem of TBML in Singapore such as the ACIP, or have also embarked on initiatives of their own to tackle the challenge.⁴³⁶ Despite these various efforts from different AML authorities, no successful prosecutions and convictions on TBML cases have been reported by the AGC.⁴³⁷ This could be attributed to the lack of enough expertise to investigate and prosecute TBML in trade-finance transactions, which is regarded by the FATF as a complex type of money laundering.⁴³⁸

Besides the shortcomings on the prosecution front, there is good coordination on how to deal with TBML in trade-finance instruments in Singapore. This has largely been achieved through the ACIP, which is the private-public partnership on TBML. The ACIP is Singapore's own platform on information sharing aimed at building a united front in fighting TBML in trade-finance instruments.⁴³⁹ Since its inception, it has issued a guideline, which complements the one from the MAS on how to manage the risks of TBML in trade-finance transactions. This effort has also been complemented by the ABS, which is the banking industry representative, through issuance of its own guidance on TBML in trade-finance transactions.⁴⁴⁰

There are lessons to learn from the Singapore AML regime on how to deal with TBML in trade-finance instruments by the South African AML authorities. These learning points, which are of comparative interest, are explored in Chapter 9 below, where such exercise is consolidated with viewpoints from other comparative jurisdictions in this study.⁴⁴¹

⁴³⁶ See para 8.4.4 above.

⁴³⁷ See para 8.4.6 above.

⁴³⁸ See Ch 2 para 2.3 et seq on the jurisprudence of TBML generally.

⁴³⁹ See again para 8.4.4 above.

⁴⁴⁰ See para 8.5.4 above.

⁴⁴¹ See Ch 9 below generally.

CHAPTER 9: A COMPARATIVE ANALYSIS OF THE LEGAL SYSTEMS INVESTIGATED IN RELATION TO TBML CONTROL IN TRADE-FINANCE INSTRUMENTS

9.1 GENERAL

In the previous chapters, I considered the AML regimes of South Africa, England, the US, and Singapore.¹ The intention was to establish how each country's AML regime resolves or attempts to resolve the problem of TBML in trade-finance instruments.²

This chapter presents a comparative perspective of selected legal issues discussed under the South African AML regime with those examined under the English, the US and Singapore AML regimes.³ Issues identified under the South African AML regime are juxtaposed with those examined in the comparative jurisdictions to identify areas of similarities and differences.⁴ Explanations for the differences and similarities identified in the comparison will then be given. The intention is to establish areas of possible improvement under the South African AML regime using learning points drawn from the comparative jurisdictions.⁵ In conducting the comparative analysis, the chapter also relies on insights from the international best practices against TBML examined in Chapter 4. These will then be used to determine how the South African AML regime may be improved in preventing TBML in trade-finance instruments.⁶

9.2 COUNTRY AWARENESS OF THE THREAT OF TBML IN TRADE-FINANCE INSTRUMENTS

9.2.1 General

To effectively counter the problem of TBML, a country needs to be aware of the existence of the problem in the first place. This will enable its relevant institutions and stakeholders to formulate AML strategies that are commensurate with the level of risk of TBML in a given jurisdiction.⁷ Thus, this part of the thesis compares how the jurisdictions of South Africa, England, the US and Singapore demonstrate awareness

¹ See Ch 5; Ch 6; Ch 7; and Ch 8 above generally. England, the US and Singapore are collectively referred to as the 'comparative jurisdictions' in this chapter and elsewhere in this thesis.

² See again Ch 5; Ch 6; Ch 7; and Ch 8 above generally. See also Ch 3 para 3.3 et seq above.

³ See again Ch 5; Ch 6; Ch 7; and Ch 8 above generally.

⁴ See para 9.2 et seq below.

⁵ See para 9.2 et seq below. See also Ch 10 below generally.

⁶ See Ch 3 para 3.3 et seq above; Ch 4 above generally; and Ch 5 above generally.

⁷ See Ch 2 para 2.4.3 above.

of the challenge of TBML in trade-finance instruments.⁸ It also examines how South African AML strategies could be improved in light of the insights from the comparative analysis.

9.2.2 The Current Position in South Africa

The discussion under the South African AML regime in Chapter 5 above has revealed that the South African economy is prone to the risk of TBML in trade-finance transactions.⁹ Despite being vulnerable to the threat of TBML, the South African government is less aware of and/or slow in acting against this type of money-laundering risk as compared against other jurisdictions considered in this study.¹⁰ Thus, unlike the English, the US and the Singapore governments, the South African government has not made any comprehensive assessment of, and reporting on TBML.¹¹ The only few studies that refer to TBML in relation to South Africa have been conducted by the FIC and some external agencies such as the GFI.¹² The FIC's assessment, which is on various money-laundering typologies, only refers to TBML in passing without giving much detail.¹³ This is unlike what FIUs in other jurisdictions have done. For example, the STRO, which is Singapore's FIU, has reported in detail on TBML as part of the ACIP.¹⁴ In the US, FinCEN has also been consistently referring to TBML through advisory notes on the possibility of this money-laundering threat to the US economy.¹⁵

As already indicated, the other reports made on TBML in South Africa are those by the GFI. These are specifically on trade misinvoicing which is regarded by the FATF as a form of TBML.¹⁶ It should be noted that neither the study from the FIC, nor the one from the GFI deals with TBML in trade-finance instruments.¹⁷ Thus, outside these

⁸ See para 9.2.2 et seq below. See also Ch 3 para 3.3 et seq above.

⁹ See Ch 3 para 3.3 et seq above and Ch 5 para 5.2 above.

¹⁰ See Ch 5 para 5.2 above. See also para 9.2.3 et seq below and Ch 10 para 10.2.1 below.

¹¹ See again Ch 5 para 5.2 above. See also Ch 2 para 2.3.3 above and para 9.2.3 et seq below.

¹² See again Ch 5 para 5.2 above. See also Ch 2 para 2.3 et seq above.

¹³ See again Ch 5 para 5.2 above.

¹⁴ See Ch 8 para 8.4.2 above. See also para 9.2.3.3 below.

¹⁵ See Ch 7 para 7.4.2 above. See also para 9.2.3.2 below.

¹⁶ See Ch 2 para 2.3.4 and Ch 5 para 5.2 above.

¹⁷ See Ch 2 para 2.3.3 above; Ch 3 para 3.3 et seq above and Ch 5 para 5.2 above.

reports, there is no further indication to demonstrate that the South African government is aware of the threat of TBML especially in trade-finance instruments.¹⁸

The South African AML situation is further worsened by the fact that the country has not yet conducted a comprehensive national money-laundering risk assessment focused on TBML.¹⁹ This could have helped South African AML authorities to appreciate the money-laundering risks threatening the country. In addition, South Africa does not have an AML strategy to deal with its money-laundering challenges at national level.²⁰ Thus, nothing points to the existence of any AML strategy against TBML in trade-finance instruments in South Africa.²¹ Even in academia, not much has been researched on TBML in the context of South Africa and trade-finance instruments.²² This leaves the country without much understanding on the problem unlike other jurisdictions like England, the US and Singapore, which have at least shown some interest in the subject through various research output.²³ It should be noted that the lack of comprehensive studies and reports on TBML in South Africa may not necessarily signify its absence.²⁴ Most jurisdictions fail to report on TBML due to lack of expertise on the subject. It is also common that most jurisdictions, like South Africa, do not classify TBML as a standalone type of money laundering. This may also hinder its reporting on a separate basis.²⁵

9.2.3 Insights from the Comparative Jurisdictions

9.2.3.1 *England*

Similar to South Africa, England is also prone to the risk of TBML in trade-finance instruments.²⁶ This risk is reportedly heightened, among other factors, due to England's new trading partners after Brexit.²⁷ However, unlike South Africa, England has conducted a national money-laundering risk assessment under which HM

¹⁸ See again Ch 5 para 5.2 above. See also Ch 3 para 3.3 et seq above.

¹⁹ See again Ch 5 para 5.2 above. See also Ch 2 para 2.3.3 above.

²⁰ See again Ch 5 para 5.2 above.

²¹ See again Ch 2 para 2.3.3 above and Ch 5 para 5.2 above.

²² See again Ch 5 para 5.2 above. See also Ch 3 above generally.

²³ See para 9.2.3 et seq below.

²⁴ See again Ch 2 para 2.3.3 above on the general estimation of the magnitude of TBML in South Africa and the attendant challenges of such estimation.

²⁵ See para 9.2.3 et seq below. See also Ch 2 para 2.3.3 above and Ch 10 para 10.2.1 below.

²⁶ See Ch 6 para 6.2 above and Ch 3 para 3.3 et seq above.

²⁷ See again Ch 6 para 6.2 above.

Treasury has identified TBML as a threat to the country.²⁸ Whereas the FIC in South Africa is the only AML institution that has reported on the challenge of TBML in the country, most AML institutions in England have reported on the problem.²⁹ These include the FCA and the JMLSG.³⁰ It should be noted that the reporting is not just on TBML in general, but is also focussed on the trade-finance sector, which is the focus of this study.³¹ This demonstrates that the English government is more aware of the challenge of TBML in trade-finance instruments than the South African government. This is a commendable approach, which could be replicated by the FIC and other AML institutions relevant to the combatting of TBML in South Africa.

Besides the reporting of TBML by AML institutions, there is also more scholarly output on the subject in England than in South Africa generally.³² Whereas there is much published research about money laundering in general in South Africa, there is little to no research about TBML, especially in trade-finance instruments.³³ This is despite the fact that the selected trade-finance instruments in this study are widely used in the country.³⁴ It would be a more welcome development to have more scholarly output on TBML in trade-finance instruments in South Africa than what is currently available.³⁵ Further research on TBML would not only raise awareness on the subject but will also inform policy makers to meaningfully formulate strategies against the problem.³⁶

9.2.3.2 The US

Just like the English, but unlike the South African government, the US government has taken proactive steps to understand the threat of TBML to its economy and national security.³⁷ It has made extensive reporting on TBML, which indicates that it is alive to the existence of the problem. For example, as early as 2010, FinCEN has made

²⁸ See again Ch 6 para 6.2 above.

²⁹ See again Ch 6 para 6.2 above. See also Ch 5 para 5.4.2 above and para 9.2.2 above.

³⁰ See Ch 6 para 6.5.2 and para 6.5.4 above.

³¹ See again Ch 6 para 6.2 above. As regards the discussion of TBML in general and in relation to trade-finance instruments, see Ch 2 para 2.3 et seq above and Ch 3 para 3.3 et seq above, respectively.

³² See again Ch 6 para 6.2 above.

³³ See Ch 5 para 5.2 above.

³⁴ See again Ch 3 para 3.3 et seq above.

³⁵ See Ch 10 para 10.2.2 below.

³⁶ See Ch 10 para 10.2.2 below.

³⁷ See Ch 7 para 7.2 above. See also Ch 5 para 5.2 above.

reports on TBML.³⁸ Other US government entities such as the GAO and the FBI have also made pronouncements on the possible use of TBML by organised crime groups to harm the US economy.³⁹

Similar to England, but unlike South Africa, the US Treasury has conducted a money-laundering risk assessment out of which it has identified TBML as one of the money-laundering types affecting it.⁴⁰ However, just like the South African government, the US government has not specifically formulated a strategy geared towards combatting TBML in trade-finance instruments.⁴¹ Various reports emanating from the US are on TBML in general but not necessarily directed at trade-finance instruments.⁴² However, credit goes to the jurisdiction insofar as the raising of awareness on the subject of TBML is concerned. This may have the effect of generally increasing policymakers' and other stakeholders' attention to the problem. South African AML authorities should also raise awareness about the threat of TBML in the same manner as the US AML authorities are doing.⁴³

9.2.3.3 Singapore

Unlike the South African, but similar to the English, and the US governments, the Singapore government has demonstrated that it is alive to the challenge of TBML in trade-finance instruments.⁴⁴ The status of Singapore as a regional financial centre and its role in international trade exposes it to TBML.⁴⁵ In both its *National Money-Laundering Risk Assessment Report* and the *FATF Mutual Evaluation Report*, Singapore has identified TBML as one of the various forms of money laundering affecting it.⁴⁶

Unlike in South Africa, Singapore's AML institutions have demonstrated a general awareness of the existence of TBML and how it may affect the country's financial

³⁸ See Ch 7 para 7.4.2 above.

³⁹ See again Ch 7 para 7.2 above.

⁴⁰ See again Ch 7 para 7.2 above and Ch 5 para 5.2 above.

⁴¹ See again Ch 7 para 7.2 above. See also Ch 3 para 3.3 et seq above.

⁴² See again Ch 7 para 7.2 above. As regards TBML in general and TBML in trade-finance instruments in particular, see Ch 2 para 2.3 et seq above and Ch 3 para 3.3 et seq above respectively.

⁴³ See Ch 10 para 10.2.2 below.

⁴⁴ See Ch 8 para 8.2 above and Ch 3 para 3.3 et seq above. See also para 9.2.2 above.

⁴⁵ See Ch 8 para 8.2 above.

⁴⁶ See again Ch 8 para 8.2 above.

system.⁴⁷ For example, the country's financial-sector regulator, the MAS has made pronouncements on the issue of TBML through issuance of a specific guideline on the subject. Similarly, the ACIP, whose equivalent in South Africa is the SAMLIT, has also pronounced itself on the risk of TBML in Singapore.⁴⁸ Unlike the ACIP in Singapore, the SAMLIT in South Africa has not yet pronounced itself on TBML. The ABS in Singapore has also further added its voice to the raising of awareness about TBML in Singapore.⁴⁹ This is unlike the BASA in South Africa, which has not made any such reports despite the fact that it often publishes on money-laundering issues in general for its members.⁵⁰ Thus, both the SAMLIT and the BASA should emulate the ACIP and the ABS in Singapore by also raising awareness of TBML in South Africa through specific reports on the subject.⁵¹

9.3 COVERAGE OF THE OFFENCE OF TBML IN TRADE-FINANCE INSTRUMENTS UNDER AML LEGISLATION

9.3.1 General

The FATF encourages member states to make money laundering a crime through domestic legislation.⁵² The emergence of TBML has raised the question of whether this type of money laundering should specifically be criminalised under AML legislation or not. This section discusses the approach of the South African, the English, the US and the Singapore legislatures in dealing with the offence of TBML.⁵³ It examines whether these jurisdictions have specifically enacted legislations for TBML or they are applying current AML laws to the problem.⁵⁴

9.3.2 The Current Position in South Africa

The South African AML regime has a comprehensive AML legislation, namely, the POCA and the FICA.⁵⁵ Although these pieces of legislation address money laundering

⁴⁷ See again Ch 8 para 8.2 above. See also Ch 5 para 5.2 above.

⁴⁸ See again Ch 8 para 8.2 above. See also para 9.2.2 above.

⁴⁹ See para 9.15.3.3 below.

⁵⁰ See para 9.15.2 below.

⁵¹ See Ch 10 para 10.2.2 below.

⁵² See Ch 4 para 4.3.2 above.

⁵³ See Ch 5 para 5.3.2.4 above; Ch 6 para 6.3.2.4 above; Ch 7 para 7.3.2.6 above; and Ch 8 para 8.3.2.4 above. See also para 9.3.2 et seq below.

⁵⁴ See para 9.3.2 below.

⁵⁵ See Ch 5 para 5.3.2 above.

as per the expectations of the FATF and the UN Conventions, they do not specifically address TBML in trade-finance instruments.⁵⁶ However, both the FICA and the POCA address the crime of money laundering in broad terms.⁵⁷ Thus, the broad nature of the definition and content of the concept of money laundering under the South African AML legislation is such that it encompasses all types of money laundering.⁵⁸ In any case, South Africa adopts an all-crimes approach for the predicate offences of money laundering in line with the requirements of the FATF.⁵⁹ This implies that TBML in trade-finance instruments, just like money laundering through any other means, is covered under the current South African AML legislation.⁶⁰

An examination of the corresponding position in the comparative jurisdictions, indicates that none of them expressly addresses TBML in trade-finance instruments under their pieces of legislation.⁶¹ Thus, the trend across the world seems to be to rely on the general AML laws to address any emergent types of money laundering, including TBML in trade-finance instruments.⁶²

9.3.3 Insights from the Comparative Jurisdictions

9.3.3.1 England

Similar to the South African legislature, the English legislature relies on the POCAE and the MLRs to address the issue of money laundering and TBML in trade-finance instruments.⁶³ Both the POCAE and the MLRs, just like the FICA and the POCA in South Africa, do not specifically address the risk of TBML in trade-finance instruments.⁶⁴ Thus, the approach in England is similar to the South African one, in that it deals with the risk of TBML through general AML legislation, namely, POCAE and the MLRs.⁶⁵

⁵⁶ See again Ch 5 para 5.3.2 above. See also Ch 3 para 3.3 et seq above and Ch 4 para 4.3.1 and para 4.3.2 above.

⁵⁷ See again Ch 5 para 5.3.2.4 above.

⁵⁸ See Ch 5 para 5.3.2.4 above.

⁵⁹ See again Ch 5 para 5.3.2.4 above.

⁶⁰ See Ch 5 para 5.3.2.5 above.

⁶¹ See Ch 5 para 5.3.2.4 above; Ch 6 para 6.3.2.4 above; Ch 7 para 7.3.2.6 above; and Ch 8 para 8.3.2.4 above. See also para 9.3.3 et seq below and Ch 3 para 3.3 et seq above.

⁶² See Ch 5; Ch 6; Ch 7; and Ch 8 above generally. See also Ch 3 para 3.3 et seq above.

⁶³ See Ch 6 para 6.3.2.5 above. See also Ch 5 para 5.3.2.4 above.

⁶⁴ See Ch 6 para 6.3.2.4 above. See also Ch 5 para 5.3.2.4 above.

⁶⁵ See again Ch 6 para 6.3.2.5 above. See also para 9.3.2 above.

The provisions of the POCAE and the MLRs regarding money laundering in England are similarly worded with those of the POCA and the FICA.⁶⁶ This could be that in the past the South African legislature used to follow the wording of English legislation especially in the commercial and/ or financial law contexts.⁶⁷ Just like in South Africa, the POCAE and the MLRs are used to address TBML in trade-finance instruments.⁶⁸ Both can adequately cover commercial activities under which the offence of TBML through trade-finance transactions may be committed.⁶⁹

In light of the foregoing, the English legislature has not seen any value in amending its AML legislation to accommodate emerging types of money laundering such as TBML.⁷⁰ This is equally the same as under the South African AML regime where the FICA and the POCA are the current pieces of legislation, which are used to deal with all types of money laundering, including TBML.⁷¹ In that vein, the FCA and the JMLSG have issued guidelines to combat TBML in trade-finance instruments under the current POCAE and the MLRs.⁷² The import of such interventions from these AML institutions in England is that they view the POCAE and the MLRs as adequate in dealing with TBML in trade-finance instruments.⁷³ Contrary to this type of intervention, comparable AML institutions in South Africa such as the FIC and the SARB's Prudential Authority, have not issued similar guidelines under the FICA and the POCA to address TBML in trade-finance instruments.⁷⁴

9.3.3.2 The US

Similar to the South African and English legislatures, the US Congress has no specific AML legislation for TBML in trade-finance instruments.⁷⁵ The country relies on the BSA and the MLCA to deal with any type of money laundering, including TBML in trade-

⁶⁶ See again Ch 6 para 6.3.2.4 above.

⁶⁷ However, this was not a general trend in other areas of law such as property law. Presently, even in commercial and /or financial law, the South African legislature is no longer fixated with following the style or wording of English legislation but now looks wider to other jurisdictions.

⁶⁸ See again Ch 6 para 6.3.2.5 above. See also Ch 3 para 3.3 et seq above.

⁶⁹ See again Ch 6 para 6.3.2.5 above. See also Ch 3 para 3.3 et seq above.

⁷⁰ See again Ch 6 para 6.3.2.5 above. See also Ch 2 para 2.3 et seq above.

⁷¹ See again Ch 5 para 5.3.2.5 above. See also para 9.3.2 above and Ch 2 para 2.3 et seq above.

⁷² See para 9.6 et seq below. See also Ch 3 para 3.3 et seq above.

⁷³ See again Ch 6 para 6.3.2.5 above. See also Ch 3 para 3.3 et seq above.

⁷⁴ See Ch 5 para 5.4.2 and para 5.5.2 above. See also Ch 3 para 3.3 et seq above.

⁷⁵ See Ch 7 para 7.3.2 above. See also Ch 3 para 3.3 et seq above.

finance instruments.⁷⁶ TBML in the US, however, is mentioned for the first time under the AMLA without even getting into the details of its techniques as an offence.⁷⁷ In terms of regarding TBML as an offence, it is viewed just like any type of money laundering under the BSA and the MLCA.⁷⁸ Thus, to deal with TBML in the US, the Congress relies on general AML legislation just like in England and South Africa.⁷⁹ The nature of the money-laundering offence under the MLCA is such that as long as the specified unlawful activities are present, then TBML may be committed.⁸⁰ Just like in England and South Africa, the US Congress also adopts an all-crimes approach whereby any type of crime can be a basis of the source of illegal funds to be laundered through TBML.⁸¹

9.3.3.3 Singapore

Similar to the South African, the English and the US positions, the legislature in Singapore does not attempt to specifically address TBML in trade-finance instruments under the CDSA.⁸² Thus, the country relies on the CDSA for the general offence of money laundering and TBML.⁸³

The CDSA provisions for money laundering almost mirror those of South Africa under the POCA and England under the POCAE.⁸⁴ This is not surprising considering that the Singapore government inherited parts of the English legal system in formulating wordings in its commercial legislation just like South Africa.⁸⁵ Thus, just like the South African AML legislation and the English one, the offence of money laundering under the CDSA of Singapore is wide enough to cover almost any type of money laundering, including TBML.⁸⁶ To confirm this view, the ACIP and the MAS in Singapore, for example, have both issued guidelines to help banks deal with the offence of TBML in

⁷⁶ See Ch 7 para 7.3.2.6 above. See also Ch 3 para 3.3 et seq above.

⁷⁷ See Ch 7 para 7.3.2.5 above. See also Ch 2 para 2.3.4 above.

⁷⁸ See again Ch 7 para 7.3.2.6 above. See also Ch 2 para 2.2 et seq above.

⁷⁹ See again Ch 7 para 7.3.2.6 above. See also para 9.3.2 and para 9.3.3.1 above.

⁸⁰ See again Ch 7 para 7.3.2.6 above. See also Ch 2 para 2.3 et seq above.

⁸¹ See para 9.3.2 and 9.3.3.1 above. See also Ch 2 para 2.3 et seq above.

⁸² See Ch 8 para 8.3.2.4 above.

⁸³ See again Ch 8 para 8.3.2.4 above.

⁸⁴ See again para 9.3.2 and 9.3.3.1 above.

⁸⁵ See Ch 1 para 1.6.3 et seq above. It should be noted that the trend of following English legislation by both South Africa and Singapore has since changed with both jurisdictions now inclined to look beyond the English jurisdiction for legislative insights.

⁸⁶ See again Ch 8 para 8.3.2.4 above.

trade finance under the current AML legislation.⁸⁷ They undertook this without amendment of the CDSA on the understanding that the current AML legislation can adequately prevent TBML. Comparably, under the South African AML regime no other institution has issued similar guidelines under the FICA.⁸⁸ Thus, by way of recommendation it will be a positive development if South African AML institutions were to emulate the ACIP and the MAS by also issuing guidelines specific to TBML under the FICA and the POCA.⁸⁹

9.4 INVESTIGATION OF TBML IN TRADE-FINANCE INSTRUMENTS BY LAW ENFORCEMENT AGENCIES

9.4.1 General

To deal with TBML in trade-finance instruments there is a need to successfully investigate it.⁹⁰ This presupposes knowledge of how this type of money laundering is committed.⁹¹ This section presents a comparative perspective on the investigation of TBML in South Africa and in the other jurisdictions under study.⁹² It analyses the role of financial-crime investigative agencies already discussed in the foregoing chapters in relation to the problem of TBML in trade-finance instruments.⁹³

9.4.2 The Current Position in South Africa

In South Africa, the SAPS is the main investigative authority in money-laundering cases.⁹⁴ It has specialised branches whose mandate is to deal with criminal offences of varied nature such as the DPCI or the Hawks. Its focus, however, has not been on money laundering but other forms of crime such as fraud.⁹⁵ The FATF and the ESAAMLG attribute the SAPS' inadequate attention to money laundering to the dearth of resources and expertise.⁹⁶

⁸⁷ See Ch 8 para 8.4.4 and 8.5.2 above.

⁸⁸ See para 9.4.2 above.

⁸⁹ See Ch 10 para 10.2.4 below.

⁹⁰ See Ch 2 para 2.3 et seq and Ch 3 para 3.3 et seq above.

⁹¹ See again Ch 3 para 3.3 et seq above.

⁹² See para 9.4.2 et seq below.

⁹³ See Ch 5; Ch 6; Ch 7; and Ch 8 above generally. See also Ch 3 para 3.3 et seq above.

⁹⁴ See Ch 5 para 5.4.8 above.

⁹⁵ See again Ch 5 para 5.4.8 above.

⁹⁶ See again Ch 5 para 5.4.8 above.

The SAPS has not published any statement regarding its investigation of TBML in trade-finance transactions.⁹⁷ This is understandable given the complex nature of TBML and the required level of expertise to investigate it. In the mutual evaluation exercise of the South African AML regime, the FATF and ESAAMLG note that the SAPS has not been fully utilising the information-requesting platform from the FIC for its intelligence services.⁹⁸ This may partly explain its lack of reportage on complex cases of money laundering such as TBML. Consequently, the FATF has put the South African government on the grey list due to AML deficiencies related to the operations of the SAPS.⁹⁹ This trend is not much different from what other money-laundering investigative agencies are doing in the comparative jurisdictions.¹⁰⁰ However, with adequate training on TBML, the SAPS has the structure, which is suitable for the investigation of such financial crimes.¹⁰¹ It could also use its partnerships with the FIC, the SAMLIT and the SABRIC to formulate strategies geared towards specialist investigations of TBML cases in trade-finance transactions.¹⁰²

9.4.3 Insights from the Comparative Jurisdictions

9.4.3.1 England

Unlike under the South African AML regime, there is a multiple-pronged institutional approach under the English AML regime towards the investigation of financial crimes, including money laundering.¹⁰³ In this regard, the NCA, the NECC and the SFO are crime-investigative agencies in England with varying mandates and focus.¹⁰⁴ The NCA is the FIU of England whose other role is the reduction of crime in the country.¹⁰⁵ Its equivalent under the South African AML regime is the FIC although they differ in terms of the scope of their mandates.¹⁰⁶

⁹⁷ See again Ch 5 para 5.4.8 above.

⁹⁸ See again Ch 5 para 5.4.8 above.

⁹⁹ For a brief explanation of the FATF grey list in relation to South Africa, see Ch 5 para 5.2 above. See also Ch 4 para 4.3.2 et seq above for a general discussion of the grey list concept.

¹⁰⁰ See para 9.4.3 et seq below.

¹⁰¹ See again Ch 5 para 5.4.8 above.

¹⁰² See Ch 10 para 10.2.5 below.

¹⁰³ See para 9.4.2 and Ch 6 para 6.4 et seq above.

¹⁰⁴ See again Ch 6 para 6.4 et seq above.

¹⁰⁵ See Ch 6 para 6.4.2 above.

¹⁰⁶ See Ch 6 para 6.4.2 above and Ch 5 para 5.4.2 above.

A Comparative Analysis of the Legal Systems Investigated in Relation to TBML Control in Trade-Finance Instruments

The NECC generally deals with economic crimes threatening the economy of England.¹⁰⁷ Thus, its focus is more or less as that of the Serious Commercial Office under the DPCI.¹⁰⁸ It is the creature of the NCA. Although its mandate does not specifically mention TBML in trade-finance transactions, it is broad enough to include TBML, which may affect the trade and economy of England.¹⁰⁹ In this regard, the NECC's role can be said to be equivalent to that of the DPCI's Serious Commercial Office. However, just like with the SAPS' DPCI, there are no reported cases of TBML investigated by the NECC in England especially in relation to trade-finance transactions.¹¹⁰ The SFO, which is another English crime-investigative authority, focuses on fraud.¹¹¹ Its remit does not directly address TBML and can be said to be equivalent to that of the DPCI's Organised Crime Investigations.¹¹² However, the SFO's services may be handy in the investigation of TBML in trade-finance instruments since the offence often relies on fraudulent documents.¹¹³ In equal measure, the SAPS' crime investigative role is also supported by other organisations such as the Falcons.¹¹⁴ The Falcons are a crime-reporting and investigative media house. Its role is to support law enforcement agencies like the SAPS through publicity of corrupt and economic crime allegations.¹¹⁵

Just like the SAPS in South Africa, the NCA and the NECC have not reported any investigation they have conducted in relation to TBML in trade-finance instruments.¹¹⁶ Thus, it will be a good preventive AML measure for the SAPS to classify money-laundering cases they have dealt with and to specifically report on TBML cases, they encounter.¹¹⁷

¹⁰⁷ See Ch 6 para 6.4.4 above.

¹⁰⁸ See Ch 5 para 5.4.8 above.

¹⁰⁹ See again Ch 6 para 6.4.4 above.

¹¹⁰ See again Ch 6 para 6.4.4 above.

¹¹¹ See Ch 6 para 6.4.10 above.

¹¹² See Ch 6 para 6.4.10 above and Ch 5 para 5.4.8 above.

¹¹³ See again Ch 6 para 6.4.10 above. See also Ch 3 para 3.3 et seq above.

¹¹⁴ See again Ch 5 para 5.4.8 above.

¹¹⁵ See again Ch 5 para 5.4.8 above.

¹¹⁶ See para 9.4.2 above and Ch 6 para 6.4 et seq above.

¹¹⁷ See Ch 10 para 10.2.6 below.

9.4.3.2 The US

The FBI is the main financial crime-investigative agency at the federal level in the US.¹¹⁸ Unlike the SAPS or the DPCI in South Africa, and the NCA or SFO in England, the FBI specifically and actively investigates TBML in the US.¹¹⁹ In the process, it has made some discoveries about how organised crime groups rely on TBML to harm the US economy.¹²⁰ Furthermore, unlike the SAPS or the DPCI in South Africa and the NCA or SFO in England, the FBI has also mentioned TBML in one of its publications as a priority crime, which it focuses on.¹²¹ However, its investigations have not focused on TBML in trade-finance instruments.¹²² Thus, the FBI understands TBML broadly where the vice has the potential to harm various sectors of the economy, including customs, trade, and potentially trade-finance transactions.¹²³

In its money-laundering investigative role, the FBI is assisted by the HSI-ICE, which combats TBML from the customs point of view.¹²⁴ The supporting role of the HSI-ICE to the FBI is more or less the same as that of the SARS to the SAPS.¹²⁵ Although the FBI does not specifically state that it deals with TBML in trade-finance instruments, its general understanding of the existence of the problem is commendable. It would be a step in the right direction if the SAPS or its divisions such as the DPCI's Serious Commercial Office were to demonstrate such understanding going forward.¹²⁶

9.4.3.3 Singapore

Just like the South African AML regime, the Singapore AML regime also relies on a single-investigative authority for money-laundering offences, namely, the CAD, which is under the SPF.¹²⁷ The CAD is designed to focus specifically on commercial crimes that may harm the economy and the financial sector of Singapore.¹²⁸ Similar to the

¹¹⁸ See Ch 7 para 7.4.10 above.

¹¹⁹ See again Ch 7 para 7.4.10 above.

¹²⁰ See again Ch 7 para 7.4.10 above.

¹²¹ See again Ch 7 para 7.4.10 above. See also para 9.4.2 and 9.4.3.1 above.

¹²² See again Ch 7 para 7.4.10 above. See also Ch 2 para 2.3 et seq above and Ch 3 para 3.3 et seq above.

¹²³ See Ch 7 para 7.4.11 above. See also Ch 2 para 2.3 et seq above.

¹²⁴ See Ch 7 para 7.4.12 above.

¹²⁵ See Ch 5 para 5.4.8 and para 5.4.10 above.

¹²⁶ See Ch 10 para 10.2.6 below.

¹²⁷ See Ch 8 para 8.4.8 above.

¹²⁸ See again Ch 8 para 8.4.8 above.

SAPS, which operates through special divisions such as the DPCI in South Africa, the CAD also operate through special branches.¹²⁹ Through its specialist AML division called the FIG, the CAD has successfully investigated TBML.¹³⁰ Such investigation, however, has not resulted in any prosecutions and convictions.¹³¹

Being a member of the ACIP, the CAD is a member of Singapore's multi-sector partnership against money laundering, including TBML in trade-finance instruments.¹³² The ACIP has specifically issued guidelines to combat TBML in trade-finance instruments in the context of Singapore.¹³³ Thus, the CAD, unlike the SAPS or its specialised divisions in South Africa, has had close experience with the combatting of TBML in trade-finance instruments.¹³⁴ Therefore, its initiatives provide a good model on how the SAPS should contribute against TBML.¹³⁵

9.5 PROSECUTION OF TBML IN TRADE-FINANCE INSTRUMENTS

9.5.1 General

A successful investigation of a money-laundering offence should naturally result in the prosecution of the offender.¹³⁶ This section is a comparative discussion of how each jurisdiction in this study prosecutes or is supposed to prosecute the offence of TBML in trade-finance instruments.¹³⁷ It considers what each jurisdiction is currently doing in terms of executing its prosecutorial mandate against money-laundering offences.

9.5.2 The Current Position in South Africa

The NPA is responsible for prosecuting money-laundering cases in South Africa.¹³⁸ A diligent search has not produced any record of the NPA's prosecution of TBML in trade-finance instruments.¹³⁹ However, the NPA has prosecuted tax-related offences, which the FATF regards as predicate crimes for TBML.¹⁴⁰ In terms of structures, the

¹²⁹ See again Ch 8 para 8.4.8 above. See also Ch 5 para 5.4.8 above.

¹³⁰ See again Ch 8 para 8.4.8 above.

¹³¹ See again Ch 8 para 8.4.6 above.

¹³² See again Ch 8 para 8.4.6 above.

¹³³ See again Ch 8 para 8.4.4 above.

¹³⁴ See again Ch 8 para 8.4.6 above. See also Ch 3 para 3.3 et seq above.

¹³⁵ See Ch 10 para 10.2.6 below.

¹³⁶ See para 9.5.2 et seq below.

¹³⁷ See para 9.5.2 et seq below. See also Ch 3 para 3.3 et seq above.

¹³⁸ See Ch 5 para 5.4.6 above.

¹³⁹ See again Ch 5 para 5.4.6 above. See also Ch 3 para 3.3 et seq above.

¹⁴⁰ See again Ch 5 para 5.4.6 above.

NPA has specialised divisions devoted to specific types of offences for prosecution.¹⁴¹ The organisation could rely on such divisions to concentrate on and prosecute cases of TBML in trade-finance instruments.¹⁴²

The NPA also uses an all-crimes approach to classify predicate offences of money laundering in South Africa.¹⁴³ One can argue that under this approach the NPA may even be prosecuting TBML without even classifying it as such. This becomes even more probable when one considers that most jurisdictions, including South Africa, do not distinguish between generic money laundering and TBML when reporting.¹⁴⁴ Thus, to establish the exact statistics regarding the number of TBML cases the NPA has dealt with can be a challenge.¹⁴⁵ However, the way the NPA conducts its business as a prosecutorial authority with regards to TBML is not much different from what other similar institutions conduct theirs in the comparative jurisdictions. This is demonstrated in the comparative analysis below.¹⁴⁶

9.5.3 Insights from the Comparative Jurisdictions

9.5.3.1 England

The prosecution of money-laundering offences in England is through a tripartite agency of the CPS, the SFO, and the FCA.¹⁴⁷ This is different from the South African position where the prosecution of money laundering is the preserve of a single agency, namely, the NPA.¹⁴⁸ However, it should be noted that the broad mandate of these prosecutorial authorities differ. The CPS, just like the NPA in South Africa, prosecutes all criminal offences in England, including money laundering.¹⁴⁹ The SFO, which is more or less like the DPCI's Serious Crime Office in South Africa or the Organised Crime Investigations in terms of conducting criminal-investigative functions, also prosecutes fraud-related cases in England, including money laundering.¹⁵⁰ Thus, in

¹⁴¹ See again Ch 5 para 5.4.6 above.

¹⁴² See again Ch 5 para 5.4.6 above. See also Ch 3 para 3.3 et seq above and Ch 10 para 10.2.8 below.

¹⁴³ See para 9.3.2 above and Ch 5 para 5.4.6 above.

¹⁴⁴ See Ch 2 para 2.3.3 above and Ch 5 para 5.2 et seq above.

¹⁴⁵ See again Ch 5 para 5.4.6 above. See also Ch 2 para 2.3.3 above.

¹⁴⁶ See para 9.5.3 et seq below.

¹⁴⁷ See Ch 6 para 6.4.8, para 6.4.10, and para 6.5.2 above.

¹⁴⁸ See again Ch 5 para 5.4.6 above.

¹⁴⁹ See Ch 6 para 6.4.8 above.

¹⁵⁰ See Ch 6 para 6.4.10 above.

the process of dealing with a fraud case, if a money-laundering aspect emerges, the SFO will also prosecute it. This is unlike in South Africa where the SAPS or its divisions such as the DPCI only investigate and forward all cases to the NPA for prosecution.¹⁵¹ As for the FCA, it is mainly a financial-sector regulator akin to the SARB's Prudential Authority. However, its mandate extends beyond regulation to include the prosecution of money laundering.¹⁵² Thus, besides conducting regulatory functions, the FCA also prosecutes money-laundering cases along with the CPS and the SFO.¹⁵³

Although the conducting of prosecutorial functions by the CPS, the SFO and the FCA might lead to confusion and duplication of roles, it may also have the effect of improving specialisation in dealing with similar cases. It may also help lessen the burden on the CPS whose mandate is broad enough to include other non-financial related crimes.¹⁵⁴

Despite a three-pronged approach in prosecuting money-laundering offences in England, none of these institutions has reported a successful prosecution of TBML in the context of trade-finance.¹⁵⁵ Of the three prosecutorial authorities, the FCA seems to have an in-depth understanding of TBML in trade-finance instruments.¹⁵⁶ This is because it has conducted a thematic study of the problem within the financial sector, which has resulted into a publication on TBML control.¹⁵⁷ However, just like the NPA in South Africa, the FCA has also not reported any successful prosecution of TBML in trade-finance instruments in the past.¹⁵⁸ As regards the CPS and the SFO, these have mandates that are broad and focused on some other types of offences that are not TBML.¹⁵⁹ Therefore, they seem not to devote much attention to TBML. However, the overall impression under the English AML regime, just like under the South African one, is that a lot still needs to be done to record cases of TBML prosecuted, if any.¹⁶⁰

¹⁵¹ See again Ch 5 para 5.4.6 above.

¹⁵² See again Ch 6 para 6.5.2 above.

¹⁵³ See again Ch 6 para 6.5.2 above.

¹⁵⁴ See again Ch 6 para 6.4.8 above.

¹⁵⁵ See again Ch 6 para 6.4.8, 6.4.10 and 6.5.2 above. See also Ch 3 para 3.3 et seq above.

¹⁵⁶ See again Ch 6 para 6.5.2 above. See also Ch 3 para 3.3 et seq above.

¹⁵⁷ See again Ch 6 para 6.5.2 above.

¹⁵⁸ See again Ch 6 para 6.5.2 above. See also Ch 5 para 5.4.6 above and Ch 3 para 3.3 et seq above.

¹⁵⁹ See again Ch 6 para 6.4.8 and 6.4.10 above.

¹⁶⁰ See para 9.5.2 above and Ch 5 para 5.4.6 above.

9.5.3.2 The US

Unlike under both the English and South African AML regimes, the US AML regime relies on two divisions to prosecute money-laundering cases.¹⁶¹ These are the Attorney General's Office and the Asset Recovery and Money Laundering Division.¹⁶²

Similar to the NPA in South Africa and the CPS in England, the Attorney General's Office, prosecutes all types of crimes in the US, including money laundering.¹⁶³ However, unlike the NPA in South Africa, the Asset Recovery and Money Laundering Division in the US is a specialist-prosecution authority, which deals with money-laundering cases that are often of complex nature.¹⁶⁴

Despite the existence of these two divisions in the US with their mandate focused on money laundering, they have not reported cases of successful prosecution of TBML.¹⁶⁵ The USGAO notes that the Asset Recovery and Money Laundering Division prosecutes TBML.¹⁶⁶ However, it states this without furnishing further details on the number or any TBML cases that have been dealt with.¹⁶⁷ With most jurisdictions not classifying TBML as separate from money laundering in general, there could be a possibility that the prosecuting authorities are already dealing with TBML in the US just like in South Africa.¹⁶⁸

9.5.3.3 Singapore

Just like under the South African AML regime, the Singapore AML regime also relies on a single authority for the prosecutorial function, the AGC.¹⁶⁹ The AGC has substantial records evidencing its part in prosecuting money-laundering cases in Singapore.¹⁷⁰ However, just like the NPA in South Africa, the CPS in England and the Asset Recovery and Money Laundering Division in the US, the AGC has not reported

¹⁶¹ See Ch 7 para 7.4.8 above.

¹⁶² See again Ch 7 para 7.4.8 above.

¹⁶³ See Ch 7 para 7.4.8 above. See also para 9.5.2 above and para 9.5.3.1 above.

¹⁶⁴ See again Ch 7 para 7.4.8 above. See also para 9.5.2 above.

¹⁶⁵ See again para 7.4.8 above.

¹⁶⁶ See again para 7.4.8 above.

¹⁶⁷ See again para 7.4.8 above.

¹⁶⁸ See again Ch 5 para 5.4.6 above and Ch 7.4.8 above. See also Ch 2 para 2.3.3 above.

¹⁶⁹ See Ch 8 para 8.4.6 above. See also para 9.5.2 above.

¹⁷⁰ See again Ch 8 para 8.4.6 above.

any TBML cases it has successfully prosecuted.¹⁷¹ This is despite the fact that the government of Singapore is quite aware of TBML in the context of trade-finance instruments.¹⁷² This is also despite the fact that in Singapore's *AML Mutual Evaluation Report* by the FATF, the AGC acknowledges that it prosecutes complex money-laundering cases, including TBML.¹⁷³

Although the government of Singapore's awareness of TBML in trade-finance instruments seems to be high, it is still developing strategies on how to deal with the problem.¹⁷⁴ Most of such strategies are mainly preventive in nature, focusing mainly on the issuance of guidelines to help financial institutions screen and avoid transactions suspected of TBML.¹⁷⁵ Thus, taking into account these initiatives, the AGC is yet to report cases of TBML it has successfully prosecuted. Another scenario could be that, just like other prosecutorial authorities in South Africa, England and the US, the AGC in Singapore, does not classify TBML as a standalone type of money laundering in its reports.¹⁷⁶ This could then account for the absence of specific cases the authority could claim to have prosecuted. In any case, Singapore's position on the prosecution of TBML is more or less on par with the South African one.¹⁷⁷

9.6 GOVERNANCE OF TBML IN TRADE-FINANCE INSTRUMENTS UNDER AML FRAMEWORKS

9.6.1 General

A governance framework for managing financial-crime risks is required both at the national and financial institution levels. This is also pertinent for the governance of risks of TBML in trade-finance transactions.¹⁷⁸ Such a framework may highlight and inform the overall strategy to be deployed in preventing money laundering. In paragraph 9.6, I present a comparative analysis of the South African AML regime and

¹⁷¹ See again Ch 8 para 8.4.6 above. See also para 9.5.2 above and para 9.5.3.1 et seq above.

¹⁷² See para 9.2.3.3 above. See also Ch 3 para 3.3 et seq above and Ch 8 para 8.2 above.

¹⁷³ See again Ch 8 para 8.4.6 above.

¹⁷⁴ See again para 9.2.3.3 above.

¹⁷⁵ See again Ch 8 para 8.4.6 above. See also Ch 3 para 3.2 above.

¹⁷⁶ See again Ch 8 para 8.4.6 above. See also Ch 2 para 2.3.3 above and para 9.5.2 above and para 9.5.3.1 et seq above.

¹⁷⁷ See para 9.5.2 above.

¹⁷⁸ See Ch 3 para 3.4 above.

those of the other jurisdictions considered in this study on the question of whether or not a governance framework specific for TBML is in place.

9.6.2 The Current Position in South Africa

In South Africa, there is no framework to specifically govern the risk of TBML in trade-finance instruments.¹⁷⁹ The FICA, which is the primary AML legislation, requires that financial institutions have an RMCP.¹⁸⁰ This is a generic governance framework for managing money-laundering risks within a financial institution.¹⁸¹ The FICA does not mention that the RMCP should address the risk of TBML in trade-finance instruments.¹⁸² However, it does not prohibit that such risks be governed by the RMCP.¹⁸³ In fact, the requirement that each financial institution must have an RMCP that is of general application to all money-laundering risks is a commendable one because it gives room for any type of money laundering to be covered, including TBML.¹⁸⁴

It should be noted that the RMCP must be applied on an RBA basis.¹⁸⁵ This implies that a financial institution could use the RMCP to deploy its AML strategies to those areas of operation it perceives to be of high money-laundering risk.¹⁸⁶ Thus, in situations where the financial institution is involved in risky trade-finance transactions, with potential TBML threats, it could adequately provide for such in its RMCP.¹⁸⁷ Although the FICA and the requirement for an RMCP do not specifically mention TBML, these are flexible enough to allow such risks to be addressed.¹⁸⁸ Additionally, the requirement for a risk-based RMCP is sensible in that it does not purport to prescribe a one-size fits-all solution for all banks in controlling financial crimes.¹⁸⁹ Instead, it allows them to govern their money-laundering risks as per their size, nature of operations and perception of threats they are likely to face.¹⁹⁰ There is a little

¹⁷⁹ See Ch 5 para 5.3.4.2 above. See also Ch 3 para 3.3 et seq above.

¹⁸⁰ See again Ch 5 para 5.3.4.2 above.

¹⁸¹ See again Ch 5 para 5.3.4.2 above.

¹⁸² See again Ch 5 para 5.3.4.2 above. See also Ch 3 para 3.3 et seq above.

¹⁸³ See Ch 5 para 5.3.4.3 above.

¹⁸⁴ See again Ch 5 para 5.3.4.3 above. See also Ch 10 para 10.2.9 et seq below.

¹⁸⁵ See Ch 5 para 5.3.4.4 above. See also para 9.7 et seq below.

¹⁸⁶ See again Ch 5 para 5.3.4.4 above. See also para 9.7.2 below.

¹⁸⁷ See again Ch 5 para 5.3.4.3 above. See also Ch 3 para 3.3 et seq above.

¹⁸⁸ See again Ch 5 para 5.3.4.3 above. See also Ch 10 para 10.2.9 et seq below.

¹⁸⁹ See Ch 5 para 5.3.4.2 and para 5.3.4.4 above. See also Ch 10 para 10.2.9 et seq below.

¹⁹⁰ See again Ch 5 para 5.3.4.3 above.

variation in the way the risk of TBML is governed under the South African AML regime and the comparative jurisdictions.¹⁹¹

9.6.3 Insights from the Comparative Jurisdictions

9.6.3.1 England

Similar to the South African position, the MLRs in England simply require financial institutions to have adequate internal controls and policies to manage money-laundering risks.¹⁹² Thus, the internal policies and controls are the equivalent of an RMCP under the South African AML regime.¹⁹³ Such policies should follow an RBA in that they should be appropriate for the size and nature of operations of the financial institution involved.¹⁹⁴ It should be noted that similar to the FICA under the South African AML regime, the MLRs do not specifically mention TBML under the internal controls.¹⁹⁵ All that the regulations require is that the internal policies and controls must be applied against any form of money-laundering threat to the financial institution.¹⁹⁶ This is more or less similar to the way the RMCP applies under the South African AML regime and could arguably include the threat of TBML in trade-finance instruments even though it is not mentioned.¹⁹⁷ In any case, neither the MLRs nor the FICA in South Africa mentions any other type of money laundering in specific terms.¹⁹⁸

Although the MLRs under the English AML regime do not mention TBML with regards to the requirement for internal policies, unlike in South Africa, there are AML institutions that do. These are the FCA and the JMLSG, which require that financial institutions in England should specifically address TBML in trade-finance instruments in their internal control policies and procedures.¹⁹⁹ Thus, the FCA and the JMLSG complement the generic requirement of an internal AML policy by recommending that financial institutions address TBML in specific terms.²⁰⁰ Such a recommendation is

¹⁹¹ See para 9.6.3 et seq below.

¹⁹² See Ch 6 para 6.3.4.2 above. See also para 9.6.2 above.

¹⁹³ See again Ch 6 para 6.3.4.2 above and para 9.6.2 above.

¹⁹⁴ See again Ch 6 para 6.3.4.2 above.

¹⁹⁵ See again Ch 6 para 6.3.4.2 above and para 9.6.2 above.

¹⁹⁶ See again Ch 6 para 6.3.4.2 above.

¹⁹⁷ See Ch 6 para 6.3.4.3 above. See also Ch 3 para 3.3 et seq above and para 9.6.2 above.

¹⁹⁸ See again Ch 6 para 6.3.4.3 above and para 9.6.2 above.

¹⁹⁹ See again Ch 6 para 6.3.4.3 above. See also Ch 3 para 3.3 et seq above.

²⁰⁰ See again Ch 6 para 6.3.4.3 above.

absent in South Africa as regards the use of the RMCP.²⁰¹ The FCA and the JMLSG do not only recommend that TBML be addressed specifically, but also require that financial institutions indicate in their internal policies how they manage the risk of TBML in trade-finance transactions.²⁰² In designing their internal policies in England, financial institutions are encouraged by the FCA and the JMLSG to incorporate views from the FATF and the Wolfsberg Group on the control of TBML in trade-finance transactions.²⁰³ This is a sound recommendation that should be adopted by the FIC in South Africa.²⁰⁴

9.6.3.2 The US

Just like under the South African AML regime, the BSA and the MLCA do not provide specific guidance to financial institutions on how to govern the risk of TBML in trade-finance instruments under the US AML regime.²⁰⁵ All that is required for financial institutions under the BSA is that they must have a BSA/AML compliance programme.²⁰⁶ This BSA/AML compliance programme could be viewed as the equivalent of the RMCP and the internal policies under the South African and the English jurisdictions respectively.²⁰⁷ The programme is intended to address the money-laundering risks that may confront banks conducting banking business in the US.²⁰⁸

Although there is no specific mention of TBML under the BSA's requirement for the BSA/AML compliance programme, TBML may arguably be addressed under the programme if encountered by a financial institution.²⁰⁹ This is because the BSA/AML compliance programme seems to be of general application to any type of money laundering, including TBML.²¹⁰ In any case, the FFIEC and FinCEN provide specific guidance to financial institutions on how they could address TBML in trade-finance

²⁰¹ See para 9.6.2 above. See also Ch 10 para 10.2.9.2 below.

²⁰² See again Ch 6 para 6.3.4.3 above. See also Ch 3 para 3.3 et seq above.

²⁰³ See Ch 6 para 6.5.2 above and para 6.5.4 above. See also Ch 3 para 3.3 et seq above.

²⁰⁴ See Ch 10 para 10.2.9.2 below.

²⁰⁵ See Ch 7 para 7.3.4.2 above and para 9.6.2 above. See also Ch 3 para 3.3 et seq above.

²⁰⁶ See again Ch 7 para 7.3.4.3 above.

²⁰⁷ See again Ch 7 para 7.3.4.3 above. See also para 9.6.2 and 9.6.3.1 above.

²⁰⁸ See again Ch 7 para 7.3.4.2 above.

²⁰⁹ See Ch 7 para 7.3.4.3 above.

²¹⁰ See again Ch 7 para 7.3.4.3 above.

instruments under the BSA/AML compliance programme.²¹¹ This is contrary to the position under the South African AML regime where comparable institutions such as the FIC and the SARB's Prudential Authority have not issued similar specific guidance.²¹² Both FinCEN and the FFIEC have issued guidelines to help financial institutions in the US to address the risk of TBML in trade-finance instruments in a manner similar to what the FCA and the JMLSG have done under the English AML regime.²¹³ In fact, the FFIEC under its *AML Manual* has devoted a section on how banks could manage the money-laundering risks in trade-finance transactions.²¹⁴ Such guidance will not only be necessary but also helpful to financial institutions in South Africa if appropriate institutions such as the FIC or the SAMLIT were to issue it for them.²¹⁵

9.6.3.3 Singapore

Similar to the AML legislation under the South African, the English and the US AML regimes, the CDSA in Singapore does not address the governance of TBML through a particular policy instrument.²¹⁶ However, through the MAS Notice 626 which is issued under the MAS Act, financial institutions in Singapore must have internal policies to manage money-laundering risks.²¹⁷ This is similar to the requirement for an RMCP under the South African AML regime.²¹⁸

Contrary to the South African AML regime, there is guidance under the Singapore AML regime on how internal policies should be applied to address specific cases of TBML in trade-finance instruments.²¹⁹ Through guidelines issued by the MAS, the ACIP and the ABS, financial institutions in Singapore are required to address TBML in trade-finance instruments in their internal policies.²²⁰ These guidelines are specific in their quest to help financial institutions address the risk of TBML in trade-finance

²¹¹ See again Ch 7 para 7.3.4.3 above.

²¹² See again para 9.6.2 above.

²¹³ See Ch 7 para 7.4.2 above and para 7.5.4 above. See also para 9.6.3.1 above.

²¹⁴ See again Ch 7 para 7.5.4 above.

²¹⁵ See Ch 10 para 10.2.9.2 below.

²¹⁶ See Ch 8 para 8.3.4.2 above. See also para 9.6.2 et seq above.

²¹⁷ See again Ch 8 para 8.3.4.2 above.

²¹⁸ See again para 9.6.2 above.

²¹⁹ See Ch 8 para 8.3.4.3 above. See also Ch 3 para 3.3 et seq above.

²²⁰ See again Ch 8 para 8.3.4.3 above. See also Ch 3 para 3.3 et seq above.

transactions.²²¹ They address the issue of CDD, transaction reporting and training of staff on the prevention of TBML in trade-finance instruments, among other things.²²²

9.7 PRESENCE AND APPLICATION OF THE RBA TO TBML IN TRADE-FINANCE INSTRUMENTS

9.7.1 General

The FATF recommends that financial institutions manage the risk of money laundering through the RBA.²²³ This is a risk-management tool that prioritises the deployment of resources by an institution to those areas of operation it perceives to be of higher money-laundering risk. Thus, the RBA is an important component of a financial institution's AML programme.²²⁴ In paragraph 9.7, I compare how the RBA is currently applied under the South African AML regime and under the other selected jurisdictions with regards to the threat of TBML in trade-finance instruments.²²⁵

9.7.2 The Current Position in South Africa

It is a requirement under the South African AML regime that financial institutions apply the RBA in managing the risks of money laundering.²²⁶ The FICA requires that each bank in South Africa should incorporate the RBA in its RMCP and be able to deploy it effectively against various money-laundering risks.²²⁷

The FIC has not issued any guidance on how the RBA should specifically be applied against TBML in trade-finance instruments.²²⁸ However, since the RBA is of general application and ought to be applied in proportion to the size and nature of the bank's business, then TBML in trade-finance instruments may also be covered.²²⁹ In other words, a bank must use the RBA to evaluate the risk of TBML in transactions involving trade-finance services it provides to its clients. Thus, since the RBA is applicable to

²²¹ See again Ch 8 para 8.3.4.3 above.

²²² See again Ch 8 para 8.3.4.3 above.

²²³ See Ch 4 para 4.3.2.4.5 above.

²²⁴ See para 9.7.2 below.

²²⁵ See para 9.7.2 below and para 9.7.3 et seq below.

²²⁶ See Ch 5 para 5.3.4.4 above.

²²⁷ See para 9.6.2 above and Ch 5 para 5.3.4.4 above.

²²⁸ See again Ch 5 para 5.3.4.4 above. See also Ch 3 para 3.3 et seq above.

²²⁹ See Ch 5 para scope 5.3.4.5 above. See also Ch 3 para 3.3 et seq above.

any type of money-laundering risk, TBML in trade-finance instruments may equally be covered under the current approach.²³⁰

9.7.3 Insights from the Comparative Jurisdictions

9.7.3.1 England

Similar to the South African AML regime, the English AML regime also applies the RBA to manage money-laundering risks in general.²³¹ The requirement for the RBA under the English AML regime is provided for under the MLRs.²³² Its application in England by financial institutions is also similar to the way it is done in South Africa.²³³ However, an observable difference between the South African and the English AML regimes is that the latter has AML institutions that have issued specific guidelines on how financial institutions should apply the RBA in the context of TBML in trade finance.²³⁴ In this regard, the FCA and the JMLSG require that financial institutions, which conduct trade-finance transactions in England, should apply the RBA to manage the risks of TBML in such transactions.²³⁵

Similar guidance from AML institutions in South Africa, such as the FIC or the SAMLIT would go a long way to assist financial institutions to manage the risk of TBML in their trade-finance transactions.²³⁶ Alternatively, the FIC could amend *Guidance Note 7*, which is already in place, to specifically address the issue of TBML in trade-finance instruments in greater detail.²³⁷

9.7.3.2 The US

Just like under the South African AML regime, under the US AML regime, the FFIEC and FinCEN equally require that financial institutions rely on the RBA for the management of money-laundering risks.²³⁸

²³⁰ See again Ch 5 para 5.3.4.5 above. See also Ch 3 para 3.3 et seq above.

²³¹ See Ch 6 para 6.3.4.4 above. See also para 9.7.2 above.

²³² See again Ch 6 para 6.3.4.4 above.

²³³ See again para 9.7.2 above.

²³⁴ See again Ch 6 para 6.3.4.4 above.

²³⁵ See Ch 6 para 6.3.4.5 above.

²³⁶ See Ch 10 para 10.2.9.4 below.

²³⁷ See Ch 10 para 10.2.9.4 below.

²³⁸ See Ch 7 para 7.3.4.4 above. See also para 9.7.2 above.

A Comparative Analysis of the Legal Systems Investigated in Relation to TBML Control in Trade-Finance Instruments

The FFIEC encourages financial institutions to employ the RBA when assessing money-laundering risks in compliance with the BSA.²³⁹ Unlike in England but similar to South Africa, there is no specific direction or guidance to financial institutions in the US to apply the RBA in the context of TBML in trade-finance instruments.²⁴⁰

9.7.3.3 Singapore

In Singapore, just like in the rest of the comparative jurisdictions and South Africa, the RBA is also a well-recognised concept in managing money-laundering risks.²⁴¹ In this regard, financial institutions in Singapore also apply the RBA according to their size and nature of operations.²⁴²

Unlike under the South African and the US AML regimes, but similar to the English AML regime, some institutions under the Singapore AML regime provide guidance on how the RBA should operate in the context of TBML.²⁴³ Such guidance comes from the MAS, and the ACIP.²⁴⁴ These two institutions recommend that financial institutions conducting business in Singapore should specifically apply the RBA when managing the risk of TBML in trade-finance transactions.²⁴⁵ This approach is similar to the one under the English AML regime. It should be adopted for the South African AML regime since it brings clarity in the management of the risk of TBML in trade-finance.²⁴⁶

9.8 GUIDANCE FOR CDD MEASURES FOR TBML IN TRADE-FINANCE INSTRUMENTS

9.8.1 General

The KYC process is a critical component of a country's AML regime. Thus, the FATF recommends that a jurisdiction's AML legislation should provide for the conducting of CDD as part of the measures necessary to prevent money laundering.²⁴⁷ As regards the application of the CDD measures for the detection of TBML in trade-finance

²³⁹ See again Ch 7 para 7.3.4.4 above.

²⁴⁰ See Ch 7 para 7.3.4.5 above. See also para 9.7.2 above and para 9.7.3.1 above.

²⁴¹ See Ch 8 para 8.3.4.4 above. See also para 9.7.2 above and para 9.7.3.1 et seq above.

²⁴² See again Ch 8 para 8.3.4.4 above.

²⁴³ See Ch 8 para 8.3.4.5 above. See also para 9.7.2 above and para 9.7.3.1 above.

²⁴⁴ See Ch 8 para 8.3.4.4 above; para 8.4.4 above; and para 8.5.2 above.

²⁴⁵ See again Ch 8 para 8.3.4.5 above. See also Ch 3 para 3.3 et seq above.

²⁴⁶ See Ch 10 para 10.2.9.4 below.

²⁴⁷ See Ch 4 para 4.3.2 et seq above.

instruments, the approach may differ from one jurisdiction to another.²⁴⁸ In paragraph 9.8, I compare various CDD approaches used under the KYC process to prevent TBML in trade-finance transactions under the South African AML regime and the comparative jurisdictions considered in this study.²⁴⁹

9.8.2 The Current Position in South Africa

The obligation to conduct CDD is central to the South African AML regime.²⁵⁰ In this regard, it should be noted that CDD prevents criminals from taking advantage of financial institutions through various illicit activities, including money laundering.²⁵¹ The CDD obligation is provided for under the FICA and the FIC guidance notes, namely, *FIC Guidance Note 3* and 7.²⁵²

In stipulating the obligation, the FICA prohibits financial institutions from establishing business relationships with anonymous customers or those who use fictitious names.²⁵³ Although *FIC Guidance Note 7* is of general application, covering various AML obligations for financial institutions, *FIC Guidance Note 3* is specifically for CDD.²⁵⁴

Despite the presence of the FIC's guidance notes and the FICA, none of them speaks in specific terms to the issue of CDD in the context of TBML in trade-finance instruments.²⁵⁵ This is because the FICA and the FIC's guidance notes are of general application to any potential risk of money laundering. Without a particular provision dealing with the matter, it can be argued that the CDD measures under the FICA and the FIC guidance notes, equally apply to TBML in trade-finance instruments.²⁵⁶ The trend from other jurisdictions, however, is to have a guideline that specifically speaks to the application of CDD in the context of TBML using existing AML legislation.²⁵⁷ Such a scenario would be a step in the right direction and would be beneficial for the

²⁴⁸ See para 9.8.2 below and para 9.8.3 et seq below.

²⁴⁹ See para 9.8.2 below and para 9.8.3 et seq below.

²⁵⁰ See Ch 5 para 5.3.4.6 above.

²⁵¹ See again Ch 5 para 5.3.4.6 above.

²⁵² See again Ch 5 para 5.3.4.6 above.

²⁵³ See again Ch 5 para 5.3.4.6 above.

²⁵⁴ See again Ch 5 para 5.3.4.6 above.

²⁵⁵ See Ch 5 para 5.3.4.7 above. See also Ch 3 para 3.3 et seq above.

²⁵⁶ See Ch 5 para 5.3.4.7 above.

²⁵⁷ See para 9.8.3 et seq below.

South African AML regime.²⁵⁸ To achieve this, the FIC could just amend FIC *Guidance Note 3*, which already deals with CDD measures in general under the FICA, to specifically address the issue of TBML in trade-finance instruments.²⁵⁹ This suggestion will bring the South African AML regime in line with other jurisdictions, as will be shown below.

9.8.3 Insights from the Comparative Jurisdictions

9.8.3.1 England

The English AML regime, just like the South African one, also places the concept of CDD at the centre of its preventive measures against money laundering.²⁶⁰ The CDD measures are provided for under the MLRs.²⁶¹ Similar to the position under the South African AML regime, the CDD measures under the MLRs are also of general application to any transaction that passes through a financial institution.²⁶²

The purpose of conducting CDD in England is also the same as in South Africa, namely, to ensure that banks know their business partners to avoid being used by criminals in money-laundering activities.²⁶³ In addition, the CDD measures under the MLRs, just like those under the FICA in South Africa, do not address specific types of money laundering such as TBML in trade-finance instruments.²⁶⁴

However, unlike under the South African position, there are some explanatory guidelines from some AML institutions in England, which assist financial institutions to put CDD measures into practice in the context of TBML in trade finance.²⁶⁵ Such guidelines come from the FCA and the JMLSG. Both institutions consider it a good practice for financial institutions in England to have written procedures, which specifically address the risk of TBML in trade-finance transactions.²⁶⁶ The guidelines from the FCA and the JMLSG provide further details on how financial institutions should use KYC information they obtain from customers to manage the risk of TBML

²⁵⁸ See Ch 10 para 10.2.9.6 below.

²⁵⁹ See Ch 10 para 10.2.9.6 below. See also Ch 3 para 3.3 et seq above.

²⁶⁰ See Ch 6 para 6.3.4.6 above.

²⁶¹ See again Ch 6 para 6.3.4.6 above.

²⁶² See again Ch 6 para 6.3.4.6 above. See also para 9.8.2 above.

²⁶³ See again Ch 6 para 6.3.4.6 and para 9.8.2 above.

²⁶⁴ See again Ch 6 para 6.3.4.6 above. See also Ch 3 para 3.3 et seq above and para 9.8.2 above.

²⁶⁵ See Ch 6 para 6.3.4.7 above. See also Ch 3 para 3.3 et seq above and para 9.8.2 above

²⁶⁶ See again Ch 6 para 6.3.4.7 above.

in any trade-finance transaction.²⁶⁷ Although under the South African AML regime there are equivalent institutions that can issue similar guidelines such as the FIC, or the SAMLIT, no such specific recommendations have been issued for TBML in trade-finance instruments.²⁶⁸ It would, thus, be a positive development to have the FIC and the SAMLIT actively issuing guidelines similar to those of the FCA and the JMLSG to combat TBML in South Africa.²⁶⁹

9.8.3.2 *The US*

Similar to the South African and the English position, the obligation for financial institutions to conduct CDD is also present under the US AML regime.²⁷⁰ The BSA requires financial institutions in the US to have a written CIP, which provides for the CDD measures.²⁷¹ It is under the CIP that a financial institution must have procedures on how to conduct its CDD on an RBA basis to prevent money laundering.²⁷²

Just like under the South African and the English AML regimes, the CIP under the US AML regime is of general application for any transaction that a financial institution is engaged in.²⁷³ In other words, it is used to prevent any type of money-laundering risks, including, possibly, those emanating from trade-finance transactions.²⁷⁴ The requirement for a CIP and its CDD measures, however, do not specifically address TBML in trade-finance transactions.²⁷⁵ Where the CIP is deployed to manage the risk of TBML in such transactions, it may do so as part of its general application to any transaction.²⁷⁶

To complement the CIP, the FFIEC in the US, just like the FCA and the JMLSG in England, has issued guidelines on how to conduct CDD in the context of TBML in trade-finance transactions.²⁷⁷ The FFIEC provides for this under its *AML Manual*. The manual guides financial institutions on a step-by-step basis to screen potentially

²⁶⁷ See Ch 6 para 6.5.2 above and para 6.5.4 above.

²⁶⁸ See again para 9.8.2 above. See also Ch 3 para 3.3 et seq above.

²⁶⁹ See Ch 10 para 10.2.9.6 below.

²⁷⁰ See Ch 7 para 7.3.4.6 above. See also para 9.8.2 and para 9.8.3.1 above.

²⁷¹ See again Ch 7 para 7.3.4.6 above.

²⁷² See again Ch 7 para 7.3.4.6 above.

²⁷³ See again Ch 7 para 7.3.4.6 above. See also para 9.8.2 and para 9.8.3.1 above.

²⁷⁴ See again Ch 7 para 7.3.4.6 above. See also Ch 3 para 3.3 et seq above.

²⁷⁵ See again Ch 7 para 7.3.4.6 above. See also Ch 3 para 3.3 et seq above.

²⁷⁶ See again Ch 7 para 7.3.4.6 above.

²⁷⁷ See Ch 7 para 7.3.4.7 above. See also Ch 3 para 3.3 et seq above and para 9.8.3.1 above.

suspicious customers in trade-finance transactions while using the CIP and CDD measures under the BSA.²⁷⁸ This is unlike under the South African AML regime where such context-specific guidance is absent from the FIC.²⁷⁹ Although the CDD concept is generally the same across jurisdictions, a context-specific guidance on how to apply it against TBML in trade-finance transactions would be recommended for the South African AML regime.²⁸⁰

9.8.3.3 Singapore

The MAS Notice 626, just like the FICA in South Africa, provides for the conducting of CDD by financial institutions in Singapore.²⁸¹ The CDD measures under the MAS Notice 626 generally apply to screen customers in any transaction that passes through a financial institution.²⁸² Thus, similar to the CDD measures under the FICA in South Africa, the measures under the MAS Notice 626 do not specifically address TBML in trade-finance instruments.²⁸³ All they do is to cater for all types of money laundering which may include TBML in trade-finance instruments.²⁸⁴ However, there are similarities with regards to the presence of guidance on how to apply the CDD measures in the context of TBML between Singapore, on the one hand, and England and the US, on the other hand.²⁸⁵

Just like the FCA and the JMLSG in England, the FFIEC in the US, the MAS and the ACIP in Singapore have also both issued guidelines to assist financial institutions to conduct CDD in trade-finance transactions.²⁸⁶ The guidelines complement the MAS Notice 626 on CDD whose application is of general nature. AML institutions in South Africa, such as the FIC and the SAMLIT, should adopt this stance, by issuing CDD guidelines for trade finance to complement the FIC *Guidance Notes 3 and 7*.²⁸⁷

²⁷⁸ See Ch 7 para 7.3.4.7 above. See also Ch 3 para 3.3 et seq above.

²⁷⁹ See again Ch 7 para 7.3.4.7 above. See also para 9.8.2 above.

²⁸⁰ See Ch 10 para 10.2.9.6 below.

²⁸¹ See Ch 8 para 8.3.4.6 above.

²⁸² See again Ch 8 para 8.3.4.6 above.

²⁸³ See again Ch 8 para 8.3.4.6 above. See also Ch 3 para 3.3 et seq above and para 9.8.2 above.

²⁸⁴ See Ch 8 para 8.3.4.7 above. See also Ch 3 para 3.3 et seq above.

²⁸⁵ See again Ch 8 para 8.3.4.7 above. See also para 9.8.3.1 et seq above.

²⁸⁶ See again Ch 8 para 8.3.4.7 above. See also para 9.8.3.1 et seq above.

²⁸⁷ See Ch 10 para 10.2.9.6 below.

9.9 GUIDANCE FOR REPORTING SUSPICIOUS ACTIVITIES RELATED TO TBML IN TRADE-FINANCE INSTRUMENTS

9.9.1 General

One of the most important duties in preventing possible money laundering is for financial institutions to recognise and report suspicious transactions.²⁸⁸ The reporting of transactions suspected of money laundering is a crucial part of an effective AML programme.²⁸⁹ One of the FATF and the Egmont Group's recommendations for any national AML regime, including that of South Africa, is to have an FIU to which suspicious transactions can be reported by financial institutions and other entities.²⁹⁰ To that end, this paragraph 9.9 compares how financial institutions in South Africa report suspicious transactions in the context of TBML in trade-finance transactions against how those in the other selected jurisdictions execute the same obligation.²⁹¹

9.9.2 The Current Position in South Africa

In South Africa, the FICA stipulates that the reporting of unusual or suspicious transactions is mandatory.²⁹² The obligation requires that financial institutions must report any transaction to the FIC, which they regard as suspicious for money laundering.²⁹³ The FICA does not stipulate any particular type of transactions to be regarded as being 'suspicious' or 'unusual' for money-laundering purposes.²⁹⁴ In other words, all transactions that a financial institution may find unusual or suspicious are subject to the AML duty to report suspicious activity.²⁹⁵ This is subjective for the financial institution and may depend on the application of the RBA by the institution.²⁹⁶

The FIC issued *Guidance Note 4* and *7* under the FICA to assist financial institutions in South Africa to identify and report unusual and suspicious transactions for money laundering.²⁹⁷ It should be noted that, just like the FICA, the guidance notes do not

²⁸⁸ See para 9.9.2 below.

²⁸⁹ See para 9.9.2 and 9.9.3 below.

²⁹⁰ See Ch 4 para 4.3.2 et seq and para 4.4.4 above.

²⁹¹ See para 9.9.2 and para 9.9.3 et seq below.

²⁹² See Ch 5 para 5.3.4.10 above.

²⁹³ See again Ch 5 para 5.3.4.10 and para 5.4.2 above.

²⁹⁴ See again Ch 5 para 5.3.4.10 above.

²⁹⁵ See again Ch 5 para 5.3.4.10 above.

²⁹⁶ See Ch 5 para 5.3.4.4 above.

²⁹⁷ See again Ch 5 para 5.3.4.10 above.

specifically address the problem of TBML in trade-finance instruments.²⁹⁸ They are also of general application to any type of transaction that may be suspected of money laundering.²⁹⁹ This could arguably include TBML in trade-finance instruments since the guidance notes do not expressly exclude them. However, under the current position, banks in South Africa may not even prioritise the identification and reporting of TBML in trade-finance transactions due to the lack of expertise and the absence of specific guidance on the subject from the FIC.³⁰⁰ It would have been ideal, however, for the FIC to issue a guidance note specifically aimed at complex forms of money laundering such as TBML in trade-finance transactions.³⁰¹ This recommendation will bring the South African AML regime in almost the same position as the comparative jurisdictions on the aspect, as will be demonstrated below.

9.9.3 Insights from the Comparative Jurisdictions

9.9.3.1 England

Similar to the South African position, the AML legislation in England also require financial institutions to report suspicious transactions to their FIU.³⁰² The POCAE and the MLRs require that financial institutions must report suspicious transactions to the NCA, which is England's FIU.³⁰³ Just like under the South African AML regime, the obligation to report suspicious transactions under the English AML regime is of general application to any transaction for which money laundering is suspected.³⁰⁴ In other words, the POCAE and the MLRs do not specifically address any type of money laundering, including TBML in trade-finance instruments.³⁰⁵ Since the obligation applies to any type of transaction, TBML in trade-finance instruments may also be covered under it.³⁰⁶

However, unlike under the South African AML regime, and to bring more clarity on this aspect, there is guidance on the reporting of transactions suspected of TBML under

²⁹⁸ See again Ch 5 para 5.3.4.10 above. See also Ch 3 para 3.3 et seq above.

²⁹⁹ See again Ch 5 para 5.3.4.10 above.

³⁰⁰ See Ch 5 para 5.3.4.11 above.

³⁰¹ See Ch 10 para 10.2.9.8 below.

³⁰² See Ch 6 para 6.3.4.10 and para 6.4.2 above.

³⁰³ See again Ch 6 para 6.3.4.10 and para 6.4.2 above.

³⁰⁴ See again Ch 6 para 6.3.4.10 and para 9.9.2 above.

³⁰⁵ See again Ch 6 para 6.3.4.10 and para 9.9.2 above. See also Ch 3 para 3.3 et seq above.

³⁰⁶ See Ch 6 para 6.3.4.11 above. See also Ch 3 para 3.3 et seq above.

the English AML regime.³⁰⁷ This guidance comes from the FCA and the JMLSG, which have both issued some guidelines on how financial institutions should specifically file reports on transactions suspected of TBML in trade-finance transactions.³⁰⁸ Both institutions recommend that financial institutions should have additional safeguards aimed at combatting TBML in trade-finance transactions.³⁰⁹ They also encourage the use of red-flag indicators of TBML to spot and report suspicious trade-finance transactions that may be affected by TBML. Most of the red-flag indicators suggested by the FCA and the JMLSG are almost a mirror image of the FATF's suggested red flags for TBML.³¹⁰ Thus, the English AML regime has institutions that have attempted to match the FATF's *Standards* when identifying and reporting transactions that appear to be suspicious using TBML red flags. Although the red flags are not conclusive evidence of the occurrence of TBML in trade-finance transactions, they provide a cue for further investigations to be conducted.³¹¹

This study will recommend that the FIC should issue a guidance note to financial institutions on how to report trade-finance transactions suspected of TBML.³¹² In this regard, the FIC need not reinvent the wheel on this proposal. Instead, it should borrow from already published guidelines such as those from the FCA, the JMLSG and even the FATF on how to identify and report suspicious trade-finance transactions for TBML.³¹³

9.9.3.2 *The US*

Similar to the position under the South African and the English AML regimes, the MLCA under the US AML regime requires that financial institutions file suspicious transaction reports to FinCEN.³¹⁴ The filing of such reports applies to all transactions that a bank conducts. Similar to the FICA in South Africa and the POCAE in England,

³⁰⁷ See again Ch 6 para 6.3.4.11 above. See also para 9.9.2 above.

³⁰⁸ See again Ch 6 para 6.3.4.11 above. See also Ch 3 para 3.3 et seq above.

³⁰⁹ See again Ch 6 para 6.3.4.11 above. See also Ch 3 para 3.3 et seq above.

³¹⁰ See Ch 4 para 4.3.2.4.4 above.

³¹¹ See Ch 4 para 4.3.2.4.4 above.

³¹² See Ch 10 para 10.2.9.8 below.

³¹³ See Ch 10 para 10.2.9.8 below.

³¹⁴ See Ch 7 para 7.3.4.10 and para 9.9.2 above.

the BSA in the US does not specifically address the filing of reports related to suspected cases of TBML in trade-finance transactions.³¹⁵

Although there is no specific mention under the MLCA on how to file reports of transactions suspected of TBML, FinCEN has issued guidelines on how these should be made.³¹⁶ It requires that a suspicious transaction report should indicate, specifically, that TBML is suspected.³¹⁷ Complementary to FinCEN efforts, the FFIEC also provides further guidance to financial institutions operating in the US on the identification and reporting of transactions suspected of TBML.³¹⁸ However, the guidance from both FinCEN and the FFIEC, does not address TBML in the context of trade-finance instruments as the FCA do under the English AML regime.³¹⁹ In other words, the US AML regime approaches TBML as a general concept insofar as it affects the entire economy, including the trade-finance sector.³²⁰ Nonetheless, the fact that FinCEN and the FFIEC, at a minimum, acknowledge the reporting of transactions suspected of TBML in specific terms is a positive step that is worth emulating by the FIC under the South African AML regime.³²¹

9.9.3.3 Singapore

Similar to the South African, the English and the US positions, the position under the Singapore AML regime is that financial institutions must also report transactions suspected of money-laundering activities.³²² The CDSA and the MAS Notice 626 require that financial institutions report all suspicious transactions they handle to the STRO.³²³ Unlike in South Africa where the reporting is done to the FIC only, the reporting of suspicious transactions in Singapore is done simultaneously to two entities, namely, the STRO, which is the country's FIU, and the MAS, which is the banks' regulator.³²⁴ However, just like the FICA in South Africa, the CDSA in Singapore does not mention specific forms of transactions to be reported except that

³¹⁵ See again Ch 7 para 7.3.4.10 above. See also Ch 3 para 3.3 et seq above.

³¹⁶ See Ch 7 para 7.3.4.11 above.

³¹⁷ See again Ch 7 para 7.3.4.11 above.

³¹⁸ See again Ch 7 para 7.3.4.11 above.

³¹⁹ See para 9.9.3.1 above and Ch 3 para 3.3 et seq above.

³²⁰ See Ch 2 para 2.3 et seq above and Ch 3 para 3.3 et seq above.

³²¹ See Ch 10 para 10.2.9.8 below.

³²² See Ch 8 para 8.3.4.10 above. See also para 9.9.2 above and para 9.9.3.1 et seq above.

³²³ See again Ch 8 para 8.3.4.10 above.

³²⁴ See again Ch 8 para 8.3.4.10 above. See also para 9.9.2 above.

they have to be suspicious.³²⁵ Neither does the CDSA also mention TBML in specific terms.³²⁶ However, since the reporting of cases suspected of money laundering applies to all transactions, TBML in trade-finance transactions may also be treated just like any other case.

To further guide financial institutions on the reporting of suspicious trade-finance transactions, the MAS and the ACIP have issued red flag indicators of potential TBML occurrence.³²⁷ The red-flag indicators, which the MAS and the ACIP have issued, mirror those issued by the FATF globally and the FCA and JMLSG in England.³²⁸ Thus, the government of Singapore is alive to the international trends on how to manage the risk of TBML in trade-finance transactions.³²⁹ It would be a recommended development if the FIC or the SAMLIT in South Africa demonstrate such alertness in preventing TBML by issuing its own red flag indicators to assist financial institutions.³³⁰

9.10 GUIDANCE ON RECORD KEEPING FOR TBML IN TRADE-FINANCE INSTRUMENTS

9.10.1 General

The AML obligation to keep records of financial transactions and customers is a significant one for financial institutions.³³¹ It ensures that a paper trail of evidence is maintained to help in the conducting of money-laundering investigations.³³² This paragraph 9.10 compares the record-keeping obligation under the South African AML regime and under the AML regimes of the selected comparative jurisdictions under study.³³³ The aim is to establish how the record-keeping obligation assists in preventing TBML in trade-finance transactions and draw lessons for the South African AML regime.

³²⁵ See para 9.9.2 above and Ch 8 para 8.3.4.10 above.

³²⁶ See again Ch 8 para 8.3.4.10 above.

³²⁷ See again Ch 8 para 8.3.4.11 above.

³²⁸ See again Ch 8 para 8.3.4.11 above. See also Ch 4 para 4.3.2.4 above and para 9.9.3.1 above.

³²⁹ See Ch 8 para 8.2 above. See also Ch 4 para 4.3.1 et seq above.

³³⁰ See Ch 10 para 10.2.9.8 below.

³³¹ See para 9.10.2 below.

³³² See para 9.10.2 below.

³³³ See para 9.10.2 and para 9.10.3 et seq below.

9.10.2 The Current Position in South Africa

The South African AML regime provides for the AML obligation to keep records of financial transactions and customers.³³⁴ The obligation is provided for under the FICA.³³⁵ It demands that the records for all types of transactions that a financial institution has dealt with, be kept. In this regard, the FICA does not specify any type of records or transactions to which the obligation must apply.³³⁶ Thus, a financial institution that deals in trade-finance transactions must keep records of such transactions and any reported cases of TBML related to such transactions.³³⁷

There is no guidance from the FIC on how financial institutions should keep records on transactions for which TBML is suspected.³³⁸ However, given the wide nature of the obligation to keep records under the FICA, a financial institution may keep the records in any manner it deems to be in compliance with the FICA. This may possibly leave a gap under which records pertaining to TBML may not be kept at all.³³⁹

9.10.3 Insights from the Comparative Jurisdictions

9.10.3.1 England

Just like under the South African AML regime, the obligation to keep records is also available under the English AML regime.³⁴⁰ It is provided for under the MLRs and the POCAE.³⁴¹ Under the obligation, financial institutions must keep records relating to their customers and transactions.³⁴² The purposes of such exercise under the English AML regime is also the same as under the South African AML regime, namely, the preservation of evidence to use in financial-crime investigations.³⁴³

Similar to the requirement under the FICA in South Africa, the MLRs in England do not specifically require financial institutions to keep records of transactions pertaining to

³³⁴ See Ch 5 para 5.3.4.8 above.

³³⁵ See again Ch 5 para 5.3.4.8 above.

³³⁶ See again Ch 5 para 5.3.4.8 above.

³³⁷ See Ch 5 para 5.3.4.9 above.

³³⁸ See again Ch 5 para 5.3.4.9 above.

³³⁹ See again Ch 5 para 5.3.4.9 above.

³⁴⁰ See Ch 6 para 6.3.4.8 above. See also para 9.10.2 above.

³⁴¹ See again Ch 6 para 6.3.4.8 above.

³⁴² See again Ch 6 para 6.3.4.8 above.

³⁴³ See again Ch 6 para 6.3.4.8 and para 9.10.2 above.

trade finance and their suspected cases of TBML, if any.³⁴⁴ Thus, the MLRs impose a blanket requirement for financial institutions to keep any records of transactions that they have dealt with.³⁴⁵ However, there is one observable difference, between the South African and the English AML regimes. The FCA in England recommends that financial institutions keep records, which demonstrate that reviews have been conducted in trade-finance transactions to curb TBML.³⁴⁶ It considers it poor-banking practice for the financial institution to simply keep records of trade documents without accompanying records of money-laundering reviews it has conducted.³⁴⁷ It would be a step in the right direction if institutions in South Africa equivalent to the FCA in England, such as the SARB's Prudential Authority, were also to recommend such good banking practices to financial institutions in South Africa.³⁴⁸

9.10.3.2 The US

Similar to the South African and English AML regimes, the US AML regime also provides for the need for financial institutions to keep records of transactions.³⁴⁹ The requirement is provided for under the BSA and stipulates that financial institutions must maintain records of transactions they have handled for their customers.³⁵⁰

Just like under the South African and the English AML regimes, the obligation to keep records under the US AML regime does not require financial institutions to specifically keep records of trade-finance transactions for which TBML may be a problem.³⁵¹ Thus, the overall obligation to keep records can arguably be said to cover any type of transaction, including trade-finance transactions.³⁵² However, unlike under the South African AML regime, FinCEN requires financial institutions in the US to specifically file suspicious transaction reports for TBML. This logically implies that they must keep a record of such transactions.³⁵³

³⁴⁴ See again Ch 6 para 6.3.4.8 above. See also para 9.10.2 above.

³⁴⁵ See again Ch 6 para 6.3.4.8 above.

³⁴⁶ See Ch 5 para 6.3.4.9 above.

³⁴⁷ See again Ch 5 para 6.3.4.9 above.

³⁴⁸ See Ch 10 para 10.2.9.10 below.

³⁴⁹ See Ch 7 para 7.3.4.8 above. See also para 9.10.2 and 9.10.3.1 above.

³⁵⁰ See again Ch 7 para 7.3.4.8 above.

³⁵¹ See again Ch 7 para 7.3.4.8 above. See also para 9.10.2 above and para 9.10.3.1 above.

³⁵² See Ch 7 para 7.3.4.9 above. See also Ch 3 para 3.3 et seq above.

³⁵³ See again Ch 7 para 7.3.4.9 above. See also para 9.10.2 above.

9.10.3.3 Singapore

Similar to the South African and the other comparative jurisdictions considered in this study, the Singapore AML regime also provides for the obligation to keep records of financial transactions and customers.³⁵⁴ The CDSA and the MAS Notice 626 provide for the obligation and requires that financial institutions maintain records of customers and transactions they have conducted.³⁵⁵ Additionally, just like under the South African AML regime, the obligation applies to records of all transactions, which pass through the financial institution.³⁵⁶

Just like under the other comparative jurisdictions, including South Africa, the CDSA and the MAS Notice 626 do not expressly require financial institutions in Singapore to keep records of trade-finance transactions.³⁵⁷ Thus, the general duty to keep records of all transactions may equally apply to records of trade-finance transactions suspected of TBML.³⁵⁸ However, unlike the SAMLIT in South Africa and FinCEN Exchange in the US, but similar to the FCA in England, the ACIP in Singapore provides guidance to financial institutions on the keeping of records related to trade-finance transactions.³⁵⁹ It recommends that financial institutions ought to maintain records of trade-finance transactions according to the requirements of the MAS Notice 626. Such records should also reflect the audit trail performed to address the risk of TBML in trade-finance transactions.³⁶⁰ These recommendations do not only bring clarity on the duty in relation to TBML in trade-finance transactions but also demonstrate good banking practice in England and Singapore and are therefore worth emulating by the FIC in South Africa.³⁶¹

³⁵⁴ See Ch 8 para 8.3.4.8 above. See also para 9.10.2 and para 9.10.3.1 et seq above.

³⁵⁵ See again Ch 8 para 8.3.4.8 above.

³⁵⁶ See Ch 8 para 8.3.4.8 above. See also para 9.10.2 above.

³⁵⁷ See again Ch 8 para 8.3.4.8 above. See also para 9.10.2 and para 9.10.3.1 et seq above.

³⁵⁸ See Ch 8 para 8.3.4.9 above.

³⁵⁹ See again Ch 8 para 8.3.4.9 above. See also para 9.10.2 above and 9.10.3.1 et seq above.

³⁶⁰ See again Ch 8 para 8.3.4.9 above.

³⁶¹ See Ch 10 para 10.2.9.10 below.

9.11 GUIDANCE ON STAFF TRAINING ON TBML IN TRADE-FINANCE INSTRUMENTS

9.11.1 General

Staff training is an important AML obligation for any jurisdiction.³⁶² It is pivotal to a financial institution's ability to effectively implement its AML programme. Thus, the AML obligation is central to the process of improving a bank's staff awareness about trends and developments in money-laundering issues.³⁶³ In paragraph 9.11, I compare the obligation to offer AML training to staff under the South African AML regime and under the comparative jurisdictions considered in this study.³⁶⁴ In particular, I consider whether there is guidance on staff training which is specific to the control of TBML in trade-finance instruments under the respective jurisdictions for which lessons may be drawn for the South African AML regime.³⁶⁵

9.11.2 The Current Position in South Africa

The FICA and FIC *Guidance Note 7* provide for the AML training obligation under the South African AML regime.³⁶⁶ In this regard, the AML training must be provided to staff on an ongoing basis.³⁶⁷ This is in recognition of the fact that money-laundering methods and trends evolve and therefore, there is a need to keep staff well updated. FIC *Guidance Note 7* complements the FICA's requirement for AML training in financial institutions. It does this by providing what to train staff on under the AML guidelines.³⁶⁸ The FICA also requires that every financial institution must have an RMCP, which must provide for the training of staff on AML issues.³⁶⁹ This gives room for financial institutions to cover various AML issues that affect their services, including TBML in trade-finance instruments, if this concerns them.³⁷⁰ Thus, both FIC *Guidance*

³⁶² See para 9.11.2 and para 9.11.3 et seq below.

³⁶³ See para 9.11.2 and para 9.11.3 et seq below.

³⁶⁴ See para 9.11.2 and para 9.11.3 et seq below.

³⁶⁵ See para 9.11.2 and para 9.11.3 et seq below.

³⁶⁶ See Ch 5 para 5.3.4.12 above.

³⁶⁷ See again Ch 5 para 5.3.4.12 above.

³⁶⁸ See again Ch 5 para 5.3.4.12 above.

³⁶⁹ See again Ch 5 para 5.3.4.12 above. See also para 9.6.2 above.

³⁷⁰ See Ch 3 para 3.3 et seq above.

Note 7 and the financial institution's RMCP are complementary to the FICA's broad provision on AML training.³⁷¹

It should be noted, however, that neither the FICA nor FIC *Guidance Note 7* provide for specific forms of AML training to be given to staff.³⁷² Thus, a financial institution should determine this in its RMCP.³⁷³ It should also determine how often it has to offer such training. In this regard, where a financial institution offers trade-finance services, it could also provide training on potential risks of money laundering that may affect such services.³⁷⁴ However, it would have been more suitable for the FIC to issue a guidance note that directly addresses staff training in order to prevent TBML in trade-finance transactions.³⁷⁵ The general trend around the world is for the FIUs of respective jurisdictions to issue such guidance notes, not only to raise awareness about TBML in trade-finance transactions, but also to ensure uniformity in the AML training.³⁷⁶

9.11.3 Insights from the Comparative Jurisdictions

9.11.3.1 England

Just like under the South African AML regime, the English AML regime also provides for the obligation to train staff on money-laundering control under its legislation.³⁷⁷ This obligation is provided for under the MLRs.³⁷⁸ Similar to the FICA, in South Africa, it is a requirement under the MLRs for financial institutions in England to also train and educate staff about money-laundering prevention.³⁷⁹ The training should strive to ensure that staff members understand their AML obligations under the MLRs and the POCAE.³⁸⁰ Moreover, the training must be availed to all staff members of the financial institution.³⁸¹

³⁷¹ See again Ch 5 para 5.3.4.12 above. See also para 9.6.2 above.

³⁷² See again Ch 5 para 5.3.4.12 above.

³⁷³ See again Ch 5 para 5.3.4.12 above. See also para 9.6.2 above.

³⁷⁴ See Ch 5 para 5.3.4.13 above. See also Ch 3 para 3.3 et seq above.

³⁷⁵ See Ch 10 para 10.2.9.12 below.

³⁷⁶ See para 9.11.3 et seq below. See also Ch 10 para 10.2.9.12 below.

³⁷⁷ See Ch 6 para 6.3.4.12 above. See also para 9.11.2 above.

³⁷⁸ See again Ch 6 para 6.3.4.12 above.

³⁷⁹ See Ch 6 para 6.3.4.12 above. See also para 9.11.2 above.

³⁸⁰ See again Ch 6 para 6.3.4.12 above.

³⁸¹ See again Ch 6 para 6.3.4.12 above.

A Comparative Analysis of the Legal Systems Investigated in Relation to TBML Control in Trade-Finance Instruments

Just like under the FICA in South Africa, the MLRs do not require financial institutions to provide specific training on TBML in trade-finance instruments.³⁸² Neither do they specifically mention any other type of money laundering. However, unlike under the South African AML regime, the FCA and the JMLSG in England provide guidance on how financial institutions could capacitate staff in AML training through provision of trade-finance related information.³⁸³ The FCA discourages financial institutions from simply providing general AML training without factoring in country, product or transaction-specific risks that are relevant for the detection of TBML in trade-finance transactions.³⁸⁴ Instead, together with the JMLSG, the FCA encourages financial institutions to provide AML training specific to trade-finance transactions, such as alerting staff about TBML red-flag indicators.³⁸⁵ This is a positive recommendation, which should be adopted for South African financial institutions by the FIC in its guidance notes to improve the quality of AML training against TBML in trade-finance transactions.³⁸⁶

9.11.3.2 The US

Just like under the South African and English AML regimes, financial institutions in the US also abide by the AML obligation to train staff on money laundering.³⁸⁷ This obligation is provided for under the BSA, which calls for a financial institution's AML compliance programme to also provide for the training of staff.³⁸⁸ Such training should ensure that staff members understand their AML responsibilities under the BSA.³⁸⁹ Thus, the obligation to train staff on money-laundering issues is a general one covering all relevant AML training that should ordinarily be offered in a financial institution.

The BSA, just like the FICA in South Africa, and the MLRs in England, does not specifically recommend that specific AML training be given to various operational areas of a financial institution.³⁹⁰ In this regard, it does not mention the need for specific

³⁸² See para 9.11.2 above. See also Ch 3 para 3.3 et seq above; and Ch 6 para 6.3.4.12 above.

³⁸³ See Ch 6 para 6.3.4.13 above.

³⁸⁴ See again Ch 6 para 6.3.4.13 above. See also Ch 3 para 3.3 et seq above.

³⁸⁵ See again Ch 6 para 6.3.4.13 above.

³⁸⁶ See Ch 10 para 10.2.9.12 below.

³⁸⁷ See Ch 7 para 7.3.4.12 above. See also para 9.11.2 and para 9.11.3.1 above.

³⁸⁸ See again Ch 7 para 7.3.4.12 above.

³⁸⁹ See again Ch 7 para 7.3.4.12 above. See also para 9.11.2 and 9.11.3.1 above.

³⁹⁰ See again Ch 7 para 7.3.4.12 above. See also para 9.11.2 and 9.11.3.1 above.

AML training in the trade-finance business of the financial institution.³⁹¹ However, unlike in South Africa but similar to England, there is guidance under the US AML regime on how the BSA requirement for AML training should be focused on trade-finance transactions.³⁹² Such guidance comes from the FFIEC under the *AML Manual*.³⁹³ The FFIEC recommends that the AML training under the BSA should specifically cover trade-finance transactions.³⁹⁴ However, unlike the FCA and the JMLSG in England, the FFIEC does not provide a detailed recommendation on how financial institutions in the US should offer AML training in such transactions.³⁹⁵ Instead, just like the need for an RMCP under the FICA in South Africa, the requirement for an AML compliance programme under the BSA also demands that such programme provide for staff training.³⁹⁶ It would thus, seem that where financial institutions are affected by TBML in trade-finance transactions, they can independently include such money-laundering risk in their AML training programme.

9.11.3.3 Singapore

The obligation by financial institutions to train staff on money laundering is equally important under the Singapore AML regime as it is under the South African one.³⁹⁷ Thus, the MAS Notice 626 in Singapore requires financial institutions to train staff on a regular basis on current money-laundering trends and AML measures to counter such trends.³⁹⁸ The MAS requires such training to be aligned to the financial institution's policies, which are the equivalent of an RMCP under the South African AML regime.³⁹⁹ Just like under the FIC's *Guidance Notice 7* in South Africa, the training under the MAS Notice 626 in Singapore should take into account the types of products and customers the financial institution usually deals with when providing AML training to staff.⁴⁰⁰ It should be noted that similar to the FICA in South Africa, the CDSA and

³⁹¹ See again Ch 7 para 7.3.4.12 above.

³⁹² See again Ch 7 para 7.3.4.12 above. See also para 9.11.2 and 9.11.3.1 above.

³⁹³ See Ch 7 para 7.3.4.13 above.

³⁹⁴ See again Ch 7 para 7.3.4.13 above.

³⁹⁵ See again Ch 7 para 7.3.4.13 above. See also para 9.11.3.1 above.

³⁹⁶ See again Ch 7 para 7.3.4.13 above. See also para 9.11.2 above.

³⁹⁷ See Ch 8 para 8.3.4.12 above. See also para 9.11.2 above.

³⁹⁸ See Ch 8 para 8.3.4.12 above.

³⁹⁹ See again Ch 8 para 8.3.4.12 above. See also para 9.11.2 above.

⁴⁰⁰ See again Ch 8 para 8.3.4.12 and para 9.11.2 above.

the MAS Act do not specifically require financial institutions in Singapore to provide specific AML training related to TBML in trade-finance instruments.⁴⁰¹

However, just like under the English and the US AML regimes, there is guidance under the Singapore AML regime on how AML training should be directed to trade-finance transactions.⁴⁰² Such guidance comes from the ACIP and the MAS, which recommend that AML training, should be targeted, where possible, at trade-finance transactions, with the intention of raising awareness about the risk of TBML.⁴⁰³ Such training should also be relevant, current and highlight regulatory changes in the area of TBML in trade-finance transactions.⁴⁰⁴ Thus, equivalent AML institutions in South Africa, for instance, the SAMLIT and the SARB's Prudential Authority should adopt such recommendations from the ACIP and the MAS to improve their AML regulatory environment.⁴⁰⁵

9.12 SOME INITIATIVES AGAINST TBML IN TRADE-FINANCE INSTRUMENTS BY THE FIU

9.12.1 General

FIUs are central to the AML efforts of any country, including South Africa.⁴⁰⁶ The FATF and the Egmont Group have both stressed that FIUs are significant in the control of TBML.⁴⁰⁷ Therefore, this paragraph 9.12 compares the contribution of the FIC in combatting TBML in trade-finance instruments under the South African AML regime and of the other FIUs under the comparative jurisdictions in this study.⁴⁰⁸

9.12.2 The Current Position in South Africa

The FIC is South Africa's FIU.⁴⁰⁹ Its role is, *inter alia*, to receive information from reporting entities, analyse and disseminate it to other stakeholders.⁴¹⁰ The FIC works closely with other AML institutions in South Africa such as the SAMLIT and the

⁴⁰¹ See again Ch 8 para 8.3.4.12 and para 9.11.2 above.

⁴⁰² See Ch 8 para 8.3.4.13 above. See also para 9.11.3.1 and 9.11.3.2 above.

⁴⁰³ See Ch 8 para 8.3.4.13 above. See also Ch 3 para 3.3 et seq above.

⁴⁰⁴ See again Ch 8 para 8.3.4.13 above. See also Ch 3 para 3.3 et seq above.

⁴⁰⁵ See Ch 10 para 10.2.9.12 below.

⁴⁰⁶ See para 9.12.2 below.

⁴⁰⁷ See Ch 4 para 4.3.2 et seq and 4.4.4 et seq above.

⁴⁰⁸ See para 9.12.2 and para 9.12.3 et seq below.

⁴⁰⁹ See Ch 5 para 5.4.2 above.

⁴¹⁰ See again Ch 5 para 5.4.2 above.

SARS.⁴¹¹ It is central to the generating of financial intelligence, which is relevant in money-laundering investigations by the SAPS.⁴¹² Judging by the number of cases prosecuted by the NPA bordering on money-laundering control, the FIC seems to have been executing this role diligently.⁴¹³ Both the FATF and the Egmont Group have placed FIUs at the centre of combatting TBML.⁴¹⁴ However, the FIC has not made any comprehensive report regarding its awareness of, and strategies against TBML.⁴¹⁵ The only time it has mentioned TBML was in a report of various money-laundering typologies.⁴¹⁶ Even in that instance, the mentioning is done in passing without much detail.

The trend worldwide, as shown by the comparative jurisdictions in this study, is for FIUs of respective countries to issue a report or some guideline on TBML.⁴¹⁷ The FIC has the power under the FICA to issue guidance notes to assist financial institutions in complying with various AML obligations under the legislation.⁴¹⁸ It has issued such guidance notes in the past on CDD, filing of suspicious transaction reports and general AML obligations.⁴¹⁹ However, it has not issued any guidance note on the control of TBML in trade-finance transactions.⁴²⁰ Such a guidance note would have gone a long way to set the tone on how financial institutions could manage the risk of TBML in trade-finance transactions.⁴²¹ To undertake this task, the FIC may simply adopt and modify TBML guidelines from the FATF, the Wolfsberg Group and/or even from any of the comparative jurisdictions considered in this study.⁴²²

In terms of building synergies and AML capacity in other organisations, the FIC has largely played this role positively.⁴²³ For example, it is part of the SAMLIT, a private-public partnership on the combatting of money laundering.⁴²⁴ Although this partnership

⁴¹¹ See Ch 5 para 5.4.4 above and para 5.4.10 above.

⁴¹² See again Ch 5 para 5.4.2 above. See also para 9.4.2 above.

⁴¹³ See again Ch 5 para 5.4.2 above. See also Ch 5 para 5.4.6 above.

⁴¹⁴ See again Ch 4 para 4.3.2 et seq and 4.4.4 et seq above.

⁴¹⁵ See again Ch 5 para 5.4.2 above.

⁴¹⁶ See again Ch 5 para 5.4.2 above.

⁴¹⁷ See para 9.12.3 et seq below.

⁴¹⁸ See again Ch 5 para 5.4.2 above.

⁴¹⁹ See again Ch 5 para 5.4.2 above.

⁴²⁰ See again Ch 5 para 5.4.2 above. See also Ch 3 para 3.3 et seq above.

⁴²¹ See Ch 10 para 10.2.11 below.

⁴²² See Ch 10 para 10.2.11 below.

⁴²³ See para 9.14 below.

⁴²⁴ See again Ch 5 para 5.4.2 and para 5.4.4 above.

is still new, it has since researched and published on illegal wildlife trade in South Africa. Thus, as part of the SAMLIT, the FIC can influence the taskforce to initiate research on TBML in trade finance and publish the same for the benefit of various stakeholders in South Africa.⁴²⁵

9.12.3 Insights from the Comparative Jurisdictions

9.12.3.1 England

The NCA in England is the equivalent of the FIC in South Africa.⁴²⁶ Its functions are also similar to those of the FIC, namely, dealing with suspicious transaction reports filed with it, analysing information and disseminating it to stakeholders, among other things.⁴²⁷ Thus, the NCA plays the central task of coordinating the combatting of money laundering in England. Just like the FIC in South Africa, it has not issued a specific report or guideline dealing with TBML in trade-finance transactions.⁴²⁸ However, unlike the FIC, the NCA has an expert group created specifically for TBML.⁴²⁹ The expert group has not made any significant pronouncements on record regarding TBML.⁴³⁰ However, its mere existence can be argued to be a step in the right direction, which is worth emulating, by the SAMLIT.⁴³¹

In terms of the institutional capacity to deal with TBML, the NCA has had some influence under the English AML regime. In this regard, it has either initiated or participated in the creation of AML institutions that have shown interest in combatting TBML in trade-finance transactions.⁴³² Such institutions include the NECC and the JMLIT whose mandates potentially cover TBML.⁴³³ The NECC is part of the NCA and specialises in economic crimes whose broad nature may include TBML in trade-finance instruments.⁴³⁴ The JMLIT is a private-public partnership which is similar to the SAMLIT in South Africa, and whose main concern is on money laundering

⁴²⁵ See Ch 10 para 10.2.11 and para 10.2.19 below.

⁴²⁶ See Ch 6 para 6.4.2 above. See also para 9.12.2 above.

⁴²⁷ See Ch 6 para 6.4.2 above. See also para 9.12.2 above.

⁴²⁸ See again Ch 6 para 6.4.2 above. See also Ch 3 para 3.3 et seq above and para 9.12.2 above.

⁴²⁹ See again Ch 6 para 6.4.2 above. See also para 9.12.2 above.

⁴³⁰ See again Ch 6 para 6.4.2 above.

⁴³¹ See Ch 10 para 10.2.15 below.

⁴³² See again Ch 6 para 6.4.2; para 6.4.4; and para 6.4.6 above. See also Ch 3 para 3.3 et seq above.

⁴³³ See again Ch 6 para 6.4.2 above. See also Ch 6 para 6.4.4 and 6.4.6 above.

⁴³⁴ See Ch 6 para 6.4.4 above. See also Ch 3 para 3.3 et seq above.

generally.⁴³⁵ The idea of private-public partnerships or taskforces on money laundering such as the JMLIT began in England and has since been replicated across various jurisdictions, including in South Africa.⁴³⁶

9.12.3.2 The US

Just like the FIC in South Africa, FinCEN is the US's financial intelligence unit.⁴³⁷ It also plays a central role in the combatting of money laundering in the US.⁴³⁸ In this regard, FinCEN administers the BSA and other AML legislation in the US.⁴³⁹ It also functions similarly to the FIC in South Africa and the NCA in England by collecting and analysing information from financial institutions in order to build financial intelligence for law enforcement agencies.⁴⁴⁰

However, unlike the FIC and the NCA, FinCEN has made direct contributions towards the control of TBML in general.⁴⁴¹ It has issued advisory notes and GTOs to help financial institutions in the US to be on high alert in the screening of financial transactions for TBML.⁴⁴² Notably, FinCEN has been consistent in this effort. However, it should be pointed out that its focus on TBML, has not been on trade-finance transactions, *per se*.⁴⁴³ By way of a general recommendation, the FIC in South Africa, should also build its capacity and expertise in TBML through issuing such short, but frequent, advisory notes and GTOs that may operate as warnings for financial institutions to be alert.⁴⁴⁴

It should further be noted that unlike the FIC in South Africa, and the NCA in England, FinCEN specifically requires financial institutions under the US AML regime, to file suspicious transaction reports for TBML.⁴⁴⁵ This is an important intervention considering that most jurisdictions, including South Africa, rarely require institutions to specify such detail. Thus, to improve its data-collation exercise on TBML control, this

⁴³⁵ See para 9.14 below. See also Ch 6 para 6.4.6 above and Ch 5 para 5.4.4 above.

⁴³⁶ See Ch 6 para 6.4.6 above. See also para 9.14 below.

⁴³⁷ See Ch 7 para 7.4.2 above. See also para 9.12.2 above.

⁴³⁸ See Ch 7 para 7.4.2 above.

⁴³⁹ See again Ch 7 para 7.4.2 above.

⁴⁴⁰ See again Ch 7 para 7.4.2 above. See also para 9.12.2 above and para 9.12.3.1 above.

⁴⁴¹ See again Ch 7 para 7.4.2 above. See also para 9.12.2 above and para 9.12.3.1 above.

⁴⁴² See again Ch 7 para 7.4.2 above.

⁴⁴³ See again Ch 7 para 7.4.2 above. See also Ch 3 para 3.3 et seq above.

⁴⁴⁴ See Ch 10 para 10.2.11 below. See also Ch 5 para 5.4.4 above.

⁴⁴⁵ See again Ch 7 para 7.4.2 above. See also para 9.12.2 and para 9.12.3.1 above.

study recommends that the FIC should also require financial institutions to specifically file suspicious transaction reports on TBML.⁴⁴⁶

9.12.3.3 Singapore

Similar to the South African AML regime, and the AML regimes of the other comparative jurisdictions, the Singapore AML regime also places significant reliance on its FIU, which is the STRO.⁴⁴⁷ The STRO also receives and analyses suspicious transaction reports from financial institutions and forward financial intelligence to law enforcement agencies.⁴⁴⁸

The STRO is crucial to the operations of financial institutions and law enforcement in Singapore. It is also a major player in Singapore's fight against TBML.⁴⁴⁹ Similar to the FIC in South Africa and the NCA in England, it has not issued any report directly engaging the problem of TBML.⁴⁵⁰ However, the STRO being located within the Singapore Police Force it has programmes that could be useful in the combatting of TBML such as WINGS and CRIMES II.⁴⁵¹ These are data-analytics programmes that are relevant in the gathering and collating of trade-finance information in order to analyse it for the possible occurrence of TBML.⁴⁵²

9.13 SOME INITIATIVES AGAINST TBML IN TRADE-FINANCE INSTRUMENTS BY THE CUSTOMS AUTHORITY

9.13.1 General

The WCO and the FATF have both indicated that customs authorities, globally, have a role to play against TBML.⁴⁵³ This paragraph 9.13 compares the AML role of the SARS in the control of TBML and that of equivalent customs authorities in the comparative jurisdictions considered in this study.⁴⁵⁴

⁴⁴⁶ See Ch 10 para 10.2.11 below. See also Ch 5 para 5.4.4 above.

⁴⁴⁷ See Ch 8 para 8.4.2 above. See also para 9.12.2 and para 9.13.3 et seq above.

⁴⁴⁸ See again Ch 8 para 8.4.2 above.

⁴⁴⁹ See again Ch 8 para 8.4.2 above.

⁴⁵⁰ See again Ch 8 para 8.4.2 above.

⁴⁵¹ See again Ch 8 para 8.4.2 above.

⁴⁵² See again Ch 8 para 8.4.2 above.

⁴⁵³ See Ch 4 para 4.3.2 et seq and 4.4.3 et seq above.

⁴⁵⁴ See para 9.13.2 and para 9.13.3 et seq below.

9.13.2 The Current Position in South Africa

The SARS is the revenue and customs authority in South Africa.⁴⁵⁵ Similar to other customs authorities considered in this study, the SARS is also a member of the WCO.⁴⁵⁶ As part of its role, the SARS combat tax crimes, which are also regarded as predicate offences for money laundering.⁴⁵⁷ Under the FICA, the SARS is expected to cooperate with the FIC in reporting suspicious money-laundering activities occurring within its sphere of control.⁴⁵⁸ However, in their mutual evaluation report of the South African AML regime, the FATF and the ESAAMLG have rated the SARS' focus on money laundering as minimal.⁴⁵⁹ Given this limited focus on money laundering in general, the SARS has not meaningfully contributed towards the combatting of TBML in trade-finance transactions.⁴⁶⁰ Unlike other customs authorities in the comparative jurisdictions, the SARS has not issued any guidelines indicating its initiatives against TBML.⁴⁶¹ However, its role against TBML can arguably be covered in its activities against money laundering in general.

The SARS' biggest shortcoming in dealing with TBML in trade-finance transactions may be its focus on tax and customs offences. It does not largely conduct money-laundering investigations in similar ways as the SAPS do.⁴⁶² The investigative role remains with the SAPS, which is also inevitably burdened by various other criminal offences.⁴⁶³ This, therefore, implies that the success or failure of the SARS in pursuing money-laundering activities within the customs' sector depends on its cooperation with the SAPS.⁴⁶⁴ The SARS' lack of expertise in money-laundering investigations and its focus on other tax crimes may hinder its ability to scrutinise its processes for potential TBML. However, there is room for improvement in this regard. For example, the SARS may report TBML in trade-finance transactions to the FIC under its obligation to report money laundering in general.⁴⁶⁵ To effectively do this, there is a need to train SARS'

⁴⁵⁵ See Ch 5 para 5.4.10 above.

⁴⁵⁶ See Ch 4 para 4.4.3 et seq above. See also para 9.13.3 et seq below.

⁴⁵⁷ See again Ch 5 para 5.4.10 above.

⁴⁵⁸ See again Ch 5 para 5.4.10 above.

⁴⁵⁹ See again Ch 5 para 5.4.10 above.

⁴⁶⁰ See again Ch 5 para 5.4.10 above. See also Ch 3 para 3.3 et seq above.

⁴⁶¹ See again Ch 5 para 5.4.10 above. See also para 9.13.3 et seq below.

⁴⁶² See again Ch 5 para 5.4.10 above.

⁴⁶³ See para 9.4 above.

⁴⁶⁴ See again para 9.4 above.

⁴⁶⁵ See Ch 10 para 10.2.13 et seq below. See also para 9.12 above.

staff on TBML techniques and the various environments likely to be threatened by this type of money laundering.⁴⁶⁶ There are also other potentially good initiatives against TBML from the comparative jurisdictions, which could be adopted by the SARS for use under the South African AML regime.⁴⁶⁷

9.13.3 Insights from the Comparative Jurisdictions

9.13.3.1 England

Similar to the SARS in South Africa, HMRC is also the revenue collection authority in England.⁴⁶⁸ It is also a member of the WCO.⁴⁶⁹ Just like the SARS, HMRC has a twin role of combatting tax-related crimes and money laundering.⁴⁷⁰ In its AML role, it collaborates with the NCA, which is England's FIU.⁴⁷¹ However, just like the SARS, HMRC has not reported any specific case of TBML in trade-finance transactions it has dealt with.⁴⁷² Thus, there is nothing that could be drawn from it as a lesson for the SARS in South Africa since they operate almost in similar terms.

9.13.3.2 The US

The ICE is the customs authority under the US AML regime, which is almost the equivalent of the SARS in South Africa.⁴⁷³ However, unlike the SARS and HMRC in England, the ICE has a specialist unit devoted to combatting customs crimes and money laundering, namely, the HSI-ICE.⁴⁷⁴

The HSI-ICE has demonstrated much interest in combatting TBML in the customs arena. For example, it has established TTUs to facilitate the sharing of trade information between the US and its trading partners.⁴⁷⁵ Such trade information is analysed through the DARTT system within the TTU to reveal any anomalies that may indicate the occurrence of TBML.⁴⁷⁶ The TTUs operate outside the financial sector and

⁴⁶⁶ See Ch 10 para 10.2.13 et seq below.

⁴⁶⁷ See para 9.13.3 et seq below.

⁴⁶⁸ See Ch 6 para 6.4.12 above. See also para 9.13.2 above.

⁴⁶⁹ See Ch 4 para 4.4.3 and para 9.13.2 above.

⁴⁷⁰ See again Ch 6 para 6.4.12 above. See also para 9.13.2 above.

⁴⁷¹ See again Ch 6 para 6.4.12 above.

⁴⁷² See again Ch 6 para 6.4.12 above. See also para 9.13.2 above.

⁴⁷³ See Ch 7 para 7.4.12 above. See also para 9.13.2 above.

⁴⁷⁴ See again Ch 7 para 7.4.12 above. See also para 9.13.2 above and para 9.13.3.1 above.

⁴⁷⁵ See again Ch 7 para 7.4.12 above.

⁴⁷⁶ See again Ch 7 para 7.4.12 above.

their focus is on TBML in general without necessarily restricting itself to trade-finance transactions.⁴⁷⁷ However, financial institutions could use the information collected by the TTUs in the screening of trade-finance transactions for potential TBML.⁴⁷⁸ The DARTT system used by the HSI-ICE to analyse and profile data in the TTUs does so automatically.⁴⁷⁹ The system is appropriate for flagging up red-flag indicators of TBML in trade transactions.⁴⁸⁰

The TTU model presents a good platform for cooperation between and/or among stakeholders in the fight against TBML in the US.⁴⁸¹ Such a platform is absent from the South African AML regime.⁴⁸² Therefore, it would be a step in the right direction to have a TTU-modelled platform for South Africa to assist in the control of TBML.⁴⁸³

9.13.3.3 Singapore

Singapore Customs also plays a similar role to that played by the SARS in South Africa and other customs authorities already considered in the comparative jurisdictions.⁴⁸⁴ It also plays the twin role of revenue collection and combatting customs-related tax crimes.⁴⁸⁵ Unlike the SARS in South Africa, and HMRC in England, Singapore Customs has shown significant interest in combatting TBML just like the HSI-ICE in the US.⁴⁸⁶ It has done this by initiating various programmes targeted at minimising the risk of TBML in trade-finance transactions in Singapore.⁴⁸⁷ Such programmes include the NTP and the TFC, which are platforms designed to bring together financial institutions and traders in the combatting of TBML.⁴⁸⁸

Unlike in the US where the TTUs focus on TBML in general, the NTP and the TFC target TBML in the trade-finance sector.⁴⁸⁹ The NTP and the TFC also enable financial

⁴⁷⁷ See again Ch 7 para 7.4.12 above. For a discussion of TBML in general and TBML with a focus on trade-finance instruments, see Ch 2 para 2.3 et seq above and Ch 3 para 3.3 et seq above.

⁴⁷⁸ See again Ch 7 para 7.4.12 above. See Ch 3 para 3.2 et seq above.

⁴⁷⁹ See again Ch 7 para 7.4.12 above.

⁴⁸⁰ See again Ch 7 para 7.4.12 above. See Ch 3 para 3.3 et seq above.

⁴⁸¹ See again Ch 7 para 7.4.12 above. See also Ch 10 para 10.2.13 below.

⁴⁸² See para 9.13.2 above.

⁴⁸³ See Ch 10 para 10.2.13 below.

⁴⁸⁴ See Ch 8 para 8.4.10 above. See also para 9.13.2 and 9.13.3 et seq above.

⁴⁸⁵ See again Ch 8 para 8.4.10 above. See also para 9.13.2 above.

⁴⁸⁶ See again Ch 8 para 8.4.10 above. See also para 9.13.2 and para 9.13.3 et seq above.

⁴⁸⁷ See again Ch 8 para 8.4.10 above. See also Ch 3 para 3.3 et seq above.

⁴⁸⁸ See again Ch 8 para 8.4.10 above.

⁴⁸⁹ See again Ch 8 para 8.4.10 above. See also para 9.13.3.2 above; Ch 2 para 2.3 et seq above and Ch 3 para 3.3 et seq above.

institutions to access trade data for use in screening trade-finance transactions for potential TBML.⁴⁹⁰ These platforms are new and, therefore, Singapore Customs has not yet reported significant results as evidence of their success in combatting TBML in trade finance.⁴⁹¹ However, the fact that Singapore Customs created the NTP and the TFC, demonstrates its willingness to confront a problem through innovative solutions, which may turn out to be helpful.⁴⁹² This study recommends that the SARS also establish similar platforms such as the NTP or TFC.⁴⁹³ Such platforms would enable the customs authority in South Africa to work together with financial institutions, the FIC and other relevant stakeholders such as the SAMLIT, in combatting TBML in trade-finance transactions.⁴⁹⁴

9.14 PLATFORM FOR INFORMATION SHARING AGAINST TBML IN TRADE-FINANCE INSTRUMENTS

9.14.1 General

When AML institutions and jurisdictions across the world share information to combat financial crime, the task becomes manageable.⁴⁹⁵ Thus, the idea of sharing information between and/or among institutions is a significant one in efforts to combat TBML in trade-finance instruments.⁴⁹⁶ This part of the comparative chapter considers various information-sharing efforts in place under the South African AML regime and those under the selected comparative jurisdictions.⁴⁹⁷ The South African AML regime is considered first followed by insights from the comparative jurisdictions selected for this study.

9.14.2 The Current Position in South Africa

Information sharing between and/or among stakeholders for purposes of combatting money laundering is a key feature under the South African AML regime.⁴⁹⁸ It is

⁴⁹⁰ See again Ch 8 para 8.4.10 above. See also Ch 3 para 3.3 et seq above.

⁴⁹¹ See again Ch 8 para 8.4.10 above.

⁴⁹² See Ch 10 para 10.2.13 below. See also Ch 5 para 5.4.10 above.

⁴⁹³ See Ch 10 para 10.2.13 below. See also Ch 5 para 5.4.10 above.

⁴⁹⁴ See Ch 10 para 10.2.13 below and para 10.2.15 below.

⁴⁹⁵ See Ch 4 above generally. See also para 9.14.2 et seq below.

⁴⁹⁶ See again Ch 4 above generally. See also Ch 3 para 3.3 et seq above and Ch 10 para 10.2.14 below.

⁴⁹⁷ See para 9.14.2 and para 9.14.3 below.

⁴⁹⁸ See Ch 5 para 5.4 et seq above.

achieved through various platforms such as the cooperation between the FIC, the SARS, the SAPS, the ABS and banks, among other AML institutions.⁴⁹⁹

One of the major establishments for information sharing in South Africa is the SAMLIT.⁵⁰⁰ This is a private-public partnership or taskforce created specifically for the sharing of AML information between stakeholders under the South African AML regime.⁵⁰¹ The JMLIT under the English AML regime influenced the creation of the SAMLIT.⁵⁰²

As part of its mandate, the SAMLIT has since issued a report on illegal wildlife trade in the context of South Africa.⁵⁰³ Unlike efforts by similar taskforces in the comparative jurisdictions, such as the ACIP in Singapore, the SAMLIT has not directly contributed against TBML in trade-finance instruments.⁵⁰⁴ This is despite the fact that it has an appropriate structure and mandate to spearhead research on TBML since it is a taskforce for money laundering in general.⁵⁰⁵

9.14.3 Insights from the Comparative Jurisdictions

9.14.3.1 England

Just like under the South African AML regime, the English AML regime also provides for the idea of public-private partnerships to counteract the act of money laundering.⁵⁰⁶ It has achieved this through establishing the JMLIT whose mandate is, among others, the sharing of information between stakeholders in England to minimise the risk of money laundering.⁵⁰⁷ For its pioneering efforts, the JMLIT is considered by the FATF to be a good model for combatting money laundering, which is worth emulating by other jurisdictions.⁵⁰⁸ Thus, the model has since been replicated in many jurisdictions including in South Africa, through the SAMLIT.⁵⁰⁹

⁴⁹⁹ See again Ch 5 para 5.4 et seq above.

⁵⁰⁰ See Ch 5 para 5.4.4 above.

⁵⁰¹ See again Ch 5 para 5.4.4 above.

⁵⁰² See para 9.14.3.1 below. See also Ch 5 para 5.4.4 above and Ch 6 para 6.4.6 above.

⁵⁰³ See again Ch 5 para 5.4.4 above.

⁵⁰⁴ See Ch 8 para 8.4.4 above. See also para 9.14.3.3 below.

⁵⁰⁵ See again Ch 5 para 5.4.4 above. See also Ch 10 para 10.2.15 below.

⁵⁰⁶ See Ch 6 para 6.4.6 above. See also para 9.14.2 above.

⁵⁰⁷ See again Ch 6 para 6.4.6 above.

⁵⁰⁸ See again Ch 6 para 6.4.6 above. See also Ch 4 para 4.3.2 et seq above.

⁵⁰⁹ See para 9.14.2 above. See also para 9.14.3.2 and 9.14.3.3 below.

Being new, the JMLIT, just like the SAMLIT, has not yet made known significant publications on TBML in trade-finance instruments.⁵¹⁰ However, unlike the SAMLIT, it has an expert-working group specifically devoted to TBML.⁵¹¹ This expert-working group is expected by the JMLIT to make important contributions in the efforts to combat TBML in England over time.⁵¹² To improve its AML initiatives under the South African AML regime, the SAMLIT should have a similar expert-working group on TBML.⁵¹³

9.14.3.2 The US

Just like under the South African and English AML regimes, the US government also places great importance on information sharing in the combatting of money laundering.⁵¹⁴ It achieves this through FinCEN Exchange, which is the equivalent of the SAMLIT in South Africa and the JMLIT in England.⁵¹⁵

When considered against the SAMLIT and the JMLIT, FinCEN Exchange is relatively new.⁵¹⁶ However, its function is the same as that of the other information-sharing platforms, namely, the exchange of AML information between stakeholders.⁵¹⁷ In this regard, it brings together FinCEN, financial institutions, and law enforcement agencies for that same goal. Just like the SAMLIT, FinCEN Exchange has not yet published any research on TBML.⁵¹⁸

9.14.3.3 Singapore

Similar to the SAMLIT in South Africa, the ACIP under the Singapore AML regime was also established to specifically share information on the combatting of money laundering.⁵¹⁹ It is composed of the MAS, the ABS and the CAD.⁵²⁰ Its objective is to

⁵¹⁰ See again Ch 6 para 6.4.6 above. See also para 9.14.2 above and Ch 3 para 3.3 et seq above.

⁵¹¹ See Ch 6 para 6.4.6 above. See also para 9.14.2 above.

⁵¹² See again Ch 6 para 6.4.6 above.

⁵¹³ See Ch 10 para 10.2.15 below.

⁵¹⁴ See Ch 7 para 7.4 above. See also para 9.14.2 above.

⁵¹⁵ See Ch 7 para 7.4.6 above. See also para 9.14.2 and 9.14.3.1 above.

⁵¹⁶ See again Ch 7 para 7.4.6 above. See also para 9.14.2 and para 9.14.3.1 below.

⁵¹⁷ See again Ch 7 para 7.4.6 above.

⁵¹⁸ See again Ch 7 para 7.4.6 above. See also para 9.14.2 above.

⁵¹⁹ See Ch 8 para 8.4.4 above. See also para 9.14.2 above.

⁵²⁰ See again Ch 8 para 8.4.4 above.

strengthen the AML regime of Singapore against money laundering, among other forms of financial crime.⁵²¹

As a private-public partnership in the mould of the SAMLIT, the ACIP has shown more direct and substantial interest in TBML than the SAMLIT.⁵²² In this regard, it has published some guidelines speaking directly to the issue of controlling TBML in trade-finance instruments under the AML regime of Singapore.⁵²³ The MAS and the ABS, who are the ACIP members, have also, in their own right, separately issued guidelines to help financial institutions combat TBML in trade-finance transactions.⁵²⁴ It is significant to note that the ACIP was established around the same time as the SAMLIT but it has contributed much in the efforts to control TBML in trade-finance transactions than the SAMLIT.⁵²⁵ One possible reason can be given for the ACIP's more direct interest in TBML than the SAMLIT. It could be that the government of Singapore felt more threatened by TBML than the South African government given that Singapore is a significant trade and financial hub in the Asia/Pacific region.⁵²⁶

9.15 SOME FINANCIAL-SERVICES INDUSTRY EFFORTS AND INITIATIVES AGAINST TBML IN TRADE-FINANCE INSTRUMENTS

9.15.1 General

The financial sector is a major player in the fight against money laundering globally.⁵²⁷ The money launderer will usually resort to the financial system to transfer and clean funds acquired through illegal means.⁵²⁸ This therefore means that stakeholders in the financial sector play a crucial role against the challenge of money laundering.⁵²⁹ That role equally applies in the case of TBML in trade-finance transactions.⁵³⁰ In its many reports, the FATF has recommended various strategies to effectively combat TBML.⁵³¹ One such strategy is to rely on the initiatives of some financial-industry players in any

⁵²¹ See again Ch 8 para 8.4.4 above.

⁵²² See again Ch 8 para 8.4.4 above. See also para 9.14.2 above.

⁵²³ See again Ch 8 para 8.4.4 above. See also Ch 3 para 3.3 et seq above.

⁵²⁴ See again Ch 8 para 8.4.4 above. See also Ch 8 para 8.5.2 and para 8.5.4 above.

⁵²⁵ See again Ch 8 para 8.4.4 above. See also Ch 5 para 5.4.4 above and para 9.14.2 above.

⁵²⁶ See Ch 8 para 8.2 above. See also Ch 5 para 5.2 above.

⁵²⁷ See Ch 5 para 5.5 et seq; Ch 6 para 6.5 et seq; Ch 7 para 7.5 et seq; and Ch 8 para 8.5 et seq above.

⁵²⁸ See Ch 2 para 2.2 et seq above.

⁵²⁹ See Ch 3 para 3.2 above.

⁵³⁰ See again Ch 3 para 3.2 and para 3.3 et seq above.

⁵³¹ See Ch 4 para 4.3.2 et seq above.

given jurisdiction.⁵³² Thus, in paragraph 9.15, I compare the *status quo* under the South African AML regime against financial-sector initiatives in the selected jurisdictions considered in this study to establish if there are any lessons to be drawn for the South African AML authorities.⁵³³

9.15.2 The Current Position in South Africa

The financial sector in South Africa consists of various important participants that are relevant in the combatting of TBML in trade finance.⁵³⁴ These include the SARB's Prudential Authority, the BASA and the SABRIC, among others.⁵³⁵ The SARB's Prudential Authority deals with money-laundering issues within the banking sector.⁵³⁶ In its risk-rating matrix, the SARB's Prudential Authority has identified trade finance as one of the areas under threat from money laundering in South Africa.⁵³⁷ Thus, the authority constantly strives to understand the emerging money-laundering trends and developments in the country. However, it has not yet issued a best practice note to guide financial institutions in the combatting of TBML in trade-finance transactions.⁵³⁸ This is unlike what other equivalent bank regulators in the comparative jurisdictions have done.⁵³⁹

Similar to other bank regulators, which also belong to some national taskforces against money laundering in their jurisdictions, the SARB's Prudential Authority is also a member of the SAMLIT.⁵⁴⁰ The SAMLIT, as already discussed above, has the mandate to research and share AML information between stakeholders.⁵⁴¹ As the regulator in the financial-services sector, the SARB's Prudential Authority is strategically positioned within the SAMLIT to influence certain policy positions of the taskforce. I submit that the SARB's Prudential Authority should use its presence in the

⁵³² See again Ch 4 para 4.3.2 et seq above.

⁵³³ See para 9.15.2 et seq below.

⁵³⁴ See Ch 5 para 5.5 et seq above. See also Ch 3 para 3.3 et seq above.

⁵³⁵ See again Ch 5 para 5.5 et seq above.

⁵³⁶ See Ch 5 para 5.5.2 above.

⁵³⁷ See again Ch 5 para 5.5.2 above.

⁵³⁸ See again Ch 5 para 5.5.2 above. See also Ch 3 para 3.3 et seq above.

⁵³⁹ See para 9.15.3 et seq below.

⁵⁴⁰ See again Ch 5 para 5.5.2 above. See also Ch 5 para 5.4.4 above.

⁵⁴¹ See para 9.14.2 above.

SAMLIT to propose strategies on how TBML in trade finance may be managed within the South African financial industry.⁵⁴²

Besides the SARB's Prudential Authority, other role players within the South African financial industry are the BASA and the SABRIC.⁵⁴³ The BASA is the South African banking-industry representative.⁵⁴⁴ It is also a significant player under the South African AML regime. It is in the BASA's interests that its members avoid being used as conduits in the cleaning of proceeds of crime.⁵⁴⁵ In this regard, the BASA is a member of the SAMLIT where it contributes in strategising against money-laundering threats in South Africa. Unlike similar banking-industry representatives considered in this study, the BASA has not issued any publication directed at TBML in trade-finance instruments.⁵⁴⁶ Doing so would be a welcome development in the South African banking industry since members are likely to follow what their representatives recommend.⁵⁴⁷

With respect to the SABRIC, this is a financial-crime busting institution, which works in close cooperation with financial institutions in South Africa.⁵⁴⁸ The SABRIC is strong on technology-based solutions against various types of financial crime. Thus, its focus is not solely on money laundering.⁵⁴⁹ In this regard, it has not made any direct contributions against TBML in trade-finance transactions.⁵⁵⁰ However, due to its strengths in technology-based solutions against financial crime, the SABRIC could be central to the combatting of TBML through information sharing.⁵⁵¹ Its capabilities when combined with those of the SAMLIT could produce strategies that are useful against TBML.⁵⁵²

⁵⁴² See Ch 10 para 10.2.15 below.

⁵⁴³ See Ch 5 para 5.5.4 and 5.5.6 above, respectively.

⁵⁴⁴ See again Ch 5 para 5.5.4 above.

⁵⁴⁵ See again Ch 5 para 5.5.4 above.

⁵⁴⁶ See again Ch 5 para 5.5.4 above. See also Ch 3 para 3.3 et seq above and para 9.15.3 et seq below.

⁵⁴⁷ See Ch 10 para 10.2.17 below.

⁵⁴⁸ See Ch 5 para 5.5.6 above.

⁵⁴⁹ See again Ch 5 para 5.5.6 above.

⁵⁵⁰ See again Ch 5 para 5.5.6 above. See also Ch 3 para 3.3 et seq above.

⁵⁵¹ See Ch 10 para 10.2.15 and para 10.2.17 below.

⁵⁵² See Ch 10 para 10.2.15 and para 10.2.17 below.

9.15.3 Insights from the Comparative Jurisdictions

9.15.3.1 England

Similar to the South African AML regime, there are also multiple financial-industry players that are relevant in the combatting of TBML in trade finance under the English AML regime.⁵⁵³ These include the FCA, the JMLSG, and UK Finance.⁵⁵⁴ Just like the SARB's Prudential Authority in South Africa, the FCA is the supervisory authority for banks in England responsible for AML issues.⁵⁵⁵ However, unlike the SARB's Prudential Authority, the FCA has additional powers to investigate and prosecute cases of money laundering in England.⁵⁵⁶ The prosecutorial function for money-laundering cases under the South African AML regime is the preserve of the NPA.⁵⁵⁷ The FCA also publishes industry-guidance reports to help banks in England combat various forms of money laundering, including TBML in trade-finance instruments.⁵⁵⁸ Thus, unlike the SARB's Prudential Authority in South Africa, the FCA has directly contributed against the threat of TBML in trade-finance transactions in England.⁵⁵⁹ It has done so through the publication of the *Financial-Crime Risks Report*, which is directed at managing the risk of TBML in trade-finance transactions.⁵⁶⁰ The report is comprehensive, covering good and bad practices in the preventing of TBML in trade-finance transactions.⁵⁶¹ Besides its direct initiatives against TBML, the FCA, just like the SARB's Prudential Authority, is also a member of the JMLIT. As part of the JMLIT, it influences the taskforce's efforts against TBML.⁵⁶²

As regards the JMLSG, this is a private-sector organisation with some statutory recognition under English laws.⁵⁶³ Just like the FCA, it also issues industry-guidance reports for its members on how to combat TBML in trade-finance instruments.⁵⁶⁴ Even courts of law in England rely on the guidance reports issued by the JMLSG in

⁵⁵³ See Ch 6 para 6.5 et seq above. See also para 9.15.2 above.

⁵⁵⁴ See again Ch 6 para 6.5 et seq above.

⁵⁵⁵ See Ch 6 para 6.5.2 above. See also para 9.15.2 above.

⁵⁵⁶ See again Ch 6 para 6.5.2 above. See also para 9.15.2 above.

⁵⁵⁷ See Ch 5 para 5.4.6 and para 9.5.2 above.

⁵⁵⁸ See again Ch 6 para 6.5.2 above. See also Ch 3 para 3.3 et seq above.

⁵⁵⁹ See again Ch 6 para 6.5.2 above. See also para 9.15.2 above.

⁵⁶⁰ See again Ch 6 para 6.5.2 above. See also Ch 3 para 3.3 et seq above.

⁵⁶¹ See again Ch 6 para 6.5.2 above. See also Ch 3 para 3.3 et seq above.

⁵⁶² See para 9.14.3.1 above.

⁵⁶³ See Ch 6 para 6.5.4 above.

⁵⁶⁴ See again Ch 6 para 6.5.4 above. See also Ch 3 para 3.3 et seq above.

determining whether financial institutions have complied with the POCAE or the MLRs.⁵⁶⁵ There is no equivalent institution under the South African AML regime of the stature and nature of the JMLSG.⁵⁶⁶ The only institution that comes close to the status of the JMLSG in South Africa is the FIC in the sense that it also issues guidance notes that are recognised under the FICA.⁵⁶⁷ However, unlike the JMLSG, the FIC has not issued a guidance note specific to TBML in trade-finance instruments.⁵⁶⁸

The other significant financial-industry player in the combatting of TBML in trade finance under the English AML regime is UK Finance.⁵⁶⁹ It is more or less like the BASA in the South African financial sector with most of its membership coming from the banking sector.⁵⁷⁰ Just like the BASA in South Africa, UK Finance has not issued a position paper against TBML in trade finance in its own right.⁵⁷¹ Nonetheless, it is a member of the JMLIT and the JMLSG, which organisations have made direct and substantial contributions against TBML in trade finance in the context of the English AML regime.⁵⁷²

9.15.3.2 The US

Just like in South Africa, and England, some financial-sector bodies are also active in AML efforts under the US AML regime.⁵⁷³ These are the Federal Bank Regulators, the FFIEC, and the ABA.⁵⁷⁴ Both the Federal Bank Regulators and the FFIEC assist financial institutions in the US to comply with the BSA in their AML obligations.⁵⁷⁵ The SARB's Prudential Authority under the South African AML regime is the equivalent of the Federal Bank Regulators under the US AML regime.⁵⁷⁶ Similar to the SARB's Prudential Authority, the Federal Bank Regulators have not pronounced themselves against TBML in trade-finance transactions.⁵⁷⁷ One may argue that since the BSA is

⁵⁶⁵ See again Ch 6 para 6.5.4 above.

⁵⁶⁶ See again Ch 5 para 5.5 et seq above.

⁵⁶⁷ See para 9.12.2 above. See also Ch 5 para 5.4.2 above.

⁵⁶⁸ See again para 9.12.2 above. See also Ch 3 para 3.3 et seq and Ch 6 para 6.5.4 above.

⁵⁶⁹ See Ch 6 para 6.5.6 above.

⁵⁷⁰ See again Ch 6 para 6.5.6 above. See also para 9.15.2 above.

⁵⁷¹ See again Ch 6 para 6.5.6 above. See also para 9.15.2 above and Ch 3 para 3.3 et seq above.

⁵⁷² See again Ch 6 para 6.5.6 above.

⁵⁷³ See Ch 7 para 7.5 et seq above. See also para 9.15.2 and para 9.15.3.1 above.

⁵⁷⁴ See again Ch 7 para 7.5 et seq above.

⁵⁷⁵ See Ch 7 para 7.5.2 above.

⁵⁷⁶ See para 9.15.2 above.

⁵⁷⁷ See again Ch 7 para 7.5.2 above. See also Ch 3 para 3.3 et seq above.

used in the US to combat all forms of money laundering and the Federal Bank Regulators administer it, TBML in trade finance could also be included. However, this is not evidently clear from any of its publications.⁵⁷⁸ The only direct contribution the Federal Bank Regulators have made against TBML in trade finance is through being part of the FFIEC's *AML Manual*.⁵⁷⁹

The FFIEC makes standards for the Federal Bank Regulators to supervise financial institutions for compliance with the BSA in a uniform manner.⁵⁸⁰ It publishes the *AML Manual* to guide both the Federal Bank Regulators and financial institutions in complying with their AML obligations.⁵⁸¹ Similar to the FCA in England, the FFIEC has directly addressed the risk of TBML in trade-finance transactions under its *AML Manual*.⁵⁸² The FFIEC, however, seems to have no equivalent body under the South African AML regime.⁵⁸³ The only body that seems to come close to it is the FIC in the sense that it also publishes guidance notes that are relied upon by financial institutions in South Africa to comply with AML obligations under the FICA.⁵⁸⁴ However, as has already been stated elsewhere, the FIC's equivalent under the US AML regime is FinCEN.⁵⁸⁵ Unlike FinCEN, the FIC has not yet pronounced itself against TBML in trade-finance transactions, by way of a comprehensive guidance note.⁵⁸⁶

In addition to the Federal Bank Regulators and the FFIEC, the ABA is another organisation under the US financial sector, which is relevant in the combatting of TBML in trade-finance instruments.⁵⁸⁷ It is the equivalent of the BASA in South Africa and is a representative of the banking sector in the US.⁵⁸⁸ It is a significant partner in most of the US government's AML initiatives, including law reform. Just like the BASA in South Africa, the ABA has not made any statement of its own on TBML in trade-finance transactions.⁵⁸⁹ However, it has participated in the updating of the FFIEC's *AML*

⁵⁷⁸ See again Ch 7 para 7.5.2 above.

⁵⁷⁹ See again Ch 7 para 7.5.2 above.

⁵⁸⁰ See Ch 7 para 7.5.4 above.

⁵⁸¹ See again Ch 7 para 7.5.4 above.

⁵⁸² See again Ch 7 para 7.5.4 above. See also para 9.15.3.1 above and Ch 3 para 3.3 et seq above.

⁵⁸³ See again Ch 7 para 7.5.4 above. See also para 9.15.2 above.

⁵⁸⁴ See again para 9.12.2 above.

⁵⁸⁵ See again Ch 5 para 5.4.2 and Ch 7 para 7.4.2 above. See also para 9.12.2 above.

⁵⁸⁶ See again para 9.12.2 above.

⁵⁸⁷ See Ch 7 para 7.5.6 above. See also Ch 3 para 3.3 et seq above.

⁵⁸⁸ See again Ch 7 para 7.5.6 above. See also para 9.15.2 above.

⁵⁸⁹ See again Ch 7 para 7.5.6 above. See also para 9.15.2 above.

Manual, which partly addresses the problem of TBML in trade-finance transactions.⁵⁹⁰ The ABA has also advised the US Congress to pass the AMLA, which is the first US AML legislation to mention TBML as a specific form of money laundering.⁵⁹¹ Although this mentioning cannot directly be attributed to the lobbying of the ABA, which is minimal, the body's influence on the passage of the AMLA itself may not be overlooked.⁵⁹²

9.15.3.3 Singapore

Just like in South Africa and in the other comparative jurisdictions, the Singapore AML regime also gets support from the financial sector in combatting TBML in trade-finance instruments.⁵⁹³ Such support comes from the MAS and the ABS.⁵⁹⁴ These institutions have played different roles under Singapore's AML regime in the combatting of money laundering in general.⁵⁹⁵

The MAS is the regulator and supervisor of financial institutions in Singapore.⁵⁹⁶ Its equivalent institution under the South African AML regime is the SARB's Prudential Authority.⁵⁹⁷ Just like the SARB's Prudential Authority, the MAS is also actively involved in AML initiatives in Singapore.⁵⁹⁸ It has the power to issue AML guidelines and notices under the MAS Act.⁵⁹⁹ For example, the MAS has issued MAS Notice 626 under the MAS Act, which comprehensively covers AML obligations for financial institutions in Singapore.⁶⁰⁰ However, unlike the SARB's Prudential Authority, the MAS has made direct significant contributions against TBML in trade-finance instruments in the context of Singapore.⁶⁰¹ It has done so through publication of the *AML Guidance for Trade Finance*, which is meant to assist financial institutions to screen trade-finance transactions for potential TBML.⁶⁰²

⁵⁹⁰ See Ch 7 para 7.5.4 and para 7.5.6 above. See Ch 3 para 3.3 et seq above.

⁵⁹¹ See again Ch 7 para 7.5.6 above.

⁵⁹² See again Ch 7 para 7.5.6 above.

⁵⁹³ See Ch 8 para 8.5 et seq above. See also Ch 3 para 3.3 et seq above.

⁵⁹⁴ See Ch 8 para 8.5.2 and para 8.5.4 above.

⁵⁹⁵ See again Ch 8 para 8.5 seq above.

⁵⁹⁶ See again Ch 8 para 8.5.2 above.

⁵⁹⁷ See again Ch 8 para 8.5.2 above. See para 9.15.2 above.

⁵⁹⁸ See again Ch 8 para 8.5.2 above. See also para 9.15.2 above.

⁵⁹⁹ See again Ch 8 para 8.5.2 above.

⁶⁰⁰ See again Ch 8 para 8.5.2 above.

⁶⁰¹ See again Ch 8 para 8.5.2 above. See also para 9.15.2 above.

⁶⁰² See again Ch 8 para 8.5.2 above. See also Ch 3 para 3.3 et seq above.

A Comparative Analysis of the Legal Systems Investigated in Relation to TBML Control in Trade-Finance Instruments

The *AML Guidance for Trade Finance* largely mirrors publications from the FATF and the Wolfsberg Group on TBML control in trade finance.⁶⁰³ Besides its own AML guidance, the MAS is also a member of the ACIP, which has also contributed directly to the prevention of TBML in trade-finance instruments.⁶⁰⁴ Additionally, the MAS has established the COSMIC, an AML information-sharing platform between itself and major banks in Singapore.⁶⁰⁵ The COSMIC allows banks to warn each other about suspicious activities taking place within customers' bank accounts to prevent money laundering.⁶⁰⁶ It seems there is no equivalent platform under the South African AML regime designed and conducting the same functions as the COSMIC.⁶⁰⁷ The only institution that comes close to it is the SABRIC but its focus is not solely on money laundering.⁶⁰⁸ It will be a positive development to have an organisational structure similar to the COSMIC under the South African AML regime to combat TBML.⁶⁰⁹

In addition to the MAS efforts, Singapore also relies on the ABS, which is a representative of the banking community in Singapore.⁶¹⁰ The ABS is the equivalent of the BASA in South Africa.⁶¹¹ It cooperates with the MAS and other AML institutions in Singapore to prevent money laundering in the country.⁶¹² Just like the BASA, the ABS, has issued AML guidelines to assist its bank members from being abused through money laundering.⁶¹³ However, unlike the BASA, the ABS has specifically addressed the risk of TBML in trade-finance instruments for the benefit of its members.⁶¹⁴ It has done this through publication of the *AML Principles for Trade Finance*.⁶¹⁵ These principles complement the *AML Guidance for Trade Finance* issued by the ACIP and the MAS *AML Guidance for Trade Finance*.⁶¹⁶ The BASA in South Africa should emulate the ABS' efforts when combatting TBML in trade finance.⁶¹⁷

⁶⁰³ See again Ch 8 para 8.5.2 above. See also Ch 4 para 4.3.2 et seq and 4.4.5 et seq above.

⁶⁰⁴ See para 9.14 et seq above. See also Ch 3 para 3.3 et seq above.

⁶⁰⁵ See again Ch 8 para 8.5.2 above.

⁶⁰⁶ See again Ch 8 para 8.5.2 above.

⁶⁰⁷ See Ch 5 above generally.

⁶⁰⁸ See para 9.15.2 above.

⁶⁰⁹ See Ch 10 para 10.2.15 below.

⁶¹⁰ See Ch 8 para 8.5.4 above.

⁶¹¹ See Ch 8 para 8.5.4 above and Ch 5 para 5.5.4 above.

⁶¹² See again Ch 8 para 8.5.4 above.

⁶¹³ See again Ch 8 para 8.5.4 above.

⁶¹⁴ See again Ch 8 para 8.5.4 above. See also Ch 3 para 3.3 et seq and para 9.15.2 above.

⁶¹⁵ See again Ch 8 para 8.5.4 above.

⁶¹⁶ See Ch 8 para 8.4.4 and para 8.5.2 above.

⁶¹⁷ See Ch 10 para 10.2.17 below.

9.16 COUNTRY INITIATIVES IN THE ABSENCE OF FATF RECOMMENDATION AGAINST TBML

9.16.1 General

The FATF is the standard-setting body on AML issues at the global level.⁶¹⁸ Its flagship 40 plus 1 Recommendations underpin the AML frameworks for most jurisdictions worldwide, including South Africa.⁶¹⁹ Regarding TBML, the FATF has issued several reports on the subject to sensitise its members.⁶²⁰ However, it has not issued a single Recommendation in the mould of the 40 Recommendations, on how to manage this type of money laundering.⁶²¹ Although various initiatives under the respective jurisdictions have been discussed on a comparative basis elsewhere in this chapter, it is necessary to evaluate the overall response of each jurisdiction.

9.16.2 The Current Position in South Africa

The South African AML authorities generally follow the recommendations of the FATF.⁶²² As a member, the South African AML regime is regularly evaluated by the FATF to establish the extent of its compliance with the FATF's recommendations on money-laundering control.⁶²³ The FICA and the various guidance notes from the FIC, generally mirror the FATF's Recommendations on AML measures such as CDD, record keeping and staff training.⁶²⁴

It is noteworthy to state that currently South Africa is under the FATF's greylisting due to some weaknesses in its AML framework.⁶²⁵ With regards to the control of TBML in trade-finance instruments, the South African AML regime also exhibits some glaring shortfalls as judged against the comparative jurisdictions in this study.⁶²⁶ Unlike the English, the US and Singapore AML authorities, the South African AML authorities have not attempted to come up with their own reports on TBML in general or TBML in

⁶¹⁸ See Ch 4 para 4.3.2 et seq above.

⁶¹⁹ See again Ch 4 para 4.3.2 et seq above. See also Ch 5 above passim.

⁶²⁰ See again Ch 4 para 4.3.2 et seq above.

⁶²¹ See again Ch 4 para 4.3.2 et seq above.

⁶²² See again Ch 5 above generally. See also Ch 4 para 4.3.2 et seq above.

⁶²³ See Ch 5 para 5.2 above.

⁶²⁴ See again Ch 5 para 5.3.4 et seq above.

⁶²⁵ See again Ch 5 para 5.2 above.

⁶²⁶ See para 9.2 et seq above.

trade-finance transactions in particular.⁶²⁷ The norm in these other comparative jurisdictions has been to try to adapt the FATF reports on TBML to their local contexts.⁶²⁸ The FIC has the power to issue guidance notes under the FICA on various aspects of money-laundering control such as CDD, but it has not issued any guidance against TBML in trade-finance instruments.⁶²⁹ This is unexpected since South Africa was involved in the 2006 production of the first report on TBML as a member of the FATF.⁶³⁰ The expectation was that the South African government or the FIC should have gone further to produce a local report or guideline on TBML which is based on its contributions or observations in the FATF's 2006 report on the subject.⁶³¹ The trend, after various reports from the FATF on TBML, has been to produce local-based reports or guidelines that speak to the nuances and circumstances of each jurisdiction as shown by the comparative jurisdictions below.⁶³²

9.16.3 Insights from the Comparative Jurisdictions

9.16.3.1 England

England is a member of the FATF that also abides by the standards and recommendations of the FATF just like South Africa.⁶³³ However, unlike the FIC in South Africa, the FCA and the JMLSG in England have both issued guidelines modelled along the publications of the FATF on TBML.⁶³⁴ These guidelines assist financial institutions to manage the risk of TBML in trade-finance transactions using the POCAE and MLRs in England.⁶³⁵

The reports from the FCA and the JMLSG are an adaptation of the various reports from the FATF on TBML since there is no specific recommendation from the FATF.⁶³⁶ Significantly, the FCA and the JMLSG managed to contextualise their best practice

⁶²⁷ See again para 9.2 et seq above. See also Ch 2 para 2.3 et seq above and Ch 3 para 3.3 et seq above.

⁶²⁸ See again Ch 4 para 4.3.2 et seq above.

⁶²⁹ See again para 9.12.2 above. See also Ch 3 para 3.3 et seq above.

⁶³⁰ See again Ch 4 para 4.3.2 et seq above.

⁶³¹ See Ch 10 para 10.2.19 below.

⁶³² See para 9.16.3 et seq below. See also Ch 10 para 10.2.19 below.

⁶³³ See Ch 6 above generally. See also Ch 4 para 4.3.2 et seq and para 9.16.2 above.

⁶³⁴ See para 9.12 et seq above.

⁶³⁵ See again Ch 6 above generally. See also para 9.12 et seq above.

⁶³⁶ See again Ch 4 para 4.3.2 et seq above.

reports to the circumstances under the English AML regime.⁶³⁷ This positive initiative is missing under the South African AML regime.⁶³⁸

9.16.3.2 *The US*

The US is also a member of the FATF just like South Africa.⁶³⁹ It also largely follows AML developments by the FATF against emerging risks of money laundering, including TBML.⁶⁴⁰ In this regard, just like under the English and unlike under the South African AML regimes, the FFIEC and FinCEN in the US have both issued advisory notes on TBML which largely mirror the views of the FATF on TBML control.⁶⁴¹ The US government has also been an active member in the FATF's AML initiatives hence it has been largely influential in the latter's policies.⁶⁴² The FFIEC *AML Manual* briefly touches on managing money-laundering risks in trade-finance instruments.⁶⁴³ However, it does not give much detail on what financial institutions should do in terms of identification of TBML red flags and their reporting.⁶⁴⁴

As regards FinCEN's advisory notes on TBML, these deal with the matter on a general basis and their focus is on BMPE.⁶⁴⁵ This is not surprising considering that the US has had to deal with the problem of BMPE against its trading partners such as Colombia and Mexico.⁶⁴⁶ Although FinCEN advisory notes do not adequately address the problem of TBML in the context of trade-finance instruments, they demonstrate FinCEN's initiative on the subject.⁶⁴⁷ Such initiative should be emulated by the FIC in South Africa.⁶⁴⁸ Besides the advisory notes on TBML, FinCEN also issues, from time to time, GTOs for various sectors of the US economy.⁶⁴⁹ The GTOs target areas, which FinCEN perceives to be under the heightened risk of TBML. However, none of these

⁶³⁷ See again Ch 6 above generally. See also various comparative perspectives touching on England in para 9.2 et seq above.

⁶³⁸ See again para 9.16.2 above. See also Ch 10 para 10.2.19 below.

⁶³⁹ See Ch 7 above generally. See also Ch 4 para 4.3.2 et seq and Ch 5 above generally.

⁶⁴⁰ See again Ch 7 above generally.

⁶⁴¹ See again Ch 7 above generally. See also para 9.2 et seq above for the various comparative perspectives on the US AML regime against TBML.

⁶⁴² See Ch 4 para 4.3.2 et seq and Ch 7 above generally.

⁶⁴³ See Ch 7 para 7.5.4 above. See Ch 3 para 3.3 et seq above.

⁶⁴⁴ See Ch 7 para 7.5.4 above. See also Ch 7 above generally.

⁶⁴⁵ See Ch 7 para 7.4.2 above. See also Ch 2 para 2.3.5.2 above.

⁶⁴⁶ See again Ch 7 para 7.4.2 above. See also Ch 2 para 2.3.5.2 above.

⁶⁴⁷ See again Ch 7 para 7.4.2 above. For a detailed discussion of the potential risk of TBML in trade-finance instruments, see Ch 3 para 3.3 et seq above.

⁶⁴⁸ See Ch 10 para 10.2.11 below.

⁶⁴⁹ See Ch 7 para 7.4.2 above.

GTOs has been issued to specifically target TBML in trade-finance instruments.⁶⁵⁰ The FIC and the SAMLIT should adopt and adapt the idea of FinCEN advisory notes and GTOs on TBML to manage the risk of TBML in trade-finance transactions under the South African AML regime.⁶⁵¹

9.16.3.3 Singapore

Singapore is also a member of the FATF just like South Africa, England and the US.⁶⁵² In this regard, it also follows the FATF *Standards and Recommendations* in designing its AML frameworks.⁶⁵³ However, unlike the FIC and the SAMLIT in South Africa but similar to the FCA and the JMLSG in England and FinCEN and the FFIEC in the US, the MAS and the ACIP in Singapore have also issued guidelines on how to deal with the problem of TBML in trade-finance transactions in the context of their local experiences.⁶⁵⁴ These guidelines largely mirror the views from the FATF reports on TBML especially where they deal with trade-finance instruments.⁶⁵⁵

The MAS and the ACIP guidelines, just like the FCA and the JMLSG ones, specifically deal with TBML in the context of trade-finance instruments in an expansive format.⁶⁵⁶ This is commendable because the guidelines offer direction to financial institutions on how to manage the risk of TBML in the absence of a FATF Recommendation on the issue. It would be commendable as well, if the SARB's Prudential Authority, the FIC or the SAMLIT were to embark on such a trajectory for the local South African circumstances.⁶⁵⁷

9.17 CONCLUSION

This chapter has presented a comparative analysis of selected TBML issues within the South African AML regime and the comparative jurisdictions.⁶⁵⁸ From the analysis,

⁶⁵⁰ See Ch 7 para 7.4.2 above. See also Ch 3 para 3.3 et seq above.

⁶⁵¹ See Ch 10 para 10.2.19 below.

⁶⁵² See Ch 8 para 8.2 et seq above. See also para 9.16.2 and para 9.16.3.1 et seq above.

⁶⁵³ See again Ch 8 para 8.2 et seq above. See also Ch 4 para 4.3.2 et seq above.

⁶⁵⁴ See again Ch 8 para 8.2 et seq above. See also para 9.2 et seq above on the various comparative contributions of the Singapore AML regime against TBML.

⁶⁵⁵ See Ch 8 para 8.4.4 and para 8.5.2 above. See also Ch 4 para 4.3.2 et seq and Ch 3 para 3.3 et seq above.

⁶⁵⁶ See again Ch 8 para 8.4.4 and para 8.5.2 above. See also Ch 3 para 3.3 et seq above.

⁶⁵⁷ See Ch 10 para 10.2.9 below.

⁶⁵⁸ See para 9.2 et seq above.

it is apparent that there are substantial similarities between the South African AML regime and those of the comparative jurisdictions considered in this study.⁶⁵⁹ The South African FICA and POCA generally conform to the requirements of the FATF Recommendations and the UN Conventions with regards to the elements of the country's AML regime.⁶⁶⁰ These include the criminalisation of money laundering, the obligations for financial institutions to prevent the offence, and the presence of AML institutions, which are generally considered to be relevant in the combatting of money laundering by the FATF.⁶⁶¹ However, with regards to the prevention of TBML in trade-finance instruments, there are significant differences between South Africa and the comparative jurisdictions.⁶⁶² Inasmuch as all jurisdictions, including South Africa, use general AML legislation and their traditional AML institutions to deal with TBML, significant departures are still observable in other jurisdictions.⁶⁶³ Such departures include the presence of guidelines and institutions specific to TBML control in trade-finance transactions.⁶⁶⁴ These are largely absent under the South African AML regime although there is room for improvement in this regard.⁶⁶⁵

The general trend across the world, as shown by the comparative jurisdictions in this study, is for countries to demonstrate awareness of the existence of the problem of TBML.⁶⁶⁶ This could be through local reports or guidelines by various AML institutions in that jurisdiction, which specifically address the issue of TBML. This has not been the case under the South African AML regime, with the FIC only remotely acknowledging the existence of TBML.⁶⁶⁷ This is despite the fact that South Africa is one of the countries that contributed to the drafting of the first report on TBML by the FATF in 2006.⁶⁶⁸ Authorities under the English, the US and Singapore AML regimes have proactively shown that it is possible and desirable for countries to issue jurisdiction-specific guidelines on TBML control in trade finance.⁶⁶⁹ Such guidelines

⁶⁵⁹ See again para 9.2 et seq above.

⁶⁶⁰ See again Ch 5 above generally. See also Ch 4 para 4.3.1 et seq above.

⁶⁶¹ See Ch 5 para 5.2 et seq above.

⁶⁶² See para 9.2 et seq above.

⁶⁶³ See again para 9.2 et seq above.

⁶⁶⁴ See again para 9.2 et seq above.

⁶⁶⁵ See Ch 10 para 10.2 et seq below.

⁶⁶⁶ See again para 9.2 et seq above.

⁶⁶⁷ See again para 9.2 et seq above, and Ch 5 para 5.2 above.

⁶⁶⁸ See Ch 4 para 4.3.2 et seq above.

⁶⁶⁹ See again para 9.2 et seq above.

A Comparative Analysis of the Legal Systems Investigated in Relation to TBML Control in Trade-Finance Instruments

help local institutions in those jurisdictions to implement the generic AML legislation, currently used to combat money laundering, against TBML in trade-finance instruments.⁶⁷⁰

There is a lot that could be learnt by South African AML institutions from the international initiatives against TBML and the comparative jurisdictions in this study.⁶⁷¹

These are summarised in the findings and conclusions in Chapter 10 below so that recommendations could thereafter be made.⁶⁷²

⁶⁷⁰ See para 9.3 above.

⁶⁷¹ See Ch 10 para 10.2 et seq below.

⁶⁷² See Ch 10 para 10.2 et seq below.

CHAPTER 10: CONCLUSIONS AND RECOMMENDATIONS**10.1 GENERAL**

This study has examined selected legal aspects of money-laundering control in trade-finance instruments under the South African AML regime.¹ The study has adopted a macro-comparative approach under which the AML regime of South Africa has been compared with those of England, the US and Singapore to establish how it can respond to the threat of TBML in trade finance.² The South African AML regime has almost all the necessary elements relevant for the combatting of money laundering despite currently being on the FATF greylist.³ Presently, the South African government is addressing the AML deficiencies in the national AML framework to fully comply with the FATF's expectations.⁴ However, with regards to the control of TBML in trade-finance instruments, there are glaring gaps and deficiencies under the South African AML regime.⁵ These would require further and various interventions.⁶ Having done a comparative analysis in the preceding chapters, I now draw the following conclusions and recommendations based, *inter alia*, on the comparative research referred to above, for this study.⁷

10.2. ABSENCE OF AML RISK ASSESSMENT AND RESEARCH ON TBML IN SOUTH AFRICA**10.2.1 Conclusion**

The National Treasury and its supporting AML authorities in South Africa have not yet conducted a national money-laundering risk assessment focused on TBML in trade-finance instruments.⁸ Consequently, the South African AML authorities do not fully appreciate the magnitude of TBML and its impact on the South African economy and trade-finance transactions.⁹ Besides the FIC, the GFI has also partly contributed to the

¹ See Ch 3 above and Ch 5 above generally. See also Ch 9 above generally.

² See Ch 1 para 1.6.4 above. See also Ch 5; Ch 6; Ch 7; Ch 8; and Ch 9 above generally.

³ See Ch 5 para 5.2 above. See also Ch 4 para 4.3.2 et seq above.

⁴ See again Ch 5 above. See also para 10.2 et seq below for the various major conclusions made in this study.

⁵ See Ch 3 para 3.3 et seq above and Ch 5 para 5.3.4 et seq above.

⁶ See Ch 9 para 9.2 et seq above. See also para 10.2 et seq below.

⁷ See again Ch 9 para 9.2 et seq above. See also para 10.2 et seq below.

⁸ See Ch 5 para 5.2 above and Ch 9 para 9.2.2 above.

⁹ See again Ch 5 para 5.2 above and Ch 9 para 9.2.2 above. See also Ch 2 para 2.3.3 above and Ch 3 para 3.3 et seq above.

conducting of research on TBML in South Africa. However, it has focused on trade misinvoicing which is, just, but a component of the broader challenge of TBML.¹⁰ To add to the GFI effort, the SARB's Prudential Authority has also conducted a banking-sector risk assessment of money laundering.¹¹ Its findings partly touch on trade finance but also without further elaboration.¹² The FATF mutual evaluations of the South African AML regime in 2009 and 2020, have not also attempted to shed light on the possible challenges of TBML in the country.¹³ This is despite the fact that South Africa has almost all the possible factors that may make it vulnerable to TBML.¹⁴

10.2.2 Recommendation

The South African Treasury and the SARB's Prudential Authority should conduct a money-laundering risk assessment in the South African financial sector to determine the threat of TBML to the economy of South Africa.¹⁵ Such an exercise will assist stakeholders in South Africa to determine their exposure to the risk of TBML. The assessment will also raise awareness about the challenge of TBML in trade-finance transactions.¹⁶ Besides a national money-laundering risk assessment, various institutions under the South African AML regime, may also undertake standalone research to establish the status of TBML threats to their areas of operation, especially in trade-finance.¹⁷ AML institutions such as the SAMLIT are even more suited to conduct research on TBML because they have had a history of conducting sector-specific studies on financial crime in South Africa.¹⁸ Thus, to avoid burdening itself by reinventing the wheel, the SAMLIT can model its research and publications on TBML after the ACIP publications on TBML control in Singapore.¹⁹

¹⁰ See Ch 2 para 2.3 et seq above.

¹¹ See Ch 5 para 5.5.2 above.

¹² See again Ch 9 para 9.2.2 above. See also Ch 5 para 5.5.2 above.

¹³ See Ch 5 para 5.2 above.

¹⁴ See again Ch 5 para 5.2 above and Ch 9 para 9.2.2 above. See also Ch 2 para 2.3.3 above.

¹⁵ See again Ch 5 para 5.2 above and Ch 9 para 9.2 above. See also Ch 1 para 1.2 above and Ch 2 para 2.3.3 above.

¹⁶ See Ch 9 para 9.2 above. See also Ch 3 para 3.3 et seq above.

¹⁷ See Ch 5 para 5.4 et seq above. See also Ch 3 para 3.3 et seq above.

¹⁸ See again Ch 5 para 5.4.4 above. See also Ch 9 para 9.14.2 above.

¹⁹ See again Ch 5 para 5.4.4 above. See also Ch 8 para 8.4.4 above and Ch 9 para 9.14.3.3 et seq above.

10.3 SOUTH AFRICAN AML LEGISLATION AND SCOPE FOR TBML

10.3.1 Conclusion

The South African government relies on general AML legislation to deal with the challenge of TBML in trade-finance instruments.²⁰ Thus, South Africa's AML legislation, namely, the POCA and the FICA, does not address TBML in specific terms.²¹ This is not unique to South Africa, as England, the US, and Singapore do not address TBML in the same specific terms under their respective AML legislations.²² In this regard, the POCA covers the offence of money laundering in similar comparable terms with how it is covered in the comparative jurisdictions.²³ It also adequately covers any type of money laundering, including TBML in trade-finance instruments without explicitly stating so.²⁴

10.3.2 Recommendation

The South African legislature does not necessarily need to amend the POCA to address TBML in specific terms since the legislation can adequately address the challenge.²⁵ However, there is a need for South African AML institutions, such as the FIC, the SAMLIT, and the SARB's Prudential Authority, to actively use the current AML legislation to address TBML in trade-finance transactions.²⁶ To undertake this exercise, the AML institutions should issue guidelines under the current AML legislation that specifically address TBML in trade-finance transactions.²⁷ The FIC should issue a general guidance note on the management of the risk of TBML in trade finance by financial institutions. Such guidance note should mirror the FCA's *Financial-*

²⁰ See Ch 9 para 9.3.2 and 9.3.3 above. See also Ch 3 para 3.3 et seq above and Ch 5 para 5.3.2.4 above.

²¹ See Ch 5 para 5.3.2.5 above and Ch 9 para 9.3.2 above.

²² See again Ch 5 para 5.3.2.5 above and Ch 9 para 9.3.2 above. See also Ch 6 para 6.3.2.4 and para 6.3.2.5 above; Ch 7 para 7.3.2.6 and para 7.3.2.7 above; and Ch 8 para 8.3.2.4 and para 8.3.2.5 above.

²³ See again Ch 5 para 5.3.2.4 and 5.3.2.5 above; Ch 6 para 6.3.2.4 and para 6.3.2.5 above; Ch 7 para 7.3.2.6 and para 7.3.2.7 above; Ch 8 para 8.3.2.4 and para 8.3.2.5 above. See also Ch 2 para 2.2 et seq above and Ch 9 para 9.3 et seq above.

²⁴ See again Ch 5 para 5.3.2.4 and 5.3.2.5 above; and Ch 9 para 9.3.2 and 9.3.3 above. See also Ch 3 para 3.3 et seq above.

²⁵ See again Ch 5 para 5.3.2.5 above. See also para 10.3.1 above and Ch 9 para 9.3.2 above.

²⁶ See Ch 5 para 5.4 et seq above. See also Ch 3 para 3.3 et seq above and Ch 9 para 9.4 et seq above.

²⁷ See again Ch 5 para 5.3.2.5 above and Ch 3 para 3.3 et seq above.

Crime Risks Report in England or the MAS AML Guidance for Trade in Singapore.²⁸ The SAMLIT should also adopt and modify the ACIP *Best Practices for Countering TBML* in Singapore for possible application under the South African AML legislation.²⁹ These guidelines address the risk of TBML in trade finance in ways that are specific to trade-finance instruments.³⁰

10.4 INVESTIGATION OF TBML IN SOUTH AFRICA BY LAW ENFORCEMENT AGENCIES

10.4.1 Conclusion

The SAPS and other criminal-investigative agencies considered in this thesis have a general duty to investigate financial crimes and money laundering.³¹ However, such a general duty differs from jurisdiction to jurisdiction when it comes to the issue of whether the investigative agencies pursue TBML cases or not.³² In South Africa, the SAPS and its divisions such as the DPCI are not proactive in the investigation of complex money-laundering cases such as TBML in trade-finance instruments.³³ In this regard, the SAPS has not made any substantial reporting regarding the issue.³⁴

10.4.2 Recommendation

The SAPS should actively pursue complex cases of financial crime, such as TBML in trade-finance instruments.³⁵ There is a need to capacitate its human resources through specialised training on TBML control.³⁶ Of significance in this regard is for the SAPS to have a special unit devoted to the investigation of TBML.³⁷ The SAPS can train and assign the Organised Crime Investigations and the Serious Commercial Office of the DPCI to pursue all initiatives to do with TBML control in South Africa.³⁸ Besides initiating training on TBML, the SAPS should also collaborate with the FIC to

²⁸ See Ch 6 para 6.5.2 above and Ch 8 para 8.5.2 above.

²⁹ See Ch 5 para 5.4.4 above and Ch 8 para 8.4.4 above.

³⁰ See again Ch 6 para 6.5.2 above; Ch 8 para 8.4.4 above and para 8.5.2 above. See also Ch 3 para 3.3 et seq above.

³¹ See Ch 9 para 9.4.2 above. See also Ch 5 para 5.4.8 above.

³² See Ch 9 para 9.4.2 above and para 9.4.3 et seq above.

³³ See also Ch 5 para 5.4.8 above and Ch 9 para 9.4.2 above. See also Ch 3 para 3.3 et seq above.

³⁴ See again Ch 5 para 5.4.8 above and Ch 9 para 9.4.2 above.

³⁵ See again Ch 5 para 5.4.8 above. See also Ch 3 para 3.3 et seq above and Ch 9 para 9.4.2 above.

³⁶ See again Ch 5 para 5.4.8 above. See also Ch 9 para 9.11 et seq above and para 10.6.6.2 below.

³⁷ See again Ch 5 para 5.4.8 above and Ch 9 para 9.11 et seq above.

³⁸ See again Ch 5 para 5.4.8 above and Ch 9 para 9.11 et seq above.

conduct a joint research aimed at establishing how it may contribute to the curbing of TBML in South Africa.³⁹ Furthermore, the SAPS should consider engaging AML taskforces such as the SAMLIT to capacitate its staff through sharing of knowledge about TBML.⁴⁰

10.5 PROSECUTION OF TBML IN SOUTH AFRICA

10.5.1 Conclusion

The NPA is the authority responsible for prosecuting money-laundering cases in South Africa.⁴¹ However, it has not reported any case of TBML in trade-finance instruments, which it has successfully prosecuted.⁴² The reason for the absence of such reporting is unclear even after a thorough search. It may be that the NPA has not dealt with such cases of TBML or it deals with them albeit under the classification of money laundering in general.⁴³ In this regard, the NPA's position is not substantially different from what other prosecutorial authorities in the comparative jurisdictions have done in relation to cases of TBML.⁴⁴

10.5.2 Recommendation

The NPA should classify TBML cases into distinct categories.⁴⁵ This would bring clarity about the types and nature of money-laundering cases the authority has dealt with. This will also demonstrate that the NPA is aware of the problem of TBML in trade finance.⁴⁶ It will also prove that the prosecuting authority has specifically dealt with that type of money laundering before.⁴⁷ Besides keeping separate records of TBML cases prosecuted, the NPA should also deploy one of its specialised divisions to focus on the prosecution of TBML and other economic crimes.⁴⁸ This would boost specialisation and expertise in TBML, which the FATF regards as complex and difficult to

³⁹ See again Ch 5 para 5.4.8 above. See also Ch 9 para 9.14 et seq above and para 10.9.1 below.

⁴⁰ See Ch 5 para 5.4.4 above and para 5.4.8 above. See also para 10.9.2 below.

⁴¹ See Ch 5 para 5.4.6 above and Ch 9 para 9.5.2 above.

⁴² See again Ch 5 para 5.4.6 above. See also Ch 3 para 3.3 et seq above and Ch 9 para 9.5.2 above.

⁴³ See again Ch 5 para 5.4.6 above and Ch 9 para 9.5.2 above. See also Ch 2 para 2.3.3 above.

⁴⁴ See Ch 9 para 9.5.2 above and 9.5.3 et seq above. See also Ch 5 para 5.4.6 above.

⁴⁵ See again Ch 5 para 5.4.6 above.

⁴⁶ See again Ch 5 para 5.4.6 See para 10.2.1 above and Ch 9 para 9.5.2 above. See also Ch 3 para 3.3 et seq above.

⁴⁷ See again Ch 5 para 5.4.6 above and Ch 9 para 9.5.2 above.

⁴⁸ See again Ch 5 para 5.4.6 above and Ch 9 para 9.5.2 above.

prosecute.⁴⁹ Most importantly, the NPA should invest in the training of its officials on the nature of TBML and its various techniques.⁵⁰ Specialised AML training is critical in ensuring increased levels of expertise and competency when prosecuting TBML cases.⁵¹ Thus, the NPA should offer such training in partnership with the SAPS, which investigates money-laundering cases.⁵²

10.6 PREVENTIVE FRAMEWORK FOR TBML IN TRADE FINANCE UNDER THE FICA

The South African AML preventive measures for the financial sector are almost similar to those of the comparative jurisdictions.⁵³ However, the scope and guidance on how to apply these measures, especially against TBML, differ from one jurisdiction to another.⁵⁴ Thus, the following are some of the findings made in relation to the preventive framework for TBML in the financial sector and their corresponding recommendations.

10.6.1 AML Governance for TBML Control

10.6.1.1 Conclusion

The South African AML legislation, namely, the FICA and the POCA do not specifically require financial institutions to address the risk of TBML in trade finance under their respective RMCPs.⁵⁵ Instead, the FICA requires that each institution must have the RMCP to address its money-laundering risks generally.⁵⁶ This position is comparable to the AML legislation of the other jurisdictions considered in this study. Although the FICA does not mention TBML, the requirement for an RMCP of a general nature seems to adequately address any type of money laundering, including TBML in trade-

⁴⁹ See Ch 2 para 2.3 et seq above and Ch 4 para 4.3.2 et seq above.

⁵⁰ See again Ch 5 para 5.4.6 above and Ch 9 para 9.5.2 above. See Ch 2 para 2.3.4 and para 2.3.5 for basic and complex techniques of TBML respectively. As regards, how TBML may affect trade-finance instruments, see Ch 3 para 3.3 et seq above.

⁵¹ See para 10.6.6.2 below.

⁵² See Ch 5 para 5.4.8 above.

⁵³ See Ch 5 para 5.3.4 et seq above. See also Ch 9 para 9.6 et seq above.

⁵⁴ See again Ch 5 para 5.3.4 above and Ch 9 para 9.6 et seq above.

⁵⁵ See Ch 5 para 5.3.4.2 above. See also Ch 9 para 9.6.2 above.

⁵⁶ See again Ch 5 para 5.3.4.2 above and Ch 9 para 9.6.2 above.

finance instruments.⁵⁷ However, as observed from the comparative analysis, other jurisdictions have specific guidance on the governance of TBML.⁵⁸

10.6.1.2 Recommendation

The FIC should provide a specific guidance note on how the RMCP required under the FICA may address TBML in trade-finance transactions.⁵⁹ Such guidance should demonstrate to financial institutions how to incorporate the concept of TBML under their respective RMCPs.⁶⁰ In this regard, the presence of the FIC's guidance note to govern TBML would improve the manner in which financial institutions screen trade-finance transactions using an RMCP.⁶¹ A good starting point for the FIC's proposed new guidance note on TBML governance in South Africa would be the FCA's *Financial-Crime Risks Report* in England or the MAS *AML Guidance for Trade* in Singapore.⁶² The latter two provide comparable principles on how the FIC should design its own guidance note on TBML governance under the FICA's RMCP.⁶³

10.6.2 The RBA Application in TBML Control

10.6.2.1 Conclusion

The RBA is an overarching principle, which is present under the South African AML regime and the other comparative jurisdictions considered in this study.⁶⁴ In this regard, the FICA requires financial institutions to apply the RBA in the analysis of threats and risks of money laundering in the various services and products they offer to their customers.⁶⁵ Although the FICA does not specifically address TBML, the application of the RBA to financial transactions can potentially address the risk of TBML in trade-finance transactions.⁶⁶ It will all depend on the ability of the officials

⁵⁷ See again Ch 5 para 5.3.4.2 above and Ch 9 para 9.6.2 above. See also Ch 3 para 3.3 et seq above.

⁵⁸ See Ch 9 para 9.6.3 et seq above.

⁵⁹ See Ch 5 para 5.3.4.3 above. See also Ch 9 para 9.6.3 et seq above.

⁶⁰ See again Ch 5 para 5.3.4.3 above. See also Ch 9 para 9.6.3 et seq above.

⁶¹ See again Ch 5 para 5.3.4.3 above. See also Ch 9 para 9.6.3 et seq above.

⁶² See Ch 6 para 6.5.2 above and Ch 8 para 8.5.2 above.

⁶³ See Ch 5 para 5.3.4.2 above.

⁶⁴ See Ch 5 para 5.3.4.4 above. See also Ch 9 para 9.7.2 and 9.7.3 et seq above.

⁶⁵ See again Ch 5 para 5.3.4.4 above.

⁶⁶ See Ch 5 para scope offence and Ch 3 para 3.3 et seq above.

involved to identify TBML when reviewing trade-finance transactions for money laundering.⁶⁷

10.6.2.2 Recommendation

The FIC should guide financial institutions on how they should specifically apply the RBA against TBML in trade-finance transactions.⁶⁸ Such guidance should come in the form of a guideline on the RBA for TBML in trade-finance transactions. With the necessary changes to suit circumstances under the South African AML regime, the FIC should model it after the FATF, the ICC, the BAFT and the Wolfsberg Group trade-finance principles on TBML.⁶⁹ In this regard, the guidance note should assist financial institutions to apply the RBA with clarity and uniformity when screening trade-finance transactions for TBML.⁷⁰ The FIC should name it *Guidance Note on the Application of the RBA in Trade-Finance Transactions* and it should suggest ways in which financial institutions may address the risk of TBML.

10.6.3 CDD for TBML Control in Trade-Finance Instruments

10.6.3.1 Conclusion

The KYC requirement through CDD measures under the South African AML regime is generally similar to the one under the English, the US and Singapore AML regimes.⁷¹ The FICA and FIC *Guidance Notes* 3 and 7 provide for the conducting of CDD on customers and their transactions to prevent money laundering in South Africa.⁷² Similar to the comparative jurisdictions examined in this study, the FICA and FIC *Guidance Notes* 3 and 7 are silent on TBML in trade finance.⁷³ Despite the silence, they apply against any type of money laundering, including TBML.⁷⁴ However, some differences exist between South Africa and the comparative jurisdictions examined in this study. Unlike the South African AML regime, the AML regimes under the

⁶⁷ See para 10.6.6 below.

⁶⁸ See Ch 5 para 5.3.4.5 above. See also Ch 9 para 9.7.2 above.

⁶⁹ See Ch 5 para 5.4.2 above and Ch 4 para 4.3 et seq above.

⁷⁰ See Ch 5 para 5.3.4.5 and Ch 3 para 3.3 et seq above.

⁷¹ See Ch 5 para 5.3.4.7 above. See also Ch 3 para 3.3 et seq above and Ch 9 para 9.8.3 et seq above.

⁷² See Ch 5 para 5.3.4.6 above.

⁷³ See Ch 5 para 5.3.4.7 above. See also Ch 9 para 9.8.2 above and para 9.8.3 et seq above.

⁷⁴ See again Ch 5 para 5.3.4.7 above and Ch 9 para 9.8.2 above.

comparative jurisdictions provide guidance outside AML legislation on how to apply CDD measures in the context of TBML in trade finance.⁷⁵

10.6.3.2 Recommendation

There is no need to amend the FICA to accommodate CDD in the context of TBML in trade-finance.⁷⁶ The FIC should make the application of CDD measures under FIC *Guidance Note 3* or *7* more focused on TBML in trade finance than it currently is.⁷⁷ To accomplish this, the FIC should amend either *Guidance Note 3* or *7* on CDD measures to include a section on how financial institutions may apply the CDD measures for trade-finance customers.⁷⁸ Alternatively, the FIC should issue a new guidance note providing for all issues related to the management of the risk of TBML in trade-finance transactions. The new guidance note will then address the issue of CDD in that context. Such a step will bring the South African AML regime closer to global comparable standards with other jurisdictions than it currently is.⁷⁹

10.6.4 Reporting of Suspicious TBML in Trade-Finance Transactions

10.6.4.1 Conclusion

The reporting of unusual and suspicious transactions by financial institutions in South Africa is an important measure in preventing money laundering just as it is under the comparative jurisdictions.⁸⁰ However, there is a difference between South Africa and the other jurisdictions with regards to the reporting of suspected cases of TBML in trade-finance transactions.⁸¹ Whereas there is guidance in the comparative jurisdictions on how financial institutions should specifically report trade-finance transactions suspected of TBML, there is none in South Africa.⁸² The only relatable guidelines on the reporting of unusual and suspicious transactions under the FICA are

⁷⁵ See again Ch 5 para 5.3.4.7 above and Ch 9 para 9.8.3 et seq above. See also Ch 3 para 3.3 et seq above.

⁷⁶ See Ch 5 para 5.3.4.6 above and para 5.3.4.7 above.

⁷⁷ See again Ch 5 para 5.3.4.7 above and Ch 9 para 9.8.3 et seq above. See also Ch 3 para 3.3 et seq above.

⁷⁸ See again Ch 5 para 5.3.4.7 above and Ch 9 para 9.8.3 et seq above. See also Ch 3 para 3.3 et seq above.

⁷⁹ See again Ch 5 para 5.3.4.7 above and Ch 9 para 9.8.3 et seq above. See also Ch 4 para 4.3 et seq above.

⁸⁰ See Ch 5 para 5.3.4.10 above. See also Ch 9 para 9.9.2 above and para 9.9.3 et seq above.

⁸¹ See again Ch 5 para 5.3.4.10 above and Ch 9 para 9.9.3 et seq above.

⁸² See again Ch 9 para 9.9.2 above and para 9.9.3 et seq above.

FIC *Guidance Notes* 4 and 7.⁸³ These apply to all types of transactions that reporting officials may deem ‘unusual or suspicious’.⁸⁴ I submit that such transactions may also include unusual or suspicious trade-finance transactions for which the risk of TBML may be suspected.

10.6.4.2 Recommendation

It will be a good banking practice for financial institutions under the South African AML regime to specifically report trade-finance transactions suspected of TBML to the FIC.⁸⁵ In this regard, there is no need to amend the provisions of the FICA that require financial institutions to report unusual and suspicious transactions.⁸⁶ All that is required is that the FIC should replicate efforts by similar institutions in the comparative jurisdictions, by issuing specific guidance on how financial institutions should report suspected cases of TBML in trade finance.⁸⁷ Alternatively, the FIC can amend *Guidance Note* 4, which already deals with the reporting of suspicious money-laundering transactions, to speak directly to the issue of TBML in trade-finance instruments.⁸⁸ It can also issue a directive or a circular detailing how financial institutions must report a trade-finance transaction suspected of TBML and specify the necessary particularities needed when making such a report. In this regard, the FIC should rely on the red-flag indicators for TBML in trade finance from the FATF, the ICC and the Wolfsberg Group to design its own guidance note, circular or manual on the subject.⁸⁹ Learning should also be from the comparative jurisdictions especially the English and Singapore AML regimes some of whose institutions, such as the FCA and the ACIP, respectively, have designed comprehensive guidelines on the issue.⁹⁰

⁸³ See again Ch 5 para 5.3.4.10 above and Ch 9 para 9.9.2 above.

⁸⁴ See Ch 5 para 5.3.4.11 above.

⁸⁵ See Ch 5 para 5.3.4.11 above and Ch 9 para 9.9.3 et seq above.

⁸⁶ See again Ch 5 para 5.3.4.10 above and Ch 9 para 9.9.2 above.

⁸⁷ See again Ch 9 para 9.9.2 above and para 9.9.3 et seq above.

⁸⁸ See again Ch 5 para 5.3.4.11 above and Ch 9 para 9.9.3 et seq above. See also Ch 3 para 3.3 et seq above.

⁸⁹ See again Ch 5 para 5.3.4.11 above and Ch 9 para 9.9.3 et seq above. See also Ch 4 para 4.3.2 et seq above.

⁹⁰ See again Ch 9 para 9.9.3 et seq above. See also Ch 6 para 6.3.4 et seq above and Ch 8 para 8.3.4 et seq above.

10.6.5 Record-keeping Obligation for TBML Control

10.6.5.1 Conclusion

The obligation requiring financial institutions to keep records of financial transactions is available under the South African AML regime as well as under the selected comparative jurisdictions in this study.⁹¹ It applies to all transactions that pass through a financial institution for all jurisdictions examined in this research.⁹² However, unlike South Africa and the US, there is some guidance available under the English and Singapore AML regimes on how to keep records relating to trade-finance transactions.⁹³ Such guidance brings clarity to the general provisions under the AML legislations by narrowing the obligation to the specific sector of trade finance.⁹⁴

10.6.5.2 Recommendation

Although the South African AML regime adequately provides for the obligation to keep financial records under the FICA, it needs to provide direction by way of some guidelines from the FIC or the SAMLIT on how the obligation should apply to trade-finance transactions.⁹⁵ This will not only demonstrate an appreciation of the general global trend in AML, but will also assist financial institutions to comply with AML laws in trade-finance transactions under the obligation.⁹⁶ The guidance on record keeping for trade-finance transactions should also specify particulars necessary in the prevention of TBML.⁹⁷ Such particulars may include the names of the transacting parties involved, their jurisdictions, the type, volume and value of goods being traded and the frequency of the transaction.⁹⁸ Although keeping this information is not conclusive evidence of the occurrence of TBML, it may assist in reconstructing the transaction record for investigative purposes. To execute this recommendation the FIC need not design a standalone guidance note for financial record keeping.⁹⁹ All it needs to do is to issue an all-encompassing guidance on TBML prevention in the trade-

⁹¹ See Ch 5 para 5.3.4.8 above. See also Ch 9 para 9.10.2 and 9.10.3 et seq above.

⁹² See again Ch 9 para 9.10.2 and 9.10.3 et seq above.

⁹³ See Ch 9 para 9.10.3 et seq above.

⁹⁴ See again Ch 9 para 9.10.3 et seq above.

⁹⁵ See again Ch 5 para 5.3.4.9 above and Ch 9 para 9.10.3 et seq above.

⁹⁶ See again Ch 5 para 5.3.4.9 above. See also Ch 9 para 9.10.2 above and para 9.10.3 et seq above.

⁹⁷ See again Ch 5 para 5.3.4.9 above; Ch 9 para 9.10.2 above; and para 9.10.3 et seq above.

⁹⁸ See Ch 3 para 3.2 et seq above.

⁹⁹ See again Ch 5 para 5.3.4.9 above; Ch 9 para 9.10.2 above; and para 9.10.3 et seq above.

finance sector, which caters for, not only financial-record keeping, but also other AML measures such as CDD, reporting of suspicious transactions and staff training.¹⁰⁰

10.6.6 Staff Training for TBML Control

10.6.6.1 Conclusion

The AML obligation to train staff by financial institutions is available under the South African AML regime and requires financial institutions to train staff for all kinds of money-laundering activities.¹⁰¹ Just like in the comparative jurisdictions considered in this study, the obligation to train staff on money laundering in South Africa does not specifically speak to the issue of TBML in trade-finance instruments under the relevant AML legislations.¹⁰² However, unlike in South Africa, the trend in the other jurisdictions is to have some AML institutions providing guidance on how AML training should be focused on trade-finance transactions.¹⁰³ Such guidance is absent in South Africa and only comes in general format under the FIC's *Guidance Notice 7* which calls for the training of staff on money-laundering control in general.¹⁰⁴

10.6.6.2 Recommendation

The FATF proposes staff training as an important tool in raising awareness about TBML.¹⁰⁵ Thus, the FIC or the SARB's Prudential Authority should design AML training manuals on TBML control for financial institutions operating in South Africa.¹⁰⁶ These supervisory authorities should adopt relevant and publicly available guidelines on TBML from the FATF, the Wolfsberg Group, and the FCA in England or the MAS in Singapore.¹⁰⁷ Such guidelines should then be adapted for the South African AML regime.¹⁰⁸ An even more desirable approach for the FIC is to issue a specific guidance note on TBML control in trade-finance instruments.¹⁰⁹ Such guidance will cover a host of other issues on TBML besides staff AML training.¹¹⁰ As already stated, the FIC

¹⁰⁰ See para 10.6.1 et seq above and para 10.6.6 below.

¹⁰¹ See again Ch 9 para 9.11.2 above. See also Ch 5 para 5.3.4.12 above.

¹⁰² See Ch 5 para 5.3.4.12 above. See also Ch 9 para 9.11.2 and 9.11.3 et seq above.

¹⁰³ See again Ch 9 para 9.11.2 and 9.11.3 et seq above. See also para 10.6.1 et seq above.

¹⁰⁴ See again Ch 5 para 5.3.4.12 above and Ch 9 para 9.11.2 above.

¹⁰⁵ See again Ch 4 para 3.4.2 et seq above.

¹⁰⁶ See Ch 5 para 5.4.2 above and para 5.4.4 above.

¹⁰⁷ See Ch 4 para 4.3. 2 et seq above; Ch 6 para 6.5.2 above; and Ch 8 para 8.5.2 above.

¹⁰⁸ See Ch 5 para 5.3.4 above.

¹⁰⁹ See again Ch 5.4.2 above. See also Ch 9 para 9.12.2 above and para 10.7.2 below.

¹¹⁰ See again para 10.6.1 et seq above. See also para 10.7.1 below.

simply needs to adopt and modify similarly designed policy instruments from institutions and jurisdictions that have already published them.¹¹¹

10.7 SOME INITIATIVES AGAINST TBML BY THE FIC

10.7.1 Conclusion

The FIC is central to the combatting of money laundering in South Africa.¹¹² It links financial institutions and law enforcement authorities through information sharing.¹¹³ The FIC is also significant in the fight against TBML in trade-finance transactions.¹¹⁴ However, to do this it needs to demonstrate awareness of the problem.¹¹⁵ From the analysis in the comparative and preceding chapters, the FIC has not adequately shown that it actively pursues TBML in general or in the trade-finance sector in particular.¹¹⁶ The trend across the world as demonstrated by the selected jurisdictions considered in this study is for the country's FIU to at least research and publish on the subject.¹¹⁷ While the general AML functions of the FIC remain similar to the FIUs of the comparative jurisdictions, they largely differ on initiatives to combat TBML in trade-finance transactions.¹¹⁸ Whereas FIUs under the US and Singapore AML regimes have issued various guidance practices to assist financial institutions address the risk of TBML in trade-finance transactions, the FIC in South Africa have not done so.¹¹⁹

10.7.2 Recommendation

The FIC needs to follow international best practice and global trends in the control of money laundering and TBML.¹²⁰ At a minimum, it should issue a guidance note on how to mitigate the risk of TBML in trade finance.¹²¹ The FICA already allows the FIC to issue, from time to time, guidance notes, which give clarity on certain AML issues.¹²²

¹¹¹ See again Ch 4 para 4.3. 2 et seq above; Ch 6 para 6.5.2 above; and Ch 8 para 8.5.2 above. See also para 10.7.2 below.

¹¹² See Ch 9 para 9.12.2 above and para 10.2 et seq above. See also Ch 5 para 5.4.2 above.

¹¹³ See Ch 9 para 9.12.2 above. See also Ch 5 para 5.4.2 above.

¹¹⁴ See Ch 5 para 5.4.2 above and Ch 3 para 3.3 et seq above.

¹¹⁵ See para 10.2 above. See also Ch 9 para 9.2 above.

¹¹⁶ See again Ch 9 para 9.12.2 above. See also Ch 5 para 5.4.2 above and Ch 3 para 3.3 et seq above.

¹¹⁷ See Ch 9 para 9.12.3 et seq above.

¹¹⁸ See Ch 9 para 9.12.2 and para 9.12.3 et seq above.

¹¹⁹ See again Ch 9 para 9.12.2 above and para 9.12.3 et seq above. See also Ch 5 para 5.4.2 above.

¹²⁰ See Ch 5 para 5.4.2 above and Ch 4 para 4.2 above.

¹²¹ See Ch 5 para 5.4.2 above; Ch 9 para 9.12.3 above; Ch 3 para 3.3 et seq above. See also para 10.6.6.2 above.

¹²² See again Ch 5 para 5.4.2 above and Ch 9 para 9.12.2 above.

With regards to a new guidance note on managing the risk of TBML, the FIC needs not reinvent the wheel since such guidance notes or similar guidelines have since been published in England through the JMLSG, in Singapore through the MAS and in the US through FinCEN.¹²³ All that is required is an adaptation of such guidelines to suit the circumstances of the South African financial sector. Since the FIC is part of the SAMLIT already, it should use such partnership to spearhead the issuance of an all-inclusive guidance note covering various sectors of the South African economy likely to be affected by TBML, including trade finance.¹²⁴ Besides a guidance note on TBML control in trade finance, the FIC should also issue updates in the style of FinCEN's GTOs and advisory notes on TBML control.¹²⁵ The GTOs and the advisory notes would assist in giving real-time updates on recent trends and developments in the field of TBML in South Africa.

10.8 SOME INITIATIVES AGAINST TBML BY THE SARS

10.8.1 Conclusion

The FATF and the WCO have stressed the importance of customs authorities across jurisdictions in combatting TBML.¹²⁶ In South Africa, the SARS is the revenue collecting authority with the additional role of combatting money laundering.¹²⁷ The FICA requires the SARS to report suspicious money-laundering activities to the FIC whenever it encounters them.¹²⁸ Due to its focus on tax-related crimes, the SARS does not pay much attention to TBML.¹²⁹ This trend is similar to what other customs authorities in the comparative jurisdictions are doing especially in England by HMRC.¹³⁰ However, unlike the SARS, the HSI-ICE in the US and Singapore Customs in Singapore have shown significant interest in the combatting of TBML.¹³¹ Both have initiated programmes that may be useful in addressing the threat of TBML in their

¹²³ See Ch 6 para 6.5.4; Ch 7 para 7.4.2; and Ch 8 para 8.5.2 and para 8.4.4 above.

¹²⁴ See again Ch 5 para 5.4.2 and para 5.4.4 above. See also Ch 3 para 3.3 et seq above and para 10.2.15 below.

¹²⁵ See Ch 7 para 7.4.2 above and Ch 9 para 9.12.3 above.

¹²⁶ See Ch 4 para 4.3.2 et seq above and para 4.4.3 et seq above.

¹²⁷ See Ch 5 para 5.4.10 above. See also Ch 9 para 9.13.2 above.

¹²⁸ See again Ch 5 para 5.4.10 above. See also Ch 9 para 9.13.2 above.

¹²⁹ See again Ch 5 para 5.4.10 above. See also Ch 9 para 9.13.2 above.

¹³⁰ See Ch 9 para 9.13.3 et seq above.

¹³¹ See Ch 9 para 9.13.3 et seq above. See also Ch 7 para 7.4.12 above and Ch 8 para 8.4.10 above.

respective jurisdictions.¹³² Such initiatives are worth adopting by the SARS as will be shown in the recommendations below.¹³³

10.8.2 Recommendation

The SARS should emulate the efforts by the HSI-ICE in the US and Singapore Customs in Singapore on their various initiatives on the combatting of TBML in trade-finance transactions.¹³⁴ The SARS should undertake this through establishing its own platforms where stakeholders will interact to fight TBML in trade-finance transactions in South Africa. In this regard, the SARS should adopt the following specific recommendations.

10.8.2.1 Creation of Trade-Finance Platforms focused on TBML Control

The SARS should create platforms to facilitate the sharing of trade information with stakeholders relevant in the combatting of TBML in trade-finance transactions.¹³⁵ Such stakeholders should include traders, the FIC and financial institutions. The SARS should model the platforms after the NTP or the TFC under the Singapore Customs in Singapore or the TTUs under the HSI-ICE in the US.¹³⁶

Both the NTP and the TFC have distinct advantages that will accrue to the SARS should it adopt the models. First, the proposed SARS' NTP equivalent will be suitable for the interaction between the SARS and the traders.¹³⁷ It will also facilitate the exchange of import/export data. Additionally, it will also be suitable for the automated analysis of transactions for possible over- and under-invoicing of value in traded commodities in and out of South Africa.¹³⁸ Second, the proposed SARS' TFC will focus on helping financial institutions assess TBML risks in trade-finance transactions.¹³⁹ To complement the TFC initiative, the SARS should also create a trade-finance registry styled after Singapore Customs' Trade Finance Registry.¹⁴⁰ The trade-finance registry

¹³² See Ch 9 para 9.13.3.2 and para 9.13.3.3 above.

¹³³ See para 10.8.2 et seq below.

¹³⁴ See Ch 7 para 7.4.12 above and Ch 8 para 8.4.10 above. See also Ch 9 para 9.13.3 above.

¹³⁵ See again Ch 5 para 5.4.10 above and Ch 9 para 9.13.2 above.

¹³⁶ See again Ch 5 para 5.4.10 and Ch 9 para 9.13.2 and para 9.13.3 above. See also Ch 7 para 7.4.12 above and Ch 8 para 8.4.10 above.

¹³⁷ See again Ch 5 para 5.4.10 above and Ch 8 para 8.4.10 above.

¹³⁸ See again Ch 5 para 5.4.10 and Ch 9 para 9.13.2 and para 9.13.3 above. See also Ch 7 para 7.4.12 above and Ch 8 para 8.4.10 above.

¹³⁹ See Ch 3 para 3.2 et seq above. See also Ch 5 para 5.4.10 above and Ch 8 para 8.4.10 above.

¹⁴⁰ See again Ch 5 para 5.4.10 above and Ch 8 para 8.4.10 above.

will act as a central database for capturing data in all trade-finance transactions passing through all participating financial institutions in South Africa in order to detect fraud in documents and avoid duplication of transactions.¹⁴¹

10.8.2.2 Creation of a Special Unit under the SARS for TBML Control

Besides creating a special platform to share data between the SARS and its stakeholders, the SARS should also have a special division focused on TBML.¹⁴² Such a unit will specifically receive training on the combatting of TBML in the customs field. I submit that the unit already tasked with the investigation of tax-related crimes under the SARS will be more suitable to receive training on TBML.¹⁴³ Thus, the special SARS unit on TBML will spearhead the investigation of TBML cases and the training of other staff within the organisation to be alert on the subject.¹⁴⁴

10.9 INFORMATION SHARING AS A KEY STRATEGY AGAINST TBML

10.9.1 Conclusion

Information sharing is one of the strategies that can be used by AML institutions in any jurisdiction to combat money laundering.¹⁴⁵ The FATF has highly recommended it for its membership in the combatting of TBML.¹⁴⁶ This is equally important for South Africa as it is for any jurisdiction across the globe. In South Africa, the SAMLIT is the main public-private partnership for sharing information, which is necessary in the controlling of TBML in trade finance.¹⁴⁷ The idea is an adaptation of the JMLIT in England, which has also been formed for the same purpose.¹⁴⁸ However, unlike the SAMLIT, the JMLIT has an expert-working group focused on the aspect of TBML.¹⁴⁹ Other comparative jurisdictions considered in this study such as Singapore, has the ACIP, which is also the equivalent of the SAMLIT.¹⁵⁰ The ACIP has gone a step further than the SAMLIT on the fighting-front against TBML by proactively publishing some

¹⁴¹ See again Ch 8 para 8.4.10 above.

¹⁴² See para 10.8.2.1 above. See also Ch 5 para 8.4.10 above.

¹⁴³ See again Ch 5 para 8.4.10 above.

¹⁴⁴ See again Ch 5 para 8.4.10 above. See also para 10.6.6 above.

¹⁴⁵ See Ch 9 para 9.14.3 et seq above.

¹⁴⁶ See again Ch 4 para 4.3.2 et seq above.

¹⁴⁷ See Ch 9 para 9.14.2 above. See also Ch 5 para 5.4.4 above.

¹⁴⁸ See again Ch 5 para 5.4.4 above. See also Ch 6 para 6.4.6 above.

¹⁴⁹ See again Ch 6 para 6.4.6 above and Ch 9 para 9.14.3 et seq above.

¹⁵⁰ See again Ch 9 para 9.14.3 et seq above. See also Ch 8 para 8.4.4 above.

guidelines on TBML control in trade-finance transactions.¹⁵¹ The SAMLIT has not yet undertaken a similar exercise although it has conducted a study and published a report on illegal wildlife trade.¹⁵²

10.9.2 Recommendation

This study makes three major recommendations regarding information sharing as a key strategy against TBML for the South African AML regime.¹⁵³ These are the following.

10.9.2.1 Improving Initiatives of the SAMLIT against TBML

To improve its initiatives against the control of TBML, the SAMLIT should adopt two recommendations. First, it ought to improve its focus on TBML control by having an expert group devoted to TBML research.¹⁵⁴ This would enable the taskforce to understand the extent and impact of TBML in South Africa.¹⁵⁵ Secondly, the SAMLIT should take further guidance from similar public-private partnerships such as the ACIP in Singapore and publish its comprehensive guidelines that deal with TBML in trade-finance transactions.¹⁵⁶ Further initiatives by the SAMLIT should be the forging of more partnerships with organisations such as the SABRIC.¹⁵⁷ The SABRIC is strong on financial-crime data analytics and it will assist the SAMLIT to have a robust technological response against TBML.¹⁵⁸

10.9.2.2 Close Cooperation between the SARS, FIC and the WCO and the Egmont Group

As part of the broad initiative against TBML control in South Africa, there is a need for improved cooperation between various South African AML institutions and international organisations.¹⁵⁹ Such cooperation will increase the flow of relevant information and international best practices against TBML.¹⁶⁰

¹⁵¹ See again Ch 9 para 9.14.3 et seq above. See also Ch 8 para 8.4.4 above.

¹⁵² See again Ch 9 para 9.14.2 above. See also Ch 5 para 5.4.4 above.

¹⁵³ See para 10.9.2.1 below; para 10.9.2.2 below and para 10.9.2.3 below.

¹⁵⁴ See again Ch 5 para 5.4.4 above and Ch 6 para 6.4.6 above.

¹⁵⁵ On the estimations of the magnitude of TBML and the challenges attendant to such estimations see, Ch 2 para 2.3.3 above.

¹⁵⁶ See Ch 8 para 8.4.4 above. See also Ch 9 para 9.14.2 and para 9.14.3 above.

¹⁵⁷ See Ch 5 para 5.4.4 and para 5.5.6 above.

¹⁵⁸ See again Ch 5 para 5.5.6 above and para 5.4.4 above.

¹⁵⁹ See Ch 4 para 4.2 et seq above.

¹⁶⁰ See again Ch 4 para 4.2 et seq above.

This study, therefore, proposes close cooperation between the SARS and the WCO on efforts to combat TBML.¹⁶¹ Thus, there is a need for SARS officials to tap on the WCO initiatives and its best practices against TBML through regular training.¹⁶² In addition, this study proposes further cooperation between the FIC and the Egmont Group on TBML control.¹⁶³ In this regard, the FIC officials should actively adopt and adapt initiatives and policies of the Egmont Group on TBML control.¹⁶⁴ As part of its membership to the Egmont Group, the FIC ought to consider having a manual or handbook on TBML control in trade finance that is modelled after the WCO-Egmont Group Handbook on TBML.¹⁶⁵

10.9.2.3 Close Cooperation between the ICC and its South African Chapters

Further adding to the foregoing forms of cooperation, the South African ICC chapters, and the BASA should cooperate with the ICC on TBML control in trade-finance instruments.¹⁶⁶ The ICC is the standard-setting body for the operation of trade-finance instruments considered in this study.¹⁶⁷ It has also collaborated with the BAFT and the Wolfsberg Group to come up with the trade-finance principles applicable to trade-finance instruments for the control of TBML.¹⁶⁸ Thus, regular cooperation between the ICC chapters in South Africa, financial institutions and the BASA should aim to improve standard-operating procedures of financial institutions when scrutinising trade-finance transactions for TBML.¹⁶⁹ Instead of financial institutions being fixated with the challenge of fraud in trade-finance instruments, they should also focus on TBML using the trade-finance principles from the ICC.¹⁷⁰

¹⁶¹ See Ch 5 para 5.4.10 above and Ch 4 para 4.4.3 above.

¹⁶² See again Ch 4 para 4.4.3 above.

¹⁶³ See Ch 5 para 5.4.2 above and Ch 4 para 4.4.4 above.

¹⁶⁴ See again Ch 4 para 4.4.4 above and Ch 5 para 5.4.2 above.

¹⁶⁵ See again Ch 4 para 4.4.4 above and para 4.4.3 above; and Ch 5 para 5.4.2 above.

¹⁶⁶ See Ch 5 para 5.5.4 above. See also Ch 3 para 3.3 et seq above.

¹⁶⁷ See Ch 4 para 4.4.2 and Ch 3 para 3.3 et seq above.

¹⁶⁸ See again Ch 4 para 4.4.2 above. See also Ch 4 para 4.4.6 and 4.4.5 above.

¹⁶⁹ See Ch 3 para 3.2 above. See also Ch 5 para 5.3.4 above.

¹⁷⁰ See again Ch 4 para 4.4.2 above. See also Ch 3 para 3.3 et seq above.

10.10 SOME FINANCIAL-SERVICES INDUSTRY EFFORTS AND INITIATIVES AGAINST TBML

10.10.1 Conclusion

The financial-services sector is a significant stakeholder in the combatting of TBML in trade-finance instruments under the South African AML regime.¹⁷¹ The SARB's Prudential Authority and the BASA play critical AML roles, which complement the efforts of the FIC and the other stakeholders such as the SAMLIT.¹⁷² Although both of them have demonstrated awareness of the challenge of money laundering in South Africa, they have not proactively dealt with TBML with the same force.¹⁷³ In this regard, the SARB's Prudential Authority and the BASA have a great deal to do in terms of initiatives against TBML when judged against efforts of equivalent bodies in the comparative jurisdictions.¹⁷⁴

10.10.2 Recommendation

This study proposes that the SARB's Prudential Authority should borrow AML initiatives of the FCA in England and the MAS in Singapore.¹⁷⁵ Both the FCA and the MAS have issued guidelines to help financial institutions combat TBML under their current AML legislations.¹⁷⁶ The SARB's Prudential Authority should also emulate the MAS' initiative in Singapore under which the MAS created an information-sharing platform called the COSMIC.¹⁷⁷ In this regard, the SARB's Prudential Authority should partner with institutions such as the SABRIC, which conducts functions similar to the COSMIC, in order to create a new platform specific to the sharing of information and warnings about the occurrence of TBML within the South African financial sector.¹⁷⁸ The BASA should also emulate the ABS in Singapore in its efforts against TBML in trade-finance instruments.¹⁷⁹ Although the architecture of the South African financial

¹⁷¹ See Ch 3 para 3.2 above and Ch 5 para 5.5 et seq above.

¹⁷² See Ch 5 para 5.5.2 above and para 5.5.4 above. See also Ch 9 para 9.15.2 above.

¹⁷³ See again Ch 5 para 5.5.2 above and para 5.5.4 above; Ch 9 para 9.15.2 above.

¹⁷⁴ See again Ch 5 para 5.5.2 above and para 5.5.4 above. See also Ch 9 para 9.15.3 et seq above and para 10.10.2 below.

¹⁷⁵ See Ch 5 para 5.5.2 above. See also Ch 6 para 6.5.2 above and Ch 8 para 8.5.2 above.

¹⁷⁶ See again Ch 6 para 6.5.2 above and Ch 8 para 8.5.2 above. See also Ch 9 para 9.15.3 et seq above.

¹⁷⁷ See again Ch 8 para 8.5.2 above.

¹⁷⁸ See Ch 5 para 5.5.2 above and para 5.5.6 above. See also para 10.2.14 above and Ch 8 para 8.5.2 above.

¹⁷⁹ See Ch 5 para 5.5.4 above and Ch 8 para 8.5.4 above. See also Ch 3 para 3.3 et seq above.

sector is different from that of the mentioned comparative jurisdictions, some AML initiatives from the latter may still be adopted and adapted. These include publications of specific AML guidelines for the trade-finance sector and the researching of TBML on an active basis to understand its nature and extent in South Africa.¹⁸⁰

10.11 SOUTH AFRICA'S AML INITIATIVES IN THE ABSENCE OF FATF RECOMMENDATION ON TBML

10.11.1 Conclusion

South Africa and the comparative jurisdictions in this study are all members of the FATF.¹⁸¹ They, therefore, generally follow the recommendations of the FATF.¹⁸² Of the four jurisdictions considered in this study, South Africa is the only country currently on the FATF greylist due to AML deficiencies in its national AML framework.¹⁸³ This is a worrying state of affairs, which requires immediate remedying to improve the reputation and integrity of South Africa's financial system. With regards to the combatting of TBML, the FATF has not yet issued any specific recommendation on the subject.¹⁸⁴ Instead, it has issued various reports on the techniques, best practices and red-flag indicators of TBML.¹⁸⁵ A recommendation on TBML would have been easier for members to follow than reports and best practice notes whose adoption may be taken casually.

10.11.2 Recommendation

Being already on the FATF greylist on various other weaknesses in the national AML framework, South African AML institutions such as the SARB's Prudential Authority, the FIC and the SAMLIT should be proactive in ensuring that they effectively prevent TBML in South Africa.¹⁸⁶ The AML institutions should achieve this through, among other things, conducting research and issuing guidelines on TBML in the context of South Africa.¹⁸⁷ Thus, in the absence of a FATF recommendation on the matter, each

¹⁸⁰ See para 10.6 et seq above and para 10.7 et seq above.

¹⁸¹ See Ch 4 para 4.3.2 et seq above; Ch 5; Ch 6; Ch 7; and Ch 8 above generally. See also Ch 9 para 9.16 et seq above.

¹⁸² See again Ch 4 para 4.3.2 et seq above.

¹⁸³ See Ch 5 para 5.2 above. See also Ch 9 para 9.16 et seq above.

¹⁸⁴ See again Ch 4 para 4.3.2 et seq above. See also Ch 9 para 9.16 et seq above.

¹⁸⁵ See again Ch 4 para 4.3.2 et seq above.

¹⁸⁶ See again Ch 5 para 5.4.2 and para 5.4.4 above. See also Ch 9 para 9.16.2 above.

¹⁸⁷ See para 10.2 et seq above.

respective AML institution, be it the FIC, the SAMLIT, or the SARB's Prudential Authority, should make either an independent or collaborative effort to produce works that demonstrate each institution's understanding of TBML and how to manage it.¹⁸⁸

10.13 VALEDICTORY NOTE ON RECOMMENDATIONS

Some of the recommendations to the South African AML regime in the fight against TBML come at a cost. Such recommendations include the establishing of completely new AML institutions to assist in the combatting of TBML.¹⁸⁹ The commissioning of large-scale research assignments at the national level and the training of staff on TBML control may also prove to be expensive for the funders. However, other recommendations simply require minor changes to already established institutions and existing policies. These include the FIC's issuance of guidance notes that are aimed at controlling TBML. The FIC should easily undertake this exercise given that it has issued similar guidance notes before.¹⁹⁰ In the absence of a recommendation on TBML control by the FATF, South African AML institutions may need to be innovative and adopt international best practices on TBML that are already in place.

10.14 AREAS FOR FURTHER RESEARCH

This study explored the risk of TBML in trade-finance instruments.¹⁹¹ Its main objective has been to analyse the South African AML regime and determine the most effective way to use it in combatting TBML through trade-finance instruments.¹⁹² However, TBML is a broad concept covering various aspects of the economy.¹⁹³ This study, therefore, has not examined in detail how to prevent TBML in art trade,¹⁹⁴ cryptocurrencies,¹⁹⁵ and even in consultancy services.¹⁹⁶ These are emerging areas of greater concern to AML regulators and may require further research in future.

¹⁸⁸ See again para 10.2 et seq above.

¹⁸⁹ See para 10.2 et seq above.

¹⁹⁰ See again para 10.2 et seq above.

¹⁹¹ See Ch 1 para 1.2 and para 1.8 above. See also Ch 3 para 3.3 et seq above.

¹⁹² See again Ch 3 para 3.3 et seq above. See also Ch 5 above generally.

¹⁹³ See again Ch 2 para 2.3 et seq above.

¹⁹⁴ See again Ch 1 para 1.8 above and Ch 2 para 2.4.6 above.

¹⁹⁵ See Ch 2 para 2.4.7 above.

¹⁹⁶ See Ch 2 para 2.3.5.4 above.

10.15 CONCLUDING REMARKS

The concept of TBML is broad.¹⁹⁷ This thesis restricts itself to TBML in the context of selected trade-finance instruments.¹⁹⁸ These instruments are seldom used for money-laundering purposes. Whenever the selected instruments are at play, financial institutions rarely view them as possible conduits for proceeds of crime through TBML.¹⁹⁹ Thus, this thesis argues that there is a need for a holistic approach in combatting TBML in trade-finance transactions. This requires not only institutions traditionally involved in money laundering in general, but also those institutions actively involved in trade-finance operations at the domestic and international levels.²⁰⁰ Such involvement entails cooperation and formation of partnerships between and /or among organisations. It also entails using soft means of dealing with crime such as the use of preventive AML guidelines in pre-empting the possible use of trade-finance instruments for crime.

From the discussion in this thesis, it is clear that TBML can be countered using current AML laws meant for money laundering in general.²⁰¹ However, to meaningfully apply existing AML legislation against TBML in trade-finance transactions, there is a need to understand the mechanics of TBML itself in the first place.²⁰² This presupposes knowledge of the various money-laundering methods and trends including TBML itself. Thus, there is a general need for AML training in modern methods of laundering proceeds of crime to catch up with innovative organised crime groups and professional money launderers.²⁰³

¹⁹⁷ See again Ch 1 para 1.8 above and Ch 2 para 2.3 et seq above.

¹⁹⁸ See again Ch 1 para 1.8 above. See also Ch 3 para 3.3 et seq above.

¹⁹⁹ See again Ch 3 para 3.3 et seq above.

²⁰⁰ See Ch 4 para 4.2 above.

²⁰¹ See Ch 5; Ch 6; Ch 7; and Ch 8 above generally.

²⁰² See again Ch 2 para 2.3 et seq above.

²⁰³ See again Ch 2 para 2.2 et seq above.

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