

**CONFRONTING THE PROCEEDS
OF CRIME IN SOUTHERN AFRICA**

AN INTROSPECTION

**Edited by
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ABBREVIATIONS AND ACRONYMS

INTRODUCTION:

AML/CFT	anti-money laundering/combating the financing of terrorism (strategy)
ESAAMLG	Eastern and Southern African Anti-Money Laundering Group
FATF	Financial Action Task Force
FIU	financial intelligence unit
SADC	Southern African Development Community

CHAPTER 1:

ACB	Anti-Corruption Bureau
AML/CFT	anti-money laundering/combating the financing of terrorism (strategy)
CID	Criminal Investigation Department
DPP	Director of Public Prosecutions
ESAAMLG	Eastern and Southern African Anti-Money Laundering Group
FAST	flexible anti-smuggling teams
FATF	Financial Action Task Force
FIU	financial intelligence unit
forex	foreign exchange
MWK	Malawian kwacha
MRA	Malawi Revenue Authority
OTA	Office of Technical Assistance
SADC	Southern African Development Community
SARPPCO	Southern African Regional Police Chiefs Co-operation Organisation
US\$	United States dollar

CHAPTER 2:

ACC	Anti-Corruption Commission
AMLIU	Anti-Money Laundering Investigations Unit
BoZ	Bank of Zambia
DEC	Drug Enforcement Commission
ESAAMLG	Eastern and Southern African Anti-Money Laundering Group

FATF	Financial Action Task Force
IMF	International Monetary Fund
LAZ	Law Association of Zambia
PIA	Pensions and Insurance Authority
PPMLA	Prohibition and Prevention of Money Laundering Act 2001
SADC	Southern African Development Community
SEC	Securities and Exchange Commission
STR	suspicious transaction report
UN	United Nations
ZICA	Zambia Institute of Chartered Accountants
ZMK	Zambian kwacha

CHAPTER 3:

AAM	African Associated Mines
CD 1	Control Document 1
C\$	Canadian dollar
ENG	ENG Capital Asset Management
FIIE Unit	Financial Intelligence Inspectorate and Evaluation Unit
LIBOR	London Interbank Offered Rate
NDH	National Discount House
PEPS	politically exposed persons
SADC	Southern African Development Community
SMM	Shabanie Mashaba Mines
Z\$	Zimbabwean dollar
ZAR	South African rand

CHAPTER 4:

ADS	African Defence Systems
AFU	Asset Forfeiture Unit
ESAAMLG	Eastern and Southern African Anti-Money Laundering Group
FATF	Financial Action Task Force
FIC	Financial Intelligence Centre
FICA	Financial Intelligence Centre Act
FinCEN	(United States) Financial Crime Enforcement Network
JSE	JSE Securities Exchange South Africa
POCA	Prevention of Organised Crime Act
POCDATARA	Protection of Constitutional Democracy against Terrorist and Related Activities Act
STR	suspicious transaction reports
ZAR	South African rand

CHAPTER 5:

ACC	Anti-Corruption Commission
BoN	Bank of Namibia
CCU	Commercial Crimes Unit
CMA	Common Monetary Area
DCEC	Directorate of Corruption and Economic Crime (Botswana)
DLEU	Drug Law Enforcement Unit
ESAAMLG	Southern African Anti-Money Laundering Group
FATF	Financial Action Task Force
FBI	Federal Bureau of Investigation
FIC	Financial Intelligence Centre
GIPF	Government Institutions Pension Fund
GTI	Great Triangle Investments
MVTU	Motor Vehicle Theft Unit
NAMDEB	Namibia De Beers Mining Company
NAMFISA	Namibia Financial Institutions Supervisory Authority (Act)
NAMPOL	Namibian police
NDF	Namibia Defence Force
N\$	Namibian dollar
ODC	Overseas Development Corporation
ODCN	Offshore Development Corporation of Namibia
OTA	(US Treasury) Office of Technical Assistance
POCA	Prevention of Organised Crime Act
PRU	Protected Resources Unit
SCU	Serious Crime Unit
SSC	Social Security Commission
ZAR	South African rand

CHAPTER 6:

CIFiM	Centro de Informação Financeira de Moçambique (Mozambique Financial Information Centre)
FIU	financial intelligence unit
FSTAP	Financial Sector Technical Assistance Project
IGEPE	State Shares Management Agency
IMF	International Monetary Fund
SADC	Southern African Development Community
USAID	United States Agency for International Development
US\$	United States dollar

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Joseph Munyoro has a Bachelor of Accountancy degree from the Copperbelt University of Zambia and an MBA from the Edinburgh Business School. He is a Fellow of the Association of Chartered Certified Accountants of the United Kingdom. After working for the international audit firm PricewaterhouseCoopers from 1994 to 1997, he joined the Bank Supervision Department of the Central Bank of Zambia, where he was involved in developing customer diligence directives in 1998. Since 2001 he has been working in the Non-Bank Financial Institutions Department, developing and enforcing appropriate regulatory frameworks for various classes of non-bank financial institutions.

Ray Goba qualified to practise law in Zimbabwe, after which he also studied in the United States at the University of Minnesota. After a spell as a prosecutor in Zimbabwe, Ray was appointed Chief Law Officer and head of the Serious Economic Crimes Section in the Attorney-General's office in 1991. Between 1993 and 1994 he was Acting Director of Public Prosecutions and successfully prosecuted the first money laundering case in Zimbabwe under the Serious Offences (Confiscation of Profits) Act of 1990. He also participated in many investigations into bank and foreign exchange fraud, and sat on boards of enquiry into economic misconduct. He has consequently retained a keen interest in money laundering control. In 1998 he became Deputy Prosecutor-General in Namibia's Office of the Prosecutor-General. Since 2000 he has served as the Deputy Government Attorney handling civil matters.

Bothwell Fundira is a qualified accountant who has an MBA from the University of Warwick. He is a Fellow of the Chartered Institute of Management Accountants in Zimbabwe. Having spent more than 20 years in the financial and banking sector, he is familiar with a wide range of financial products, some of which tend to be abused for money laundering. He has written several papers on money laundering in Zimbabwe. At present he is the deputy chief executive of a large pension fund in Zimbabwe, with responsibilities that include finance, human resources, administration and investments.

Charles Goredema is a senior researcher at the Institute for Security Studies. He is based in Cape Town where he heads a research programme studying organised crime and money laundering trends in Southern Africa. Charles has been engaged in research into organised crime, money laundering and responses to them since 2000. In the course of his work he has spoken at many seminars and conferences and authored numerous publications.

Benjamim Capito has served as a legal adviser in the bank regulation department of the central Bank of Mozambique for a number of years. His tenure spans a period of volatility and turbulence in the economic and financial system in Mozambique. He has a wealth of experience in bank regulation and in identifying factors that facilitate the concealment of proceeds of crime and corruption in Mozambique, and an uncanny ability to explain complex situations.

INTRODUCTION

A survey conducted at the beginning of 2002 revealed that, despite the existence of laws to criminalise it, money laundering was a little-understood phenomenon in many parts of southern Africa. While it had been known for a long time that, in the words of a veteran Canadian undercover agent, “[p]eople commit crimes to make money so that they can get power and so that they can buy stuff” (Mathers 2004), outside of the banking sector there was a low level of appreciation of the risks arising from the proceeds of crime. The obligations implicit in the recommendations of the Financial Action Task Force (FATF) did not significantly influence regulatory planning.

The last four years have witnessed a dramatic shift in the way countries in the region deal with the proceeds of crime. In August 2006 Malawi adopted a Bill against money laundering and the financing of terrorism, as a visible expression of commitment to confront these activities. Before Malawi acted, South Africa, Mauritius, Zambia, Botswana and Zimbabwe had each centred their strategies against money laundering on similarly titled legislation. This monograph contains analyses of the frameworks taking shape in most of these countries. Tracing their proximate inspiration from international instruments such as the United Nations Convention Against Transnational Organised Crime, the structure and content of the laws in southern Africa are heavily influenced by the recommendations of the FATF. It is somewhat inevitable that in the monograph their efficacy is assessed, firstly, against the backdrop of the recommendations, and thereafter against the peculiar challenges the laws have to confront.

The anti-money laundering mechanisms advocated by the FATF recommendations, and the relevant international conventions, are constructed around structures of prevention, law enforcement and international co-operation. Each structure comprises discernible sub-structures or elements (Reuter & Truman 2004), as shown in the table below.

Table 1: Anti-money laundering structures

Money laundering preventive measures	Anti-money laundering enforcement measures co-operation	Measures to foster transnational
Customer due diligence	Criminalisation of predicate (underlying criminal) acts and of money laundering	Awareness of global trends
Reporting obligations	Investigation of predicate activities and of money laundering	Co-operation agreements; real-time transnational economic crime situation reviews
Regulation and supervision	Prosecution and punishment	Effective mutual assistance processes
Sanctions for non-compliance	Tracing and confiscating the proceeds	Transnational structures to trace and confiscate the proceeds

Measures to prevent money laundering are premised on the idea that a distinction can be drawn between lawful income and ‘dirty’ income. Dirty income can mix with lawful income, principally through the agency of certain entry points that are vulnerable. Prevention measures are directed at these vulnerable entry points to alert them to the risk of manipulation or infiltration by dirty income. Typical among the entry points are the banks, widely regarded as the gatekeepers of the financial system. They are enjoined to know their customers and develop profiles of the transactions expected of them. Emphasis is placed on transaction recording and scrutiny in order to identify unusual or suspicious ones, which then have to be reported to state agencies. These agencies are obliged to set up and maintain a regulatory infrastructure to ensure compliance by the vulnerable institutions. Compliance is enforced using a range of punitive criminal (and in some cases administrative) sanctions.

Prevention is intricately connected to the enforcement of the law against money laundering itself. Included under the structure of law enforcement is the requirement to define and criminalise money laundering connected to as wide a range of economic crimes as is prescribed by the various international conventions on drugs, cross-border crime, corruption and terrorism. Measures within this structure are directed at the acquisition of or dealing with the proceeds of crime, as well as giving assistance to the criminal, wittingly or negligently. They also include mechanisms to augment the capacity of the mandated agencies to investigate predicate crimes and money laundering, and that of prosecuting agencies to present cases to court. In addition, anti-money laundering regimes give prominence to the confiscation of the proceeds of crime. While the positioning of this aspect in Table 1 may indicate that what is envisaged is conviction-dependent confiscation of the proceeds of crime, in reality there is ambivalence on this aspect. Some jurisdictions have adopted civil forfeiture, while others are averse to the idea of confiscation without a criminal conviction.

The susceptibility of moving the proceeds of crime across borders is the basis for the sustained effort that has been put into structuring mechanisms to foster international networking. International co-operation has been taking shape as a distinct structure since the late 1980s, particularly under the inspiration of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the FATF Recommendations and the Basel Committee on Banking Supervision. The FATF Recommendations and Basel Committee inspired similar institutions, such as the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG) and the Southern African Development Community (SADC) Banking Council. International co-operation depends on collating and sharing intelligence. Reciprocity is its cornerstone, in the absence of an effective mechanism to penalise errant countries.

The contributions in this monograph examine the extent to which these structures, and in some cases their capacity to perform their assigned role, have developed in the period between 2004 and 2006. In most instances, it is only possible to conduct this assessment against the background of the typical money laundering typologies in the given country.

Jai Banda examines the position in Malawi, the most recent country to pass anti-money laundering legislation. The law was preceded by relatively extensive campaigns involving the public and stakeholders, to enable them to understand their respective roles in fighting money laundering and the financing of terrorism. It was argued that if all stakeholders appreciated the implications of money laundering and terrorist financing, they would realise the importance of supporting efforts to confront these activities. After securing political will and 'buy-in' from all stakeholders, the country would put in place appropriate legal and regulatory frameworks. The major assignment was to prepare legislation against money laundering and terrorist financing on the basis of the revised FATF 40+8 Recommendations, and United Nations conventions and resolutions.

Once the necessary legislation was in place, the country was expected to establish and build the capacity of a financial intelligence unit (FIU) to act as a hub linking the reporting institutions with the investigative and enforcement agencies or counterpart institutions in other jurisdictions. While the law is barely a year old, the anti-money laundering/combating the financing of terrorism (AML/CFT) strategy has existed for more than two years. This chapter reviews developments during the period the strategy has been in place.

Joseph Munyoro examines the progress made in Zambia towards implementing measures to pre-empt money laundering, or to detect money laundering and enforce the law against those involved. He highlights the significant role of political will in determining the pace of implementation of anti-money laundering measures. Munyoro acknowledges that the regulatory and institutional framework in Zambia is still deficient, and considers the areas that require review and improvement.

Bothwell Fundira focuses on money laundering in which intermediary institutions are implicated, which seems to be a dominant typology in crisis-afflicted Zimbabwe. He postulates three possible scenarios. The first is where the institution involved was corrupt from inception, or became corrupted by subsequent changes in ownership or changes in the economic environment. The use of such an institution to launder the proceeds of crime is inevitable. The second scenario involves an institution with "willing or rogue employees

who provide [money laundering] services on an ad hoc and non institutionalised basis" (Reuter & Truman 2004). In other words, the leadership of the institution is not corrupt, but it has been infiltrated by corrupt insiders. The third scenario consists of an institution that facilitates money laundering transactions unwittingly, either because it does not have mechanisms to detect money laundering or because of dereliction in applying the mechanisms that exist. He provides interesting findings based on observation over the last three years.

South Africa's initiatives to address money-laundering date back to the 1990s, while measures to combat the funding of terrorism are more recent. The chapter by Charles Goredema reviews developments in establishing systems to combat money laundering and the financing of terrorism since 2004, against the backdrop of the current strategic plan of the ESAAMLG. South Africa has played a critical role in ESAAMLG since becoming a member a few years ago.

Ray Goba analyses the nature of money laundering activities observed in Namibia during the period 2004 to 2006, using concluded and ongoing cases to highlight the predicate crimes that generate funds that are subsequently laundered, the manner in which such funds are laundered, and the state's response. He finds that determinations about whether an institution was set up to facilitate criminal enterprise from the start or only became corrupted subsequently can only be made in retrospect. Mechanisms to detect these trends should be strengthened so that this determination can be made earlier.

Benjamim Capito analyses the progress made in Mozambique since 2004, against the backdrop of the formidable challenges emanating from money laundering in that country.

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CHAPTER 1

MONEY LAUNDERING DEVELOPMENTS IN MALAWI, 2004 TO 2006

Jai Banda

Introduction

On taking office in May 2004, newly elected President Bingu wa Mutharika clearly signalled his administration's intention to tighten fiscal management and fight corruption and financial crime.

In July 2004 Malawi adopted an anti-money laundering/combating the financing of terrorism (AML/CFT) strategy, to translate the country's commitment to combating international money laundering and terrorist financing into tangible measures. The strategy encompassed the prevention of money laundering and the enforcement of anti-money laundering measures.

A survey in 2004 revealed that there was little understanding of the concept of money laundering in Malawi. Except for banks, sectoral representatives did not understand it or the issues it raised for their work. The obligations implicit in the revised Financial Action Task Force (FATF) Recommendations¹ did not feature in planning.

The AML/CFT strategy sought to conduct thorough awareness campaigns so that the public and all reporting stakeholders could understand their respective roles in fighting money laundering and terrorist financing. It was argued that if all stakeholders appreciated the implications of money laundering and terrorist financing, they would realise the importance of supporting efforts to confront these offences. After securing political will and 'buy in' from all stakeholders, the country would put in place appropriate legal and regulatory frameworks. The major assignment was to prepare legislation against money laundering and terrorist financing on the basis of the revised FATF 40+8 Recommendations, United Nations conventions and resolutions.

Once the necessary legislation was in place, the country would establish and build the capacity of a financial intelligence unit (FIU) to act as a hub linking the reporting institutions with the investigative and enforcement agencies or counterpart institutions in other jurisdictions.

The AML/CFT strategy has existed for more than two years. This chapter reviews developments during the period the strategy has been in place.

Legislation against money laundering in Malawi

The development of anti-money laundering law

Anti-money laundering law took long to develop in Malawi because of mistrust and political power struggles, in a context in which President Bingu wa Mutharika's party does not have the majority it requires to push its legislative programme through Parliament.

The first attempt to introduce money laundering legislation in Malawi through an amendment to the Penal Code in 2000 was rejected on the basis that the proposed law was not wide enough. It was suggested that a comprehensive Bill be drafted. The result was the Money Laundering and Proceeds of Serious Crime Bill 2002, first presented to Parliament on 22 June 2002. Finding it quite complex, Parliament referred it to the Parliamentary Committee on Commerce for review. The committee questioned why the administration of the Bill was vested in the Minister of Home Affairs. Following a lull, the Bill was regazetted on 10 September 2004, with the administration of the Bill placed in the hands of the Minister of Finance.

Despite this change, the Bill could not be tabled as opposition Members of Parliament felt that if the Minister of Finance was left to administer the Bill, the law would be abused to persecute them. They also raised other concerns. On 2 December 2005 the Bill was regazetted as the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Bill 2005. It now took into account some of the concerns raised by the opposition, for instance the setting up of the Financial Intelligence Unit.²

Notwithstanding the inclusion of the unit, the legislators were still not satisfied. The Legal Affairs Committee of Parliament argued that the Bill was still not

well understood among stakeholders as there had been a limited public familiarisation campaign. Another matter of concern was the date of commencement of the Bill. Sentiments were raised that it would be retrospective. The chairman of the Parliamentary Legal Affairs Committee, the Honourable Atupele Muluzi, son of the former president, Bakili Muluzi, threw in his lot with arguments that the Bill should not be used to target his father.³ The opposition insisted that the Bill should have a specific provision stating that it would not be applied retrospectively. Parliament was accordingly not prepared to pass the Bill into law.

Several meetings took place between MPs, the Ministry of Justice and the Reserve Bank of Malawi, during which the MPs insisted that their recommendations should be taken on board.

The upshot was the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Bill 2006, gazetted on 3 May 2006. This Bill was debated and passed by Parliament on 4 August 2006 and assented to by President Mutharika on 22 August 2006.

Measures to prevent money laundering under the new Act

The Act imposes a new set of anti-money laundering responsibilities on financial institutions. It sets out a broad conceptualisation of a financial institution.⁴ Persons concerned must be carrying on a business. The Act enumerates the defining activities of a business in quite an exhaustive list, including:⁵

- issuing and administering means of payment, such as credit cards, traveller's cheques and bankers' drafts;
- trading for own account or for account of customers in money market instruments such as cheques, bills and certificates of deposit;
- casino and lottery;
- a trust or company service provider;
- legal practitioners, notaries, other independent legal professionals and accountants;

- dealing in real estate, when the person dealing is involved in transaction for a client concerning the buying and selling of real estate; and
- such other business as the Minister may prescribe by notice published in the gazette.

Measures to combat money laundering are contained in both the Banking Act (Chapter 44:01) and the new Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act 2006 (hereinafter referred to as the Money Laundering Act).

Before the latter Act came into being, the offence of money laundering was not defined in Malawi. In terms of section 35 of the new Act, a person commits the offence of money laundering if, knowing or having reasonable grounds to believe that any property is entirely or partly the proceeds of crime, he or she

- converts or transfers the property, with the aim of concealing or disguising its illegal origin or to assist anyone involved in committing the offence to evade detection;
- conceals or disguises the true nature, origin, location, disposition, movement or ownership of the property;
- acquires, possesses or uses it; or
- conspires to commit any of the above acts or omissions.

The definition of 'money laundering' clarifies what money laundering is and helps one to appreciate the measures stipulated in the new Act.

Customer identification is required by both Acts. Bankers under the Banking Act must take all reasonable steps to establish the true identity of the person concerned in a transaction.⁶ Under the Money Laundering Act, every financial institution is required, before entering into a business relationship, to ascertain the identity of the customer on the basis of reliable and independent data or information.⁷

In Malawi personal identification is difficult because of the absence of a national identity card system. In addition, only a minority of Malawians have passports or driving licences. National identity cards are only expected to be introduced by the end of 2007.

Financial institutions are required to ascertain the nature of the client's business when a business relationship is established. This is expected to facilitate the profiling of normal client business activity. The Act goes further by requiring financial institutions to establish the purpose of any transaction involving an amount above a prescribed threshold.

Having sufficient information about a customer/client or a prospective customer/client underpins all anti-money laundering procedures that depend on a financial transaction base. In such procedures information is the most effective weapon against systematic money laundering through formal intermediary institutions. In terms of the 'know your client' injunction a person who violates the provision is liable in the case of a natural person to imprisonment for two years and a fine of MWK100,000 (US\$712), and in the case of a corporation to a fine of MWK500,000 (US\$3,560).

If the financial institution does not obtain satisfactory evidence of the identity of a customer it is obliged to report the attempted transaction to the FIU and should not proceed further with it.⁸

The new legislation outlaws anonymous accounts or accounts in fictitious, false or incorrect names,⁹ and requires financial institutions to maintain records of account transactions for seven years. Banks are familiar with long-term record-keeping, and with the prohibition in the Banking Act against processing suspicious transactions.¹⁰ Unfortunately the proscription in the Banking Act did not impose an obligation to report suspicious transactions. It only stopped banks from facilitating transactions which they perceived to be suspicious.

Under the new law a transaction exceeding a prescribed threshold in foreign currency, or one that is suspected on reasonable grounds to be related to the commission of a money laundering offence or the funding of terrorism, is reportable within three working days, and wherever possible before the offence is committed. A financial institution is required to take reasonable measures to ascertain the purpose of the transaction, the origin and ultimate destination of the funds involved, and the identity and address of any ultimate beneficiary, and communicate its findings in a report to the FIU.¹¹

It is important to note that as the types of transactions that may be used for money laundering are almost unlimited, it is not possible to define in a limited or all-embracing manner what constitutes a suspicious transaction. Financial institutions have to be vigilant to transactions that are “not in keeping with the client’s profile”. Typically these transactions involve large cash payments that seem out of character for the turnover of the business. It is suggested that examples of what could constitute suspicious transactions would be useful as guidelines although they cannot be exhaustive and would require updating and adaptation to changing circumstances and new methods of laundering money. The guidelines would be an aid only, and would not be applied as a routine instrument in place of common sense. While each individual situation may not be sufficient to suggest that money laundering is taking place, a combination of such situations may indicate such a transaction.

Under the new legislation an auditor (whether internal or external) of a financial institution or a supervisory authority who suspects the commission of a money laundering offence is obliged to report the transaction to the FIU. Failure to do so renders the auditor liable to prosecution. Auditors are apprehensive that reporting suspicious transactions will put them in a tight corner where they have to find a balance between earning a living and biting the hand that feeds them. They argue that there is no legal protection from reprisals, such as dismissal, for reporting directors’ or principals’ suspicious transactions to the FIU. An auditor who does not report is liable to imprisonment for one year and a fine of MWK100,000 (US\$712) or in the case of a corporation to a fine of MWK500,000 (US\$3,560) and loss of business authority.¹²

The sole protection afforded to auditors is found in the Corrupt Practices Act 1995 (Act 18 of 1995), which provides for protection of whistle-blowers and other informers. In terms of section 51(A) of the Act, any person who believes that the public interest overrides the interest of the institution in or under which he serves or to which he is subject, or overrides the interest of a particular community, association or society to which he belongs, may inform the Anti-Corruption Bureau (ACB) or the police of a corrupt practice that he knows or believes is being perpetrated by or in that institution.

The provision further stipulates that no information relating to a whistle-blower or to any other informer who has provided information to the bureau or to the police shall be admitted in evidence in any civil or criminal proceedings and no witness shall be obliged or permitted to disclose the name or address of such whistle-blowers. Any information about a whistle-blower contained in documents used as evidence in court must be concealed from view or obliterated in order to protect the identity of the whistle-blower.

The new law prohibits any person or institution from ‘tipping off’ the subject of a suspicious transaction report, on pain of imprisonment of up to ten years and a fine of MWK100,000 (US\$712).¹³ The identity of persons and informants in suspicious transaction reports are also protected.

The Money Laundering Act also requires financial institutions to establish and maintain internal reporting procedures.¹⁴ In terms of the new law, every financial institution is obliged to establish and maintain procedures and systems to

- implement customer identification requirements;
- implement record-keeping and retention requirements;
- implement reporting requirements;
- make its officers and employees aware of the laws and regulations relating to money laundering and the financing of terrorism;
- make its officers and employees aware of the procedures, policies and audit systems adopted by it to deter money laundering and the financing of terrorism; and
- screen persons before hiring them as employees.

Financial institutions are responsible for training their officers, employees and agents to recognise suspicious transactions, pick out trends in money laundering and the financing of terrorist activities, and detect money laundering risks within financial products, services and operations. They also have to appoint compliance officers, who are responsible for ensuring compliance with the Act and any other law relating to money laundering or the financing of terrorism. Compliance officers act as a link between the financial institution and the supervisory authorities and FIU.

Responses by vulnerable institutions to money laundering

Since there was no legislation criminalising money laundering, financial institutions did not feel obliged to pay particular attention to it, let alone take the trouble to report suspicious transactions.

Estate agents and motor dealers had no mechanisms at all to respond to money laundering. Apart from the Malawi Revenue Authority (MRA) audits on companies, not much was done to counter money laundering. Against the background of an increase in the use of fake documents to avoid import duty and to clear stolen vehicles, the MRA issued a warning in December 2004 to the general public against purchasing fraudulently cleared motor vehicles.

The MRA is now working with the ACB and the Fiscal Police to fight corruption and money laundering. The MRA has further established a department to investigate tax fraud. The department has established several units – such as special enforcement squads, flexible anti-smuggling teams (FAST), patrol squads, special investigations units, tax audit teams, post clearance audit teams, transit check points, and many others – just to fight tax evasion, tax-related fraud and money laundering.

In September 2004 the MRA suspended three employees for allegedly either undervaluing imported goods or failing to charge duty at all on some goods from Tanzania. The three employees at the Mzuzu customs office allegedly connived with the importers of the goods. The Mzuzu FAST Team intercepted two truckloads and investigations established that some goods were undervalued and on others no duty had been levied at all. Similarly, on 4 August 2005 the MRA arrested a businessman for evading tax amounting to MWK8.8 million (US\$70,968) by disguising new fabrics imported from India as second-hand clothes to pay less tax. In January 2006 the MRA dismissed 27 employees for corruption.

The Reserve Bank of Malawi's efforts against money laundering have taken the following forms:

Control of entry into the finance sector

In order to minimise the likelihood of criminals or their organisations taking control of banks or setting up their own banks, the Reserve Bank put in place

a rigorous licensing process to ensure that only 'fit and proper' persons are allowed to own and manage financial institutions.

The licensing process involves a review of the profiles of shareholders, directors and executive officers in terms of integrity, expertise and working experience to operate a bank in a sound and prudent manner. Although the licensing process cannot guarantee that a bank will be well run after it opens, it has proved to be an effective method for reducing financial crime in the banking sector.

Promotion of sound corporate governance principles

The Reserve Bank has also been promoting sound corporate governance principles to enhance the fight against money laundering. It has been mindful of the fact that a bank may, after having been licensed, take action or fail to take action, the effect of which may facilitate money laundering. For this reason the Reserve Bank vets certain actions by a licensed institution and promotes good governance. The following are examples of this:

- Approving changes in shareholdings
An institution owned by dishonest individuals is unlikely to be managed honestly. As part of its regulatory role, the Reserve Bank assesses the suitability of prospective shareholders in terms of their past banking and non-banking business conduct and integrity.
- Approving the appointment of new directors or executive officers
The Reserve Bank's role has been to prevent the appointment of individuals who may commit fraud or who may not be competent enough to ensure systems that can forestall financial crime. Unfit directors have to be kept out of circulation in the financial sector.

Other directives by the Reserve Bank of Malawi

During the period under discussion the Reserve Bank has noted the haemorrhaging of much-needed foreign currency from the country. This has been attributed to ineffective and obsolete financial laws to regulate what are perceived to be the main outlets of foreign currency, namely the foreign exchange (forex) bureaux.

Amid protests, the Reserve Bank increased its capital requirements for forex bureaux as one way of plugging the holes. In the past, capital to start a bureau was very low and as a result this kind of business was open to individuals of doubtful integrity. Dishonest businessmen with little capital would open forex bureaux specifically to acquire foreign currency, which they would smuggle out of the country. As a means of controlling the forex business the Reserve Bank increased the capital requirements so that only those who could put up security could run forex bureaux. The Reserve Bank is also monitoring the performance of forex bureaux.¹⁵

The Reserve Bank deregistered the Unit Trust of First Factory Company and First Asset Management Limited for not complying with the rules governing the industry. It claimed that malpractices were involved, citing misrepresentation of capitalisation and foreign exchange violations as some of the reasons for the closure of the companies. The bank's spokesperson added that corporate governance violations by the two institutions also contributed to their deregistration. On 18 May 2005 the Reserve Bank revoked the licence of one of Malawi's established banks, Finance Bank, on allegations of committing "several acts of operational malpractices including forex flight and non-compliance with the law".¹⁶ The Governor of the Reserve Bank, Victor Mbewe, could not at the time say for sure if the closure of Finance Bank had anything to do with money laundering. Because of the absence of legislation in Malawi it was very difficult to track down money laundering culprits.

In March 2006 the Reserve Bank issued further directives for licensed institutions in Malawi. These, which apply to all banks and other financial institutions licensed under the Banking Act, are as follows:

Audit Committee

In terms of Directive No. D05-06/1A, licensed institutions are required to have an audit committee. The functions of the audit committee are to

- facilitate and promote communication regarding the licensed institutions' internal control systems, risk management or any other related matters; and

- receive and review internal and external audit reports and ensure that senior management takes appropriate and timely action to correct weaknesses in internal control, non-compliance with policies, laws, regulations and directions, and other problems disclosed by the auditor.

The directive further calls for the appointment of an independent, professionally qualified auditor who is acceptable to the Reserve Bank. Licensed institutions have to be audited annually by the independent auditor. Within six months of the close of its financial year, each licensed institution is required to submit an audit report to the Reserve Bank. The independent auditor is accountable to the Reserve Bank at all times, but especially in the following circumstances:

- where there has been serious non-compliance with the provisions of the Banking Act, the Reserve Bank of Malawi Act, or any regulations issued under the Acts and any other directives issued by the Reserve Bank;
- where a criminal offence involving fraud or other dishonesty has been committed; or
- where a senior management official in a key position has unexpectedly left employment.

The directive goes further, stipulating remedial measures and administrative sanctions, which include the suspension of the establishment.

The directive goes a long way in responding to the threat of money laundering since audits help to establish paper 'trails' of transactions.

Conflict of interest

Directive No. D04-06/TRP deals with transactions between related persons. The object of the directive is to ensure that all transactions between a licensed institution and its insiders and related persons are at arm's length. Licensed institutions are thus prevented from entering into a transaction with, or for the benefit of, an insider or related person if such a transaction is on less favourable terms and conditions than it would be with persons who are not related to the licensed institution.

In terms of the directive, an institution's board of directors must adopt, and ensure that senior management officials implement, a written policy covering all transactions. The directors are also required to monitor compliance with the policy.

A director in a senior management position who is party to or has an interest in any transaction with the institution must disclose the nature and extent of his or her interest and must leave any meeting at which the transaction is discussed. Each institution is required to maintain a record of the disclosures made by directors or senior management officials who are party to or have an interest in the transactions. Each licensed institution has to have procedures in place to identify insiders and related persons and these records must be updated at least once a year. The directive further requires each institution to submit a quarterly report to the Reserve Bank showing all exposure to insiders and related persons and providing evidence of compliance with the directive.

Failure to comply with this directive allows the Reserve Bank to impose remedial measures, including administrative sanctions. It can be argued that this directive is also a response to the threat of money laundering as it endeavours to prevent insider trading, which can yield money for laundering.

The commercial banks

Besides complying with the directives issued by the Reserve Bank, commercial banks have also put measures in place to detect money laundering. Notable among the banks is Stanbic Bank, which has engaged a full-time money laundering officer whose duties include supporting management in facilitating the development, establishment and maintenance of a co-ordinated and structured process and procedures for the effective management of operational risk related to money laundering within the bank. The officer also assists the bank's legal counsel and company secretary in providing legal, company secretarial and compliance services to ensure that the bank adheres to the principles of corporate governance, complies with the requirements of the regulators, and operates within the applicable legal framework.

The National Bank, which is said to be the largest bank in Malawi, also has an officer who deals with money laundering issues. The bank has further drafted a money laundering policy, which had still to be approved at the

time of writing. The bank has also started training and appraising its staff on the new legislation.

Predicate offences for money laundering

The principal source of criminal law in Malawi is the Penal Code, Chapter 7:01. The code applies to offences committed wholly or partly within and partly beyond the country's jurisdiction. Predicate offences in the code include fraud and breaches of trust, whose maximum sentences are less than three years. In terms of the Money Laundering Act, "serious crime" means an offence against the provision of any written law in Malawi for which a punishment of not less than 12 months may be imposed. Theft, robbery and extortion, housebreaking, burglary and dealing in dangerous drugs are all criminalised under the Penal Code in Malawi. All these predicate offences yield money for laundering. The period has seen a rise in child trafficking cases and the selling of body parts, the culprits masquerading as businessmen in order to disguise their illicit activities. This has led to calls for comprehensive legislation against child trafficking and the sale of human body parts.

Enforcement of money laundering laws

There have not yet been any prosecutions for money laundering in Malawi, though individuals have been charged for various predicate offences that yield money for laundering. The FIU, which is still being set up, is the main institution to combat money laundering. Besides receiving, analysing and assessing reports of suspicious transactions, it is supposed to work with the law enforcement and supervisory authorities. Its duties as laid down in the Money Laundering Act are quite wide and elaborate. However, since this is a new office it requires properly trained personnel. The challenge for Malawi is to ensure that capable personnel are employed so that the FIU can operate effectively.

If money laundering laws are to be properly enforced the issue of protection of witnesses is important. It is somewhat disappointing that in the Money Laundering Act the provision for whistle-blower protection is rather passive. Section 45 states that no civil, criminal, administrative or disciplinary proceedings can be taken against any whistle-blower who acts in good faith.

Malawi does not have an established infrastructure to implement the protection of whistle-blowers, and comprehensive legislative and institutional measures are required in this regard. Despite there being no cases requiring witness protection during the period under discussion, there is a need for institutional measures to protect whistle-blowers.

Forfeiture and confiscation

Malawians generally regard the forfeiture and confiscation of property with misgiving and suspicion, considering the history of this form of punishment. They have lived through an era of abuse of forfeiture laws, in which government could order forfeiture without justification.

The new money laundering law provides for confiscation of property. The underlying principle of this law is that a person should not be allowed to become unjustly enriched as a result of criminal conduct. Therefore, people who have gained material advantage from the commission of serious offences will be deprived of this advantage. Anyone who uses property or allows it to be used to commit a serious offence will have the property forfeited. This outcome is balanced against the right of the individual not to be deprived of property without due process of law, which is a constitutional right. Built into the forfeiture process of the new legislation are notice requirements and the opportunity to make submissions to the court to ensure that due process is observed. The provisions in the new Act on confiscation depend on conviction.

Before a court makes a confiscation order, it must take several factors into account. In the case of the proceeds of crime, the court must be satisfied that these were derived, obtained or realised as a result of the commission of a serious crime. The court must be satisfied that the lawful income of the convicted person cannot account for the acquisition of the property. These factors are designed to avoid the draconian results of orders made in error.

Where a person is convicted of an offence under the Corrupt Practices Act the court is empowered, in addition to any other penalty, to order that any property or value acquired through the offence be forfeited to the government. The court is also empowered to order the return or repatriation to Malawi of any money or property or the value of any property located outside Malawi.

The Corrupt Practices Disposal of Recovered, Seized or Frozen Property Regulation (Government Notice 37/1999), permits recovered, seized or frozen property that comes into the possession of the ACB to vest in the state if it cannot be returned to the rightful owner. This will only occur if it is not claimed within three months of a public notice in the gazette. There have been no cases of this nature in the country during the last three years.

If it is no longer possible to confiscate the proceeds of crime – because they have, for instance, been diminished or cannot be found – the court may order payment instead of making a confiscation order.

Investigation of predicate activities and money laundering

The investigation of activities connected to money laundering is the responsibility of the Malawi police force, which is divided into different branches. The general duties branch investigates ordinary theft, theft from persons and motor vehicles, and shoplifting. These are relatively minor, but are also linked to money laundering. The drug section investigates drug-related crime, and the anti-motor vehicle theft section investigates motor vehicle thefts. Both of these predicate activities yield money for laundering. The Criminal Investigation Department (CID) investigates sophisticated and complicated cases such as fraud, housebreaking, burglary and armed robbery. Under the CID there are several branches, including the fiscal branch, that deal mainly with white-collar crime.

During the period under review the fiscal branch had 33 police officers across the country, with four border towns having one policeman each, two border towns having two each, and one border town having five. The capital city Lilongwe, where the government headquarters are housed, had only four officers and the commercial city of Blantyre had 19. The small size of the fiscal branch has long been a handicap in the fight against white-collar crime and this is likely to persist in the attempts to combat money laundering.

The Fiscal Police lack capacity in various respects. Mobility is a challenge, as the branch has only one motor vehicle. Most officers require training in the concept and practice of money laundering. Computer literacy is lacking, as is training in basic accounting. Communication is also a problem. Since money

laundering is a new phenomenon, Malawi police operatives would benefit from attachment to law enforcement agencies and financial institutions in other countries.

At this stage the fiscal department enjoys good relations with Interpol and the Southern African Regional Police Chiefs Co-operation Organisation (SARPPCO). Within Malawi, interaction with the Reserve Bank, the MRA and the ACB has also been of benefit in fighting white-collar crime in general.

Prosecution structures in Malawi

The Constitution provides for the office of the Director of Public Prosecutions (DPP), which has power in any criminal case to institute and undertake criminal proceedings against any person before any court for any offence alleged to have been committed by that person.¹⁷ This means that the DPP can prosecute persons involved in money laundering and other offences as codified in the Penal Code. The office of the DPP has problems in that it is not well staffed and is unable to keep up with the number of cases that occur. In addition, many prosecutors are inexperienced. The office directly handles only 10% of prosecutions, with the rest being assigned to police prosecutors. It is important to note that the budget for the DPP's office has been raised from MWK24 million (US\$171,428) in 2004/2005 to MWK69.5 million (US\$496,428) for 2005/2006, and MWK95 million (US\$678,571) for the 2006/2007 fiscal year.

Former DPP Ishmael Wadi proposed radical changes in the running of the office, including the hiring of special prosecutors for financial crimes such as money laundering as one way of making the office more effective.

The ACB also has a prosecutions division but this does not have enough lawyers. At the time of writing there were only four lawyers working with the ACB, and it had just lost its director in politically charged circumstances.

The MRA, on the other hand, has strengthened its legal team to prosecute criminal tax cases as one way of tackling an offence intricately connected

to money laundering. The DPP has given its consent to lawyers working with the MRA to prosecute criminal matters relating to tax.¹⁸

Malawi's capacity for international co-operation

Legislation on mutual legal assistance exists in the form of the Service of Process and Execution of Judgements Act (Chapter 4:01) and the Evidence by Commissioners Act (Chapter 4:03). This legislation is not comprehensive enough and is confined to two countries, Zimbabwe and Zambia, both of which were once in a colonial federation with Malawi. The application of the legislation needs to be broadened to include other countries, particularly those in the Southern African Development Community (SADC) region with which Malawi has most of its dealings. The legislation is silent on the question of transferring arrested persons from one country to another to assist in investigations, prosecutions or judicial proceedings, including searches and the seizure of the proceeds of foreign crimes that may have been found in Malawi.

The FIU can disclose any information to foreign financial intelligence units, provided there is an agreement or arrangement between the FIU and the foreign state or international organisation regarding the exchange of such information.

In cases where such an agreement or arrangement has not been entered into between the FIU and the foreign state or international organisation or body, the FIU may conditionally share the information it has. The usual condition is that the information must be used for intelligence purposes only and should not be further disclosed without the consent of the FIU.

Malawi is party to various international treaties and protocols on money laundering, terrorist financing and drug trafficking. The principal purpose of the new money laundering law is to activate Malawi's compliance with her obligations under the various conventions to which the country is party. These are:

- the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988);
- the SADC Protocol on Combating Illicit Drugs (1996);
- the United Nations Convention on the Suppression of Financing of Terrorism (1999);

- the United Nations Convention Against Transnational Organised Crime (2000);
- United Nations Security Council Resolution 1373 (2001); and
- the United Nations Convention Against Corruption (2003).

These conventions oblige Malawi to enact laws that criminalise money laundering and the financing of terrorism and enable the country to trace, restrain and ultimately confiscate the proceeds of serious crime as well as money intended to finance terrorism. Since 2004 Malawi has been under extreme pressure to comply with these conventions and is in the process of doing so. The country is a member of the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG), a regional grouping whose object is to combat the laundering of the proceeds of all serious crime and the financing of terrorism.

In March 2005 the governments of Malawi and the United States signed an agreement in terms of which the US Embassy in Malawi would provide a grant of MWK22 million (US\$157,142) to the ACB. President Bingu wa Mutharika pledged that the funds would be used to detect and prevent corruption, financial crimes and money laundering. The director of ACB at the time, Gustave Kaliwo, committed the bureau to train 35 people in the investigation of cases involving financial crime and the transfer of public assets stolen from Malawi and kept abroad.

In 2005 Malawi entered into an agreement with the United States Department of the Treasury to access technical assistance advisers in anti-money laundering and the operation of financial intelligence units. An adviser from the Department of the Treasury's Office of Technical Assistance (OTA) is based at the Reserve Bank of Malawi to provide training and assistance in building systems and capacity to improve the management and protection of Malawi's financial resources. The adviser is further expected to assist the Reserve Bank to establish and equip a financial intelligence unit, to support Malawi's amendment of its AML/CFT legislation, and to prepare a national AML/CFT strategic plan in line with the resolutions of the Ministerial Council of ESAAMLG.

The ACB engaged British experts to train its investigators. These experts trained about 20 officers for two weeks in investigative, interviewing and statement-

taking skills.¹⁹ The United Kingdom is reportedly providing £500,000 (MWK115 million) per year to the ACB,²⁰ a huge sum that is being invested in the fight against corruption.

Conclusion

The AML/CFT strategy, launched in July 2004, is to run until June 2007. There is evidence that this strategy will enable Malawi to establish an effective regime against money laundering. Although progress is slow, the country has endeavoured to attain its goals as laid down in the strategy and as envisaged by ESAAMLG.

Malawi has managed to criminalise money laundering in relation to all serious offences. It has enacted legislation for the confiscation of the proceeds of crime, outlawed anonymous bank accounts, compelled banks to identify customers and to keep financial records for at least five years, and met other obligations as required by ESAAMLG.

The country is still in the process of developing a better understanding of the nature, extent and impact of money laundering and terrorist financing. In this regard more public awareness campaigns are necessary.

A lot of work still needs to be done to facilitate and co-ordinate the provision of technical assistance and training of financial investigators, law enforcement agents, the judiciary, the financial intelligence unit, financial regulatory authorities and financial institutions in order to build capacity to prevent and combat money laundering and terrorist financing.

Notable cases and incidents of money laundering during the period

Because no one has ever been prosecuted for money laundering in Malawi it is strictly inaccurate to describe what follows as a money laundering case study. However, it is based on a real occurrence and reveals one of the many money laundering possibilities. It has conveniently been called the "12 companies case".

Case study: the 12 companies case

The ACB investigated a case involving a businessman who registered 12 companies with the Registrar-General's office. All the companies were used for the importation and exportation of goods and services and in the end the practices led to the laundering of millions of kwachas.

The businessman used to export goods such as sugar, cement and salt. The rule of practice is that a product such as sugar, bought from the sugar manufacturer Illovo and meant for export, is exempt from surtax of 20%. Proof of export is through a stamped bill, which is processed by the MRA. The form is processed at an inland MRA station and is later stamped at the point of exit to certify that the commodity crossed the Malawi border. The stamped document is taken back to the MRA as proof of export.

In this case the investigations by the ACB revealed the following:

- Over a period of one year, the businessman bought export commodities worth MWK200 million (US\$142,857.14).
- Over the same period the government through the MRA exempted the businessman of surtax worth MWK40 million (20% of MWK200 million) (US\$285,714.28).
- Only one of the 12 companies registered by the businessman was investigated, revealing that he had not exported the commodities purchased. As a result the government lost MWK40 million (US\$285,714.28) in surtax on the transactions of only one of his companies.
- The greater part of the evaded surtax (MWK40 million) (US\$285,714.28) was used to buy commodities from outside Malawi for resale in the country.
- Most of the goods were bought in different names by the remaining 11 registered companies.

Investigations further revealed that:

- For a period of four years, the businessman imported goods into Malawi and evaded customs duty of almost MWK400 million (US\$2,857,142.85).

- Evasion of duty was facilitated by some public officers and bank officials.
- Various sums of money were offered and received by the officials who assisted the businessman to evade duty. The total bribes offered and received amounted to MWK2 million (US\$14,285.71).
- The evaded duty (money stolen from government) was reinvested in other retail and commercial business. The money was laundered in the economy in the form of profits from his companies.
- One of the corrupt public officers who received bribes obtained a loan from the government and bought one minibus. After eight months he owned a fleet of seven minibuses, using the bribe to purchase the additional six vehicles.

It is conceivable that the businessman used lawyers and auditors to hatch the scheme to incorporate the companies as a means of hiding the transmission of unlawfully earned money.

Notes

- 1 The Financial Action Task Force formed in 1989 has spearheaded the global efforts to combat money laundering, and its recommendations are the world standard for effective national anti-money laundering regimes.
- 2 The setting up of a financial intelligence unit was first refused by the Minister of Justice and the Minister of Finance, who both argued that it was not necessary in Malawi as fiscal police were already carrying out the activities of such a unit.
- 3 Dr B. Muluzi was being accused of diverting MWK1.4 billion (US\$10,000,000) of government money into his personal account.
- 4 The Banking Act, Chapter 44:01, however, describes a financial institution as a person whose regular business consists of the granting of loans, advances and credit facilities and investing funds by other means and whose business is financed by own or borrowed funds or with funds not acquired by accepting or soliciting deposits from the public. Such institutions include pension funds, insurance companies, investment funds and investment companies.
- 5 Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act 2006, section 2.

- 6 Banking Act, section 49.
- 7 Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act 2006, section 24.
- 8 Ibid, section 25.
- 9 Ibid, section 26(1).
- 10 Banking Act, section 49.
- 11 Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act 2006, section 28(1).
- 12 Ibid, section 29.
- 13 Ibid, section 30.
- 14 Ibid, section 32.
- 15 *The Daily Times*, 9 September 2005.
- 16 *The Nation*, May 2005.
- 17 Constitution of Malawi, section 99(1).
- 18 *The Daily Times*, 28 August 2006.
- 19 Juliet Chimwaza in *The Nation*, 9 May 2006.
- 20 *The Daily Times*, 15 March 2006.

CHAPTER 2

POLITICAL WILL AND THE IMPLEMENTATION OF ANTI-MONEY LAUNDERING MEASURES: THE ZAMBIAN EXPERIENCE, 2004 TO 2006

Joseph Munyoro

Introduction

This chapter examines the progress made in Zambia towards implementing measures to pre-empt money laundering, or to detect money laundering and enforce the law against those involved. It highlights the significant role of political will in determining the pace of implementing money laundering measures. It also considers areas requiring improvement in the anti-money laundering regulatory and institutional framework.

Money laundering prevention

Zambia is developing a national anti-money laundering strategy document.¹ Although the anti-money laundering strategy has not up to now been developed to serve as a co-ordinating framework, the country started taking measures aimed at combating money laundering as early as the 1990s. The country's legal framework for combating money laundering is encapsulated in the Prohibition and Prevention of Money Laundering Act 2001 (PPMLA), which was enacted in November 2001. The delay in developing the anti-money laundering law was caused by many factors, including lack of political will.² The effect of the delay was that by the time the law was adopted it was already outdated. By that time, the Financial Action Task Force (FATF) Recommendations on which the law had been modelled were undergoing revision to incorporate important lessons learnt in tracking money laundering developments in the seven years since 1996.³ These included the increasingly sophisticated combinations of techniques that money launderers had started adopting, such as the use of front companies to disguise the true ownership and control of illegal proceeds, and an increased use of professionals to provide

advice and assistance in laundering criminal funds.⁴ Such developments required countries to expand anti-money laundering measures so that they applied beyond the financial sector.

Customer due diligence

The PPMLA requires a regulated institution to keep customer identification records and business transaction records (which should include descriptions of the transactions sufficient to identify their purposes and methods of execution) for 10 years after the termination of the business transactions.⁵ The PPMLA also gives supervisory authorities the responsibility of issuing directives that provide detailed customer due diligence requirements.⁶

As at 30 September 2006 the Bank of Zambia (BoZ) was the only supervisory authority that had issued the directives, which list documents that customers of regulated institutions must produce as proof of identity and specify the process for verifying customer names, addresses and the nature of their business. In the case of trusts, the directives require institutions to obtain additional information that would enable them to know and understand the beneficial owners.⁷

The banking sector is of greater money laundering concern to supervisory authorities than the other sectors. This is because, historically, money laundering has been predominantly conducted through the banking sector since it is the backbone of the national payments system. Through its on-site inspection function, the BoZ periodically assesses the compliance of banks with the directives. Despite the attractiveness of large deposits associated with money laundering, the BoZ receives co-operation from banks in fighting money laundering. This is because the banks realise that association with money laundering presents them with a very high reputation risk and, since banking thrives on customer confidence, many banks realise that it is in their interests to fight money laundering.⁸

Reporting obligations

Under the PPMLA, supervisory authorities and regulated institutions are required to report money laundering suspicions to the Anti-Money Laundering Investigations Unit (AMLIU).⁹ The BoZ directives provide examples of suspicious transactions and activities to guide institutions in identifying them for reporting to the AMLIU.¹⁰

Table 1 shows that the number of suspicious transaction reports (STRs) received by the AMLIU from all regulated institutions between 2003 and 2005 was lower than the number of suspicious transactions identified by banks. This indicates that there was under-reporting of suspicious transactions by both banks and other regulated institutions. This is because financial institutions generally perceive the AMLIU as focused on investigating and prosecuting suspected money laundering cases and less on analysing the information and developing a knowledge base that would assist in the development of appropriate preventive measures. This perception is reinforced by cases where the AMLIU has prematurely frozen bank accounts. This has created reluctance by financial institutions to report suspicious transactions because it is not in the interest of financial institutions to have their customers unduly harassed.

Table 1: Suspicious transactions received by the AMLIU and those identified by some banks

Year	2006 ¹¹	2005	2004	2003
Number of STRs received by the AMLIU ¹²	140	69	34	0
Number of suspicious transactions identified by banks ¹³	52	97	83	114
Value involved in the suspicious transactions (US\$)	29,018,157.44	8,659,097.85	29,899,935.99	5,463,420.67

The bias of the AMLIU towards investigation and prosecution is understandable because it is the principal agency that enforces the anti-money laundering law.¹⁴ Its functions include, among other things, collecting, evaluating, processing and investigating financial information received from supervisory authorities and regulated institutions and prosecuting money laundering offences.¹⁵

The functions of the AMLIU make it appear to be a law enforcement financial intelligence unit. It is attached to the Drug Enforcement Commission (DEC)

and the Commissioner of the DEC is also the Commissioner of the AMLIU. The terms and conditions of employment of the DEC also apply to the staff of the AMLIU. For all practical purposes, therefore, the AMLIU is just a unit within the DEC.¹⁶ This arrangement is not coincidental. It can be traced to the Narcotic Drugs and Psychotropic Substances Act that created the DEC. Historically, money laundering in Zambia was associated with drug trafficking. However, since there was no legislation against money laundering at that time, it was convenient to insert a provision to fight money laundering in the Narcotic Drugs and Psychotropic Substances Act (Mwenda 2005). As a law enforcement agency, the AMLIU has been able to respond rapidly to information that suggests money laundering.

Some of the weaknesses identified in the reporting requirements of the PPMLA are as follows:

- Section 13(1)(b) of the PPMLA requires a regulated institution to report to the AMLIU any business transaction that gives rise to reasonable suspicion that a money laundering offence has been, is being, or is about to be committed. This leaves the issue of reporting suspicious transactions open to the judgement of an individual and, consequently, depending on how vigilant that individual is, some money laundering transactions may pass without being reported. This situation therefore reduces the number of reportable transactions.
- Though it requires reporting to be made, the PPMLA does not specify any mandatory reporting threshold, whether the transaction is suspicious or not. Furthermore, the law does not specify any format in which reporting is to be made.
- The PPMLA does not prohibit the maintenance by regulated institutions of anonymous accounts or accounts in fictitious names as required by recommendation 5 of the FATF Recommendations.
- Section 14 of the PPMLA states that it is not an offence for any person to make any disclosure in compliance with the Act. This provision was intended to encourage reporting of information to the AMLIU. However, the law does not protect the person reporting against any civil liability

that may arise if sued by the person reported. This absence of proactive protection makes whistle-blowers reluctant to report to the AMLIU, and consequently the unit receives fewer STRs than expected.

In order to address the weaknesses noted in the anti-money laundering legal and institutional framework, the Financial Sector Development Plan for Zambia put forward recommendations that supervisory authorities needed to implement.¹⁷

Regulation and supervision

The PPMLA identifies supervisory authorities that have the responsibility of issuing anti-money laundering directives specific to institutions under their supervision.¹⁸ The list of supervisory authorities, though not exhaustive, specifically mentions the three financial sector regulators, namely the BoZ, the Pensions and Insurance Authority (PIA),¹⁹ and the Securities and Exchange Commission (SEC).²⁰ A host of others are also mentioned, covering a wide range of regulated institutions. Those not specifically mentioned are broadly captured in a catch-all clause that “any other supervisory authority which may be established by law as a supervisory authority”.²¹

Although the PPMLA places responsibility on supervisory authorities to issue directives to the regulated institutions, it does not provide guidance on the minimum the directives should contain.²² A statutory instrument that would be expected to provide this guidance, and which is provided for in the law, has not yet been issued. In addition, given that the PPMLA does not provide the AMLIU with any means of holding supervisory authorities accountable for implementing their anti-money laundering responsibilities, the result has been that, except for the BoZ, all the other supervisory authorities, including the SEC and the PIA, have not issued any anti-money laundering directives. The fact that two financial sector regulators have not issued anti-money laundering directives implies that a sizeable portion of the financial sector is still open to abuse by money launderers. This is because legislation on its own is inadequate to deal with sector-specific money laundering activities (Mwenda 2005).

Subsequent to the BoZ issuing the anti-money laundering directives in August 2004, it has complemented these directives by strengthening its on-site

inspection processes through the development of special inspection procedures to combat money laundering and the financing of terrorism.

However, as indicated above, the AMLIU does not hold supervisory authorities accountable for implementing the PPMLA. As a result, the enforcement of the PPMLA is less than adequate as most of the supervisory authorities have not issued specific directives to the institutions they supervise. There are therefore no benchmarks by which to evaluate the compliance of regulated institutions. Only the BoZ has issued directives and it is also the only authority that has a mandate to carry out regular on-site inspections to ensure that the institutions it supervises are complying, not only with the Banking and Financial Services Act but also with other laws of Zambia, including the PPMLA.²³ It is possible that suspicious activities that are not picked up by the BoZ during supervision go undetected.

In Zambia there is a growing recognition that, as a result of increased vigilance against money laundering in the banking sector, money launderers have been moving away from this sector and are progressively using non-bank financial institutions and designated non-financial businesses and professions to launder the proceeds of their crimes. Appropriate anti-money laundering measures should therefore be targeted at non-bank financial institutions and designated non-financial businesses and professions. In this regard, the other financial sector regulators need to follow the example of the BoZ and implement appropriate anti-money laundering measures for their respective sub-sectors.

The non-bank financial institutions that are under the supervision of the BoZ but which the BoZ has hitherto not regulated are the money transmission service providers.²⁴ As at 30 September 2006, there were three companies that provided money transmission services. These were the Zambia Postal Services Corporation (a statutory corporation) and two private international corporations, Western Union Money Transfers and MoneyGram International Money Transfers. It is generally recognised that money laundering is a major risk that these institutions bring to the financial sector. Since the BoZ has not yet licensed these institutions, its anti-money laundering directives are not applicable to them. However, the two private corporations have implemented their own internal anti-money laundering measures, which require the identification of both the sender and

recipient of the funds and place a maximum limit on the amount that can be sent and received in a day.²⁵

The BoZ has recognised the need to regulate providers of money transmission services and has drafted a Payments Systems Bill, in terms of which these institutions will be regulated when it is eventually enacted.

In the case of designated non-financial businesses and professions, it is lawyers, accountants and real estate agents that require the attention of supervisory authorities. The relevant supervisory authorities recognised by the PPMLA are the Law Association of Zambia (LAZ) and the Zambia Institute of Chartered Accountants (ZICA). These are the statutory bodies established to regulate the conduct of lawyers and accountants respectively. However, there is no supervisory authority to regulate the conduct of real estate agents. Even though an organisation of real estate agents exists, it is a loose association that has not had any meaningful impact on the conduct of real estate agents, who largely operate without any regulation or formal code of conduct.

Zambia's experience with money laundering involving real estate suggests that some professions should be appropriately supervised. A press release on 10 June 2005 by the Task Force on Corruption²⁶ indicated that a good proportion of state resources allegedly plundered by high-ranking government officials was invested in real estate. At various stages the money laundering processes involved lawyers, accountants and real estate agents. If these professions continue operating without being held accountable for implementing anti-money laundering measures by their respective supervisory authorities, money laundering through them will continue unabated. Interviews conducted with both the ZICA and the LAZ indicated that they have not issued any anti-money laundering directives or guidelines for their members. This is partly because of the absence of any accountability mechanism between the AMLIU and the supervisory authorities and partly because both the ZICA and the LAZ have not realised the urgent need to implement anti-money laundering measures in their respective areas of supervision.

In order to address some of these shortcomings in the near future, the AMLIU has proposed amendments to the PPMLA that include some of the 2003 revisions

to the FATF Recommendations, such as the need for specific measures targeted at designated non-financial businesses and professions.

However, for as long as the law does not give the AMLIU powers to hold supervisory authorities accountable for implementing anti-money laundering measures in their respective areas of responsibility, there will be minimal or no progress in fighting money laundering outside the financial sector supervised by the BoZ. This will effectively negate the anti-money laundering efforts made, and measures implemented, by the BoZ. This is because money laundering, like water, flows more to areas where it is less regulated.

Sanctions for non-compliance

The PPMLA criminalises money laundering and provides for the investigation and prosecution of money laundering offences and the punishment of individuals and institutions found guilty.

This Act places responsibility on both the supervisory authority and the regulated institutions to report to the AMLIU any information that gives them reasonable grounds to believe that a money laundering offence has been, is being, or is about to be committed.²⁷ An officer of a supervisory authority who obstructs an investigation commenced by the AMLIU is liable, upon conviction, to a fine not exceeding 100,000 penalty units (the equivalent of US\$4,334.45)²⁸ or to imprisonment for a term not exceeding five years or to both. For a regulated institution and any of its officers who fail to report money laundering suspicions, the penalty on conviction is 200,000 penalty units (the equivalent of US\$8,668.89) for the institution and 112,000 penalty units (the equivalent of US\$4,854.58) and imprisonment for a term not exceeding three years for the officer.

Other preventive measures

The AMLIU also plays another role in money laundering prevention by assisting supervisory authorities and regulated institutions with training and developing anti-money laundering training programmes. Since its establishment, the AMLIU has carried out a number of initiatives through radio and television programmes, training workshops and other publicity campaigns to sensitise the public to the wider dangers of money laundering, (Munyoro 2006).

Enforcement of anti-money laundering laws

The anti-money laundering legal framework comprises the PPMLA, the Narcotic Drugs and Psychotropic Substances Act, the Penal Code and the Anti-Corruption Commission Act.

Criminalisation of money laundering and predicate activities

The PPMLA criminalises money laundering and provides for prosecution of money laundering offences and the punishment of individuals and institutions found guilty.²⁹

The PPMLA is silent on the predicate crimes that give rise to money laundering. It does not list any predicate crimes but adopts an 'all crimes' approach to the scope of money laundering, defining money laundering in relation to the proceeds of illegal activity (Mwenda 2005). Illegal activity is defined as any activity carried out anywhere and at any time that is recognised as a crime in Zambia.³⁰ Most are activities criminalised in the Penal Code, the Narcotic Drugs and Psychotropic Substances Act, and the Anti-Corruption Commission Act.

Zambia generally has adequate laws necessary for the fight against money laundering and its predicate offences. However, adequate laws are not sufficient in themselves. Experience gained in the country between 1996 and 2006 shows that political will is equally important, albeit with its own limitations. Political will tends to be fickle because of the transience of the administrative tenure of politicians. This means, therefore, that politicians will embrace the fight against money laundering as long as it enhances their chances of winning an election. Similarly, they will abandon the fight if they believe that sticking with it is not in their interest, regardless of whether it is in the public interest. The case study below highlights the limitations of political will.

In order to ensure that money laundering and associated predicate crimes such as corruption are confronted on a sustained basis, it is therefore important that civil society and the press, among other stakeholders, get involved in holding governments accountable for the nature and pace of progress. Such a system presupposes the existence of a free press, freedom of expression and a democratic system of governance.

Furthermore, in order to ensure that politicians remain engaged, anti-corruption and anti-money laundering should become political election campaign issues, with political parties being pressurised to clarify their positions on these socio-economic vices.

Case study: the limitations of political will³¹

Dr Kashiwa Bulaya is a former permanent secretary in the Ministry of Health. The Task Force on Corruption charged him with one count of abuse of authority of office and two counts of corruption. On the first count, between August and October 2001, Dr Bulaya was alleged to have abused his authority of office by disregarding tender procedures by engaging Butico A1, a company that he indirectly controlled, thereby giving advantage to himself.

On the second and third counts he was alleged to have corruptly received cash payments equivalent to about US\$4,200 and US\$222,500 from Angelov Yotsov of Butico A1 as gratification, inducement or reward for himself for having engaged Butico A1 to supply medical drugs to the Ministry of Health.

On 17 May 2005 the Director of Public Prosecutions withdrew the case by entering a *nolle prosequi*. A close examination of the *nolle prosequi* revealed that it was not based on any justifiable reasons – such as when evidence ceases to be available, or new evidence becomes available that changes the state’s perspectives on a case, or information emerges that indicates that prosecution may damage a country’s relations with another country, or when pursuing the case may embarrass the complainant.

The state did not give any valid reason for withdrawing the case, but the public took note that Dr Bulaya had testified favourably testified for President Mwanawasa in the presidential election petition that followed his inauguration in 2001. In the absence of a convincing explanation from the state, the public became increasingly convinced that President Mwanawasa, who had made fighting corruption his priority, was, in relation to Dr Bulaya, unwilling to see the case prosecuted, apparently for reasons not related to the public interest.

After a month of public outcry and news coverage, especially in the *Post* (an independent newspaper), about the state’s withdrawal of Dr Bulaya’s case, the public prevailed and Dr Bulaya was rearrested on 20 June 2005. On 30 September 2006 his trial was still in progress.

Investigation of money laundering and predicate activities

The AMLIU is the leading agency for implementing the anti-money laundering law, as it is responsible for carrying out investigations and prosecution of money laundering offences and co-ordinating with other law enforcement agencies.³²

Over the three years to 2006, the AMLIU has improved its law enforcement capacity by training investigative and prosecutorial staff. This has resulted in more than a threefold increase in the number of cases prosecuted between 2004 and 2006, as can be seen in Table 2.

Table 2: Overview of the law enforcement capacity of the AMLIU

Year	2006 ³³	2005	2004	2003
Number of investigative and prosecutorial employees	21 ³⁴	23	32	
Number of investigations	528	188	178	89
Number of arrests	165	119	25	
Number of cases prosecuted	86	57	22	
Number of convictions	13	6	4	
Value of property forfeited to the state (US\$)	120,699.49	72,295.04	1,010,424.57	

Source: Anti-Money Laundering Investigations Unit, 27 October 2006

However, the AMLIU has not been able quickly enough to replace members of staff lost through resignations, dismissals and death. This has had the effect of constraining its law enforcement capacity.

In addition to carrying out successful prosecutions that resulted in the proceeds of crime being forfeited to the state, the AMLIU also prevented the loss of government resources by blocking fraudulent payments to companies that did not supply goods or services and yet were claiming payments from the government. The payments blocked were an equivalent of about US\$6,438,019.43 in 2005 and US\$2,364,823.47 in 2004 (Saboi 2006).

The majority of cases investigated by the AMLIU involved fraudulent supplies of goods and services to the government, which resulted in the government losing substantial amounts of money. Money laundering cases leading to the loss of government funds typically involve, at some point, the corrupting of a government official who, in turn, ignores the fraud or facilitates it in some way. The next case study illustrates this. Corruption is one of the significant predicate crimes of money laundering in Zambia.

Case study: corruption and money laundering (Saboi 2006)³⁵

Lindon Mfungwe set up nine companies, all of which he owned jointly with his wife and children. He is alleged to have corrupted officials at the Office of the Registrar of Companies in order to register companies that had, in some cases, children younger than 10 years old as directors.

The aim of setting up these companies was purportedly to supply foodstuffs to government departments, especially the Ministry of Defence. In some of the transactions he was paid amounts exceeding US\$250,000 on the pretext that he had supplied goods to the government when in fact he had not. The money was deposited in the bank accounts of his front companies, of which he was the sole signatory.

During the time of the theft, he built a hotel that was seized by the AMLIU when it commenced its investigations against him. When Mr Mfungwe also learnt that two of his companies, namely Capital Hotel

Limited and Capital Holdings Limited, were under investigation, he transferred the equivalent of about US\$250,000 from these companies to another company called Bellwood Clinic Limited, an entity in which he had no visible interest, on 16 January 2004. Three days later he withdrew an equivalent of US\$6,250 from the company. The AMLIU saw that these companies were just part of the money laundering chain and seized the funds that had been transferred to Bellwood Clinic Limited.

In the appeal case by Bellwood Clinic Limited (appeal number 169/99), in which the company requested the High Court to quash the decision of the AMLIU to seize the funds, Judge Tamula Kakusa refused to grant the request and commended the AMLIU for its timely action against money laundering.

Mr Mfungwe died before his money laundering case could be concluded in court.

Although Zambia has an Anti-Corruption Commission (ACC), which was established in 1980, its efforts have been largely successful in lower-level corruption cases. At various stages it was either prevented from investigating senior government officials or there was an absence of political will to fight corruption. Corruption is believed to have become widespread during the tenure of Zambia's second republican president. Despite being nominally free from the direction or control of any person or authority in the performance of its duties,³⁶ in practice, the ACC was subjected to political interference. This is largely because between 1996 and 2002 senior government officials, including the then President, were involved in alleged corrupt practices themselves. This is why Mr Levy Patrick Mwanawasa, after becoming President, took an immediate step to address the problem of corruption by constituting a Task Force on Corruption in 2002 to investigate corrupt practices that had allegedly occurred during the previous administration (Mwanawasa 2004).

Since 2002 the political will against corruption and money laundering has increased. At the highest levels of political office, corruption is now recognised not only as a crime that retards economic development but also as a recipe for

civil unrest and political disharmony (Mwanawasa 2004). In 2002 the President commissioned a governance baseline survey to measure corruption perceptions in Zambia (Mwanawasa 2004). The government used the survey report to start developing a national corruption prevention policy and strategy. The drafting of this policy document involved wide consultations with a cross section of stakeholders. This anti-corruption policy document is expected to provide guidance and strategies for dealing with corruption, whose effects have been extremely harsh on poor people (Mwape 2006).

Owing to the increased political will to fight corruption, the ACC has been operating noticeably without political interference since 2002. As a result, it has been able to attract, recruit and train more prosecutorial staff. This, in turn, has led to an increase in the number of cases prosecuted, as shown in Table 3.

Table 3: Overview of the law enforcement capacity of the Anti-Corruption Commission

Year	2006 ³⁷	2005	2004	2003
Number of investigative and prosecutorial employees	97	82	68	67
Number of investigations	396	491	499	604
Number of arrests	67	30	46	
Number of cases prosecuted	67	30	46	
Number of convictions	10	11	20	
Value of property seized/forfeited to the state (US\$)	Estimate not available	Estimate not available	Estimate not available	Estimate not available

Source: Anti-Corruption Commission, 27 October 2006

Money laundering in Zambia is increasingly becoming the reverse side of corruption. There is therefore a need to synchronise the national anti-money laundering strategy with the national corruption prevention strategy. Both documents must also be integrated in the fifth national development plan in order for the anti-money laundering and anti corruption programmes to be included among national priorities and for them to receive adequate attention and funding for implementation.

Prosecution and punishment

The prosecution of money laundering and predicate crimes has been slow. The formation of the Task Force on Corruption had raised public expectations that the prosecution process would be faster since a dedicated investigation and prosecution team had been assembled.

Three years after the establishment of the task force, the public started losing hope that it would live up to their expectations. Court processes were protracted because of many adjournments. There was a growing public conviction that the creation of the task force had simply been a political manoeuvre by the President to shore up public support for himself and that he did not intend to see the alleged corrupt senior officials convicted. Voices calling for the dissolution of the task force started multiplying. This compelled the chairperson of the Task Force on Corruption to issue a public statement to counteract this growing public perception. He outlined the progress the task force was making in tracing and seizing property connected to the plunder of national resources, and also appealed to the public to be patient as the task force's job was complex, risky and time consuming.³⁸ Some of the typical delays in disposing of cases handled by the task force are illustrated in the case study below.

Although some of the delays in completing the prosecutions are justifiable, it cannot be denied that the lack of adequate training of investigation and prosecutorial staff is a significant factor.

Case study: the abuse of office by Samuel Bwalya Musonda³⁹

Samuel Bwalya Musonda was the managing director of the state-owned Zambia National Commercial Bank. During the period from June 1998 to September 2001 he abused his position by paying out money that amounted to about US\$2.2 million from a suspense debtors account in order to obtain property, wealth, advantage or profit directly or indirectly, contrary to sections 37(2)(a) and 41 of the Anti-Corruption Act 1996. Some of Mr Musonda's activities involved money laundering. However, he could not be charged with money laundering offences as his alleged crimes happened before the PPMLA became law.

The alleged offences benefited high-ranking government officials including the former President, Dr Frederick Chiluba, and the former head of intelligence, Mr Xavier Chungu. Investigations of these offences began in 2002 when President Mwanawasa established the Task Force on Corruption. The investigation alone took almost two years before it was concluded in 2004. Mr Musonda was charged with 50 counts of abuse of authority of office.

On 27 April 2004 the Director of Public Prosecutions granted consent for the case to be prosecuted. The trial took more than two years. Judgement in the case, in which Mr Musonda was found guilty on 44 counts, was delivered on 10 October 2006, almost four years after the investigation began. Mr Musonda's house, which had been bought using funds indirectly drawn from the suspense debtors account at the bank, was seized by the Task Force on Corruption during investigations and was eventually forfeited to the state when Mr Musonda was found guilty.

Tracing and confiscating the proceeds of crime

Whatever the nature of predicate crime, if the ultimate objective is economic benefit, the law enforcement authorities can succeed in reducing the motivation for engaging in such crimes by putting in place mechanisms for tracing and recovering the proceeds. Zambia pursues both civil and criminal forfeiture of property associated with money laundering.

Section 15 of the PPMLA provides for the civil seizure of property suspected of having been derived or acquired from the proceeds of crime.⁴⁰ If the seized property is not claimed or if there is no prosecution that has been instituted under any written law, such property is liable to be forfeited to the state. This can be done by the Commissioner of the DEC applying to the court for forfeiture. The commissioner is required to give public notice indicating that the property seized is liable to be forfeited to the state if not claimed within three months.⁴¹ Civil seizure ensures that suspected money launderers are promptly deprived of the use of illegitimate gains while the court process, which normally takes long, is under way.

If it is impractical for the AMLIU to seize the property before conviction, then once the suspect has been convicted of a money laundering offence, any property which was derived from the proceeds of crime becomes liable to forfeiture by the court.⁴²

Consistent with the principle of depriving criminals of economic benefits derived from their illegal activities, the Anti-Corruption Commission Act allows the Director-General of the ACC to direct any person not to dispose of property suspected to be connected to corruption.⁴³ In addition, any money, property or thing of any description, which was the subject of corruption investigations and was recovered by the ACC, vests in the state if it is not claimed within three months of the commissioner giving public notice of possible forfeiture.⁴⁴

The Narcotic Drugs and Psychotropic Substances Act also provides for the seizure of property used in or derived from a drug trafficking offence.⁴⁵

The AMLIU will thus seize property connected to any crime, while the specialised agencies such as the ACC and the DEC only deal with property acquired from corrupt practices and drug trafficking respectively.

As indicated above, the PPMLA provides for the co-ordination of forfeiture by recognising that where a prosecution has not been instituted under any written law, the AMLIU will take the lead in effecting forfeiture. If a prosecution has been initiated by another law enforcement agency, the AMLIU would leave the forfeiture to be dealt with by that agency. In some instances the AMLIU conducts joint prosecutions with other agencies so as to improve the chances of a speedy seizure of the proceeds of crimes.

This means, therefore, that the AMLIU, the ACC, the DEC and the Zambia Police Service can effect seizure and deal with eventual forfeiture of the proceeds of crime. As the AMLIU is responsible for the enforcement of anti-money laundering law, it is ideally placed to co-ordinate the recovery of any proceeds of crime. However, there is a need to review the PPMLA, the Penal Code, the Narcotic Drugs and Psychotropic Substances Act and the Anti-Corruption Commission Act so that all the anti-money laundering provisions in these pieces of legislation are harmonised to facilitate easy co-ordination among the law enforcement agencies.

In practice, the level of co-ordination between the AMLIU and the other law enforcement agencies is hampered by difficulties in inter-agency communication. The task force type of law enforcement provides a model for integrating disparate agencies, and could resolve some of the recurring problems.

Measures to foster transnational co-operation

The efforts Zambia has made to foster transnational co-operation in its anti-money laundering activities have been influenced by its membership of regional and international bodies.

Awareness of global trends

The Zambian government has taken steps to ratify a number of United Nations (UN) conventions that have a bearing on the fight against money laundering. These conventions have provided a foundation for the development of domestic laws aimed at addressing money laundering challenges.

In May 1993 Zambia ratified the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. This was an important step as at the time the most prevalent predicate crime associated with money laundering was drug trafficking. The ratification culminated in the adoption in 1993 of the Narcotic Drugs and Psychotropic Substances Act, which first criminalised money laundering. However, the Act narrowly defined money laundering as the proceeds of drug trafficking.⁴⁶

In view of the threat posed by terrorism and the realisation that terrorists disguise

the sources of their finances, Zambia has ratified the International Convention for the Suppression of the Financing of Terrorism (1999). However, this convention has not yet been translated into a domestic law.

In 1996 the International Monetary Fund (IMF) and the World Bank adopted the anti-money laundering recommendations of the FATF as the international standards for combating money laundering and terrorist financing.⁴⁷ Their technical assistance missions to Zambia have therefore often included assessments of how Zambia is implementing the FATF Recommendations. Generally, the IMF and World Bank have provided various forms of technical assistance aimed at raising the anti-money laundering regime in Zambia to international standards.

International co-operation

Zambia is a member of the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG) which is a FATF-style regional body whose members have agreed to adopt and implement the FATF Recommendations; to apply anti-money laundering measures to all serious crimes; and to implement any other measures contained in multilateral agreements and initiatives to which they subscribe for the prevention and control of the laundering of the proceeds of all serious crimes. As a condition of membership, ESAAMLG members are obliged to participate in a peer review process called 'mutual evaluations'. Through this process, ESAAMLG members assess each other against the FATF standards, and develop plans to enhance each member's compliance.

Zambia has not yet been subjected to the ESAAMLG peer review process. The country offered to be reviewed in 2004 but the review has not yet taken place. ESAAMLG has scheduled the review for the second half of 2007. However, the country is lagging behind in the implementation of the first strategic objective of ESAAMLG, which requires member countries to have developed national anti-money laundering strategies by July 2006. An anti-money laundering task force to lead efforts in co-ordinating national anti-money laundering efforts was created in October 2005 after Zambia assumed the presidency of ESAAMLG in August 2005. By the end of June 2006 the task force had drafted a national anti-money laundering strategy document, which outlined priority anti-money laundering measures to be implemented. Once the government approves it, the

anti-money laundering strategy document will serve as the basis for monitoring and evaluating progress in implementing anti-money laundering measures across different sectors of the national economy.

Mutual assistance processes

Recognising the international dimensions of money laundering and, therefore, the need for international co-operation in tackling it, Zambia ratified the UN Convention Against Transnational Organised Crime and its protocols in 2005.

The Mutual Legal Assistance in Criminal Matters Act facilitates legal assistance in criminal matters involving other countries. However, this is a law in need of revision in order to broaden the scope of permissible assistance. Currently, legal assistance in criminal matters can only be provided to countries that have signed a treaty with Zambia. In addition, the Act does not provide Zambia with comprehensive powers to request assistance from other countries and it also does not provide for a mechanism to facilitate the bilateral and multilateral sharing of proceeds of crime and assets forfeited as a result of co-operative efforts.

Transnational structures to trace and confiscate the proceeds of crime

Zambia has ratified a number of important conventions and protocols that provide mechanisms for the identification, tracing, freezing and confiscation of the proceeds of crime involving other countries. These include:

- the Southern African Development Community (SADC) Protocol on Combating Illicit Drug Trafficking;
- the SADC Protocol against Corruption; and
- the African Union Convention on Preventing and Combating Corruption.

Zambia still has to ratify the UN Convention Against Corruption that came into force at the end of 2005. Ratification of these conventions and protocols is an important first step. However, there is a need for Zambia to demonstrate further commitment to the application of these conventions and protocols by translating them into domestic laws and regulations.

Conclusion

Over the last five years, since Zambia enacted the PPMLA in 2001, progress in the implementation of anti-money laundering measures has been ambivalent. Supervisory authorities for a number of the vulnerable sectors have not yet issued anti-money laundering directives. Given that money laundering as an evolving crime always seeks out cracks in the supervisory and regulatory regime, there is a need for supervisory authorities such as the ZICA, the LAZ, the PIA and the SEC to implement anti-money laundering measures in their respective areas of responsibility. If this does not happen, combating money laundering could become elusive. The AMLIU can still play a significant role in re-energising implementation activities by assuming a more aggressive posture towards supervisory authorities that have not yet discharged their responsibilities under the PPMLA.

With a national anti-money laundering task force established in 2005 and a draft anti-money laundering strategy document soon to be finalised, there are fair prospects that the tempo of implementing anti-money laundering measures will again increase. However, this will greatly depend on the continued existence of political will and the awareness by citizens of their democratic right to hold the government accountable for combating money laundering and its various predicate crimes.

Notes

- 1 As at 30 September 2006 the draft Country Strategy Paper on Anti-Money Laundering and the Combating of Financing of Terrorism was due to be discussed by the Anti-Money Laundering Authority.
- 2 It is believed that the government delayed the enactment of the PPMLA because of self-interest by influential high-ranking government officials in the administration of Dr Frederick Chiluba who at the time were involved in alleged laundering of funds corruptly obtained from the state. In 2002 the government of Mr Levy Mwanawasa brought charges against a host of former government officials, including the former President, the Director of the Zambia Intelligence and State Security Service, the former Minister of Finance, defence chiefs and their collaborators in the financial system. However, as the PPMLA was passed towards the end of Dr Chiluba's second and last term as President after the alleged offences had been committed, the accused have not been charged with any money laundering offences as the law cannot be applied retrospectively.

- 3 The Financial Action Task Force Forty Recommendations on Money Laundering, 2003.
- 4 Ibid.
- 5 PPMLA, section 13.
- 6 Ibid, section 12(4).
- 7 BoZ Anti-Money Laundering Directives, directives 7–9.
- 8 In 2002 the BoZ closed down the United Bank of Zambia after it emerged that the latter was unable to meet its financial obligations as they fell due. This was because other banks had severed their commercial relationships with it and most of the bank's depositors had started withdrawing their funds when they became aware that four of the bank's directors had been arrested for alleged involvement in money laundering.
- 9 PPMLA, sections 12 and 13.
- 10 BoZ Anti-Money Laundering Directives, directive 11.
- 11 The figures for 2006 are as at 30 June 2006.
- 12 The numbers of STRs were obtained from the AMLIU on 27 October 2006.
- 13 The numbers of suspicious transactions identified are based on 11 banks, out of the 13 operating in Zambia, that responded to the questionnaire.
- 14 PPMLA, section 5.
- 15 Ibid, section 6.
- 16 Drug Enforcement Commission 2004 Annual Report, p. 3.
- 17 The Financial Sector Development Plan is available from <www.boz.zm/FSDP2004.htm>.
- 18 PPMLA, section 12.
- 19 The Pensions and Insurance Authority supervises pension funds and insurance companies, including insurance brokers and loss adjusters.
- 20 The Securities and Exchange Commission supervises capital market participants such as stockbrokers, stock dealers and investment advisers.
- 21 PPMLA, section 2.
- 22 Ibid, section 12.
- 23 Banking and Financial Services Act, section 78.

- 24 Section 2 of the Banking and Financial Services Act recognises a money transmission service as a financial service.
- 25 The maximum amounts of money a person can send and receive through Western Union Money Transfer per day are the equivalent of US\$1,000 and US\$5,000 respectively. The corresponding limits for MoneyGram are US\$5,000 and US\$10,000. However, Zambia Postal Services does not have any limits as it conducts only in-country money transfers.
- 26 The Task Force on Corruption was created in 2002 to investigate suspected cases involving high-ranking government officials in the administration of Dr Frederick Chiluba who are alleged to have corruptly obtained and laundered funds of the Zambian government, estimated to be worth around US\$400 million. See also <www.statehouse.gov.zm>.
- 27 PPMLA, sections 12 and 13.
- 28 A penalty unit is equivalent to ZMK180 and the exchange rate was K4,152.78/US\$ on 30 September 2006.
- 29 PPMLA, sections 7–11.
- 30 Ibid, section 2.
- 31 The material in the case study is partly based on the court proceedings in the case of *The People v Kashiwa Bulaya*. As at 30 September 2006, the case was still before the court.
- 32 Prohibition and Prevention of Money Laundering Act, section 6.
- 33 The figures for 2006 are as at 30 June 2006.
- 34 The reduction in the number of employees was largely due to resignations and dismissals.
- 35 See also *Bellwood Clinic Limited v Drug Enforcement Commissioner and Attorney General*, Appeal No. 169/99.
- 36 The Anti-Corruption Commission Act, 1996, section 5.
- 37 The figures for 2006 are as at 30 June 2006.
- 38 Press statement by the chairman of the Task Force on Corruption, released on 10 June 2005.
- 39 See *the People v Samuel Bwalya Musonda*, SSP/99/2004.
- 40 Property is defined in section 2 of the PPMLA as including "money and all other property, real or personal, movable or immovable including things in action

and other intangible or incorporeal property wherever situated and includes any interest in such property.”

- 41 PPMLA, section 18.
- 42 Ibid, section 17.
- 43 Anti-Corruption Commission Act, Section 24.
- 44 Corrupt Practices (Disposal of Recovered Property) Regulations, 1986.
- 45 Narcotic Drugs and Psychotropic Substances Act, 1993, sections 31–49.
- 46 Ibid, section 22.
- 47 The Financial Action Task Force Forty Recommendations became the internationally accepted anti-money laundering standard in 1996 after having been endorsed by more than 130 countries.

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CHAPTER 3 MONEY LAUNDERING IN ZIMBABWE, 2004 TO 2006

Bothwell Fundira

Introduction

This chapter looks at money laundering in Zimbabwe between 2004 and 2006. It reviews the typologies of money laundering observed during this period and critically examines the responses that have occurred in the country. Anti-money laundering regulations include directives issued by regulatory authorities such as the central bank and a framework introduced through relevant statutes. The chapter also examines the adequacy of the country's preventive and enforcement mechanisms. Finally, it considers the measures to facilitate international co-operation to combat money laundering.

Background

The causes and nature of money laundering in Zimbabwe need to be seen in the context of the country's social, political and economic environment. This is dominated by an economy that is under persistent siege from internal and external forces. The most visible impact is the country's rapidly falling currency: at the end of August 2006, inflation reached 1,204.6%, the highest in the world. There are no signs of a significant improvement in this rate as the economic situation continues to worsen.

Since 2003 banknotes have been unable to keep pace with inflation and as a result bearer cheques (which were meant to be temporary) were introduced in order to meet the ever increasing demand for cash. Bearer cheques have created their own legal and practical problems, some of which are connected to money laundering. The security features on the bearer cheques are inadequate and there have been several reports of counterfeit substitutes being used. The

illegality of taking bearer cheques out of the country was successfully challenged in the matter of Richard Floyd Mambo and Nigel Mahoko.¹

The introduction of bearer cheques epitomises the extent of chaos in the economy and has also provided new opportunities for illegal speculative conduct and money laundering. The country’s rampant inflation has created an environment where capital is invariably eroded if it is invested in the traditional productive sector. Individuals and corporations stand to gain more by dealing in the illegal markets, especially the foreign exchange market. It is common cause that large corporate entities, including organisations affiliated to the fiscus, have raised foreign currency in the illegal markets in order to survive. To do this they have typically falsified records, which creates a fertile ground for a wide range of illegal activities since the audit trail is conveniently obliterated.

The use of the banking system is a challenge in Zimbabwe. In August 2006 the Governor of the Reserve Bank launched what he called Project Sunrise. Individuals and organisations were given a window period of 21 days to 31 August 2006 to exchange old bearer cheques for new ones. When individuals wished to deposit amounts of more than Z\$100,000,000 (old currency, equivalent to UD\$1,000)² they had to produce proof of the source of the funds. Earlier, the governor had claimed that of the Z\$43 trillion issued by the bank, only Z\$10 trillion (or less than 25%) was in circulation in the official financial system. At the end of the exercise, Z\$10 trillion worth of bearer cheques could not be accounted for, suggesting that the funds were in the underground markets and had never resurfaced. It has long been evident that a lot of money is circulating in the informal and sometimes illegal markets, which is perhaps not surprising given the high rate of inflation and the average interest rates of less than 100% per annum.

More worrying is the fact that there are already documented cases of forged bearer cheques being used in retail outlets.³ The terrain in Zimbabwe is thus fertile for money laundering to take place and flourish.

In its analysis of money laundering activities during the period 2004 to 2006, this chapter follows Reuter and Truman (2004) in distinguishing three kinds of scenarios. The first is where the institution involved was corrupt from inception, or corrupted by subsequent changes in ownership or changes in the economic environment. The use of such companies to launder the proceeds of crime is

inevitable. The second scenario involves institutions with “willing or rogue employees who provide [money laundering] services on an ad hoc and non institutionalised basis”.⁴ In other words, the leadership of the institution is not corrupt, but the institution has been infiltrated by corrupt insiders. The third scenario consists of institutions that facilitate money laundering transactions unwittingly, either because they do not have mechanisms to detect money laundering or because of dereliction in applying the mechanisms that do exist.

Money laundering – the analytical framework

The anti-money laundering pillars discussed in the introduction to this monograph will be used as the analytical framework to analyse money laundering in Zimbabwe.

Anti-money laundering mechanisms should ideally comprise structures of prevention, enforcement and international co-operation. The table below shows the anti-money laundering pillars as understood worldwide at the moment.

Table 1: Anti-money laundering pillars

Money laundering preventive measures	Anti-money laundering enforcement measures	Measures to foster trans-national co-operation
Customer due diligence	Criminalisation of predicate (underlying criminal) acts and of money laundering	Awareness of global trends
Reporting obligations	Investigation of predicate activities and of money laundering	Co-operation agreements; real-time transnational economic crime situation reviews
Regulation and supervision	Prosecution and punishment	Effective mutual assistance processes
Sanctions for non-compliance	Tracing and confiscating proceeds	Transnational structures to trace and confiscate proceeds

The extent to which these structures exist in Zimbabwe can best be examined against the background of the typical money laundering typologies in the country.

Typical money laundering activities in Zimbabwe, 2004 to 2006

The banking sector scandals

At the end of the chapter there is an analysis of whether the new infrastructure will be able to prevent similar occurrences.

Events in the financial services sector indicate that financial institutions are at the very core of activities conducive to money laundering. A critical point for the banking sector was the maiden monetary policy statement by the then newly appointed governor, Gideon Gono, on 18 December 2003. This statement changed the financial landscape in the country overnight, as it instructed banks to refrain from undertaking non-core activities and withheld liquidity support for banks that engaged in such activities. In particular, banks were to stop participating in the illegal foreign exchange market. The monitoring of banks and financial institutions by the central bank was to be more stringent, and asset management firms that had hitherto been unregulated now had to obtain licences from the central bank after a rigorous screening process.

As already indicated, institutions can be classified into three categories. The first consists of those whose business models are consistent with money laundering activities right from the outset. An example of this is ENG Capital Asset Management (ENG), whose promoters set up a pyramid scheme and offered the gullible investment public unrealistically high interest rates in order to lure depositors. The promoters' intentions in setting up this asset management company appeared to be sinister from the start. The role of lawyer Oscar Ziweni in misappropriating funds from the institution added an extra dimension to the money laundering puzzle. He tried to use his privileged position to advantage but was charged in his personal capacity. Some of these institutions were set up with good intentions but were taken over by other managers and from there on money laundering took place. Century Discount House was taken over by ENG, and was then used to raise funds from the

public. The net result was that depositors lost their funds, which were applied to non-core activities.

The second category of institution comprises those that are set up legitimately and operate as such for a long period. Corrupt employees then see an opportunity to make money by engaging in money laundering activities. First Mutual, which had been in operation for decades, demutualised in 2004. A special-purpose vehicle was set up by management to enable them to subscribe for 20% of the new company's equity. The case study below illustrates how back-to-back financial arrangements were set up with third parties in order to finance management. As a result, First Mutual policy-holders lost money, as did depositors in Royal Bank. Investors in First Mutual Asset Management lost their investments because the company had to be liquidated as a result of the back-to-back loans.

The third category involves institutions that unwittingly facilitate the laundering of funds. Century Discount House was disposed of to ENG because the Century Group needed liquidity to finance its operations. After the takeover, ENG used Century Discount House (whose former parent company was listed on the Zimbabwean stock exchange) to obtain deposits, which were used in non-core activities, including the purchase of shares in Century Holdings. Extravagant gifts were paid to dealers in the market in order to attract deposits to the institution.

National Discount House (NDH) extended deposits to Ellan Susie and ENG in an arrangement that appears to have been done in good faith, but ran into problems as indicated in the following case study.

Case study: ENG

Within days of the monetary policy statement of December 2003, serious cracks developed in the entire financial market. The ENG case study graphically shows how money laundering took place in the banking sector and affected no fewer than six financial institutions. In these cases the laundering basically occurred through the abuse of depositors' funds.

After the December 2003 monetary policy statement, ENG placed advertisements in the press to the effect that their business plan would not enable their company to survive the economic challenges introduced by the new economic order. Investors who had placed money with the institution in the hope of above-average market returns were advised in the advertisements that their funds would be converted to equity.

The founding directors, Gilbert Muponda and Nyasha Watyoka, were arrested by the police for fraud. Their lawyer, Oscar Ziweni, was 'specified' in terms of the Prevention of Corruption Act. He disappeared for some time but resurfaced after his relatives paid Z\$124 million (old currency) to some of the creditors of ENG. He died a few months after his reappearance and so a criminal case against him was never concluded. Ordinarily, lawyers are protected by lawyer-client confidentiality, but in this particular case the lawyer was specified for not handing over money that belonged to creditors.

At about the same time, First Mutual – the second largest insurance company after Old Mutual – demutualised. The management of First Mutual formed a company, Capital Alliance (Private) Limited (hereinafter referred to as Capital Alliance) in order to purchase a 20% equity share in First Mutual. ENG became one of the largest investors in Capital Alliance. It is significant that First Mutual Asset Management invested an amount in ENG that was equivalent to the amount that led to the latter's demise.

Royal Bank is being sued by First Mutual for more than \$60 billion (old currency.) Because other efforts failed, First Mutual Asset Management applied for the liquidation of Royal Bank. In order to protect itself against the inevitable run on deposits, Royal Bank issued press advertisements to the effect that the amount claimed was security for funds invested on behalf of the management in Capital Alliance. On 4 August 2004 at 18:00, Robert McIndoe of the chartered accountancy firm Ernst and Young was appointed curator of Royal Bank. On the same day, the acting Minister of Finance placed First Mutual under the control of KPMG, another firm of chartered accountants. KPMG

were to be given the task of investigating the company's affairs, while the powers of management of First Mutual were placed under the control of the Commissioner of Insurance. During this period the company could not underwrite new insurance policies and the powers of all directors and management personnel were removed.

The top management of First Mutual are accused of setting up back-to-back arrangements with third parties to finance the purchase of shares from the company and indirectly using depositors' funds as collateral security. This is what is at the centre of a court case between First Mutual Limited and Royal Bank.⁵

Like other institutions, NDH placed money on deposit with ENG. It also lent some money to Ellan Susie, an unregistered financial institution. NDH could not pay depositors for some time and was closed for more than a year, after which a reconstruction scheme was implemented, which included converting depositors' funds to equity.

Century was a relatively new diversified financial services group with interests in leasing, asset management and commercial banking. It also had a discount house operation. In order to recapitalise, Century sold the discount house to ENG, but for more than six months it continued to operate as Century Discount House as it had not obtained regulatory approval to transfer its ownership to ENG. The directors of ENG purchased a significant number of Century Discount House shares, and when it was placed in liquidation they owned more than 20% of the publicly quoted Century Holdings Group. The management of Century Discount House were charged with negligence and acting contrary to their duties in terms of the Companies Act by letting the new owners divert funds for speculative activities.

In his monetary policy statement of 27 July 2004, the Governor of the Reserve Bank indicated that there were 41 banking institutions in the country, of which five were under curatorship, two were in liquidation, and four were under the Troubled Banks Fund. The reasons for these alarming figures are indicated above.

The same policy statement indicated that up to June 2004, an amount of US\$778.6 million from export earnings had gone through the normal banking channels compared to US\$301 million for the whole year to 31 December 2003.

Prevention, enforcement and international co-operation

The cases cited above involve actual or suspected money laundering offences. It is significant that none of the suspects has been charged with money laundering. This is mainly because many of the cases occurred in 2004 before comprehensive money laundering legislation had been enacted, but also because the law enforcement agencies were not familiar with money laundering and may therefore have opted to avoid prosecution.

The cases illustrate that international co-operation is weak because in all of them there was no mutual assistance to ensure that suspects were brought to book. One of the suspects is a senior lecturer at a prestigious university in South Africa. A senior official in the Attorney-General's office confirmed that no efforts had been made to obtain assistance from South Africa to bring this individual and others back to Zimbabwe to stand trial.

The prevention pillar

As indicated in the Introduction, the prevention pillar comprises legislation and regulations that are enacted or issued from time to time. Its purpose is to prevent the commission of money laundering by both individuals and organisations. The following legislation has been passed in Zimbabwe to criminalise money laundering:

1. The Serious Offences (Confiscation of Profits) Act criminalised money laundering as far back as the early 1990s. According to section 63 of the Act, a person or body commits money laundering if he or it

engages directly or indirectly, in a transaction, whether in or outside Zimbabwe, which involves the removal into or from Zimbabwe, of money or other property which is the proceeds of a crime; or receives, possesses, conceals, disposes of, brings into or removes

from Zimbabwe, any money or other property which is the proceeds of crime: and knows or ought to have reasonably known that the money or other property was derived or realised, directly or indirectly from the commission of an offence.

This fails to criminalise money laundering appropriately. Goredema (2003) defines money laundering as "[a]ll activities aimed at disguising or concealing the nature or source of, or entitlement to money or property derived from criminal and/or unlawful activities". Section 63 of the Serious Offences (Confiscation of Profits) Act is too general and as a result it is difficult to achieve a successful prosecution under the Act. Money laundering typically involves the placement of the proceeds of an underlying offence, followed by moving the proceeds into a number of accounts (if deposited in a financial institution), and integrating them in the legitimate economy to avoid detection. The simplistic definition of money laundering in section 63 renders the Act outmoded in terms of preventing money laundering. In addition, the Act does not identify accountable institutions or specify reporting obligations.

2. The Prevention of Corruption Act is important because it criminalises corruption, which is typically a predicate offence for money laundering. The Act provides for the appointment of a special investigator who must carefully examine the affairs of the suspect individuals or organisations and report to the minister. However, although corruption is usually a predicate offence for money laundering, the Act does not deal with money laundering.
3. The Presidential Powers (Temporary Measures) (Amendment of Criminal Procedure and Evidence Act) Regulations 2004 were ostensibly issued to facilitate investigations in cases of economic crime. Because money laundering falls into the category of economic crime the regulations are used as part of the anti-money laundering prevention pillar.

The following explanatory note aptly summarises the aim and philosophy of the regulations:

The amendment to the Criminal Procedure and Evidence Act effected by these regulations is intended to facilitate the investigation and prosecution of crimes affecting the economic interests of Zimbabwe. Section 2 of the regulations replaces the proviso to section 32(2) of the Criminal Procedure and Evidence Act to the fol-

lowing effect: in order to detain someone for seven days' detention without possibility of bail for crimes affecting the security or economic interests of Zimbabwe, the court before which the person is brought must be satisfied that he or she was arrested in any of the circumstances specified in paragraph (a), (b) or (c) of subsection (1) of section 25 of the Criminal Procedure and Evidence Act, that is: the person must have committed the offence in the presence of the arresting officer; or (b) the arresting officer had reasonable grounds to suspect the person arrested of having committed the offence in question; or (c) the arresting officer found the person attempting to commit the offence, or clearly manifesting an intention to do so. If the court is so satisfied, the fact that there is no *prima facie* case against the accused at the time when the order or warrant for the further detention is sought is irrelevant.

The effect of the regulations was to enable the police to detain individuals involved in corruption, money laundering, illegal grain transactions and foreign exchange transgressions for a period of up to 21 days in order to complete their investigations. The courts were stripped of the power to release the suspects on bail or otherwise. The regulations have been criticised because they encourage arrest in order to investigate. In practice, individuals have been held for lengthy periods without the option of bail, only to be released for lack of evidence.

4. The Bank Use Promotion and Suppression of Money Laundering Act (Act 2 of 2004) was passed to consolidate legislation and regulations that were fragmented to the extent that they negated both the prevention and the enforcement of the anti-money laundering regime. This is why it refers in some sections to the Serious Offences (Confiscation of Profits) Act concerning the implementation of the law. To date it is the most comprehensive piece of legislation in the country on money laundering. The Act tries to promote the use of the banking system so that an audit trail can be established to detect money laundering.

The Act (section 2) defines 'money laundering' as follows: "money laundering or laundering the proceeds of a serious offence means any act, scheme, arrangement, device, deception or artifice whatsoever by which the true origin of the proceeds of any serious offence is sought to be hidden or disguised."

The Act names the accountable institutions that are required to observe 'know your customer' principles, and it sets up the Financial Intelligence

Inspectorate and Evaluation Unit (FIE Unit), the repository for money laundering information. It also provides for witness protection. Section 4 of the Act gives the purpose of the FIE Unit as being to encourage the use of non-cash transactions, to receive suspicious transactions and report these to law enforcement agencies, to keep statistics of suspicious transactions, and to issue guidelines to financial institutions from time to time on how they should operate.

The first schedule to the Act lists the following as designated institutions:

- a financial institution, other than the Reserve Bank;
- a person registered as an insurer in terms of the Insurance Act (Chapter 24:07);
- a person registered as a legal practitioner in terms of the Legal Practitioners Act (Chapter 27:07);
- a person registered as a public accountant in terms of the Public Accountants and Auditors Act (Chapter 27:12);
- a person registered as an estate agent in terms of the Estate Agents Act (Chapter 27:05);
- a cash dealer;
- a moneylender;
- a pension fund registered in terms of the Pension and Provident Funds Act (Chapter 24:09);
- a person carrying on the business of import/export;
- a person carrying on the business as a manager or trustee of a unit trust or other collective investment scheme; and
- a person, other than a financial institution, who carries on the business, whether formally or informally, of providing money transmission services.

It is noteworthy that casinos are excluded from the list of accountable institutions. These need to be added to the schedule.

The designated institutions are required to apply 'know your customer' principles. This they must do by having sight of an identity document in the case of an individual, a certificate of incorporation in conjunction with a tax clearance return in the case of a company, and a certificate of registration in the case of other organisations. They must also establish that

an individual is in fact not entering into a relationship on behalf of a third party or third parties.

Designated institutions are required to keep full details of the transactions they enter into with their customers. Section 25(e) emphasises that full details of the transaction are required, particularly where negotiable instruments are involved.

The designated institutions have to report all suspicious transactions within three days of the transaction. The institutions are required to appoint an officer who is responsible for collating all money laundering information. The officer must report suspicious transactions to the money laundering unit at the Reserve Bank. In line with witness protection principles, no employee shall be liable for any sanction whatsoever for reporting a transaction to the authorities if such a report is made in good faith.

The Director of the FIIE Unit is appointed by the Governor of the Reserve Bank.

The unit comprises Reserve Bank employees, seconded Ministry of Finance personnel from the National Economic Conduct Inspectorate and employees of the Zimbabwe Revenue Authority. Expertise is drawn from different sources of law enforcement in order to achieve comprehensive investigations. The inspectors have the right to visit individuals and organisations to inspect documents unimpeded. Any individual, organisation, trader or parastatal that hinders or obstructs inspectors in their duties is liable to a fine or lengthy imprisonment.

5. The Exchange Control (Money Transfer Agencies) Order seeks to regulate the transfer of money from Zimbabweans in the diaspora. Money transfer agencies effectively took over the role that was played by bureaux de change, which were banned in 2002 on the pretext that they were being used to support illegal foreign currency activities. In October 2006 all money transfer agencies were closed by the Central Bank, with the exception of Homelink, the agency operated by the central bank.

It is noteworthy that bureaux de change and money transfer agencies were banned because they were considered to be prime conduits for illegal foreign currency activities. In other words, they were deemed to be facilitators of money laundering and not part of the preventive pillar to combat it.

In response to United Nations Security Council Resolution 1373 (2001) regarding the financing of terrorism, the Reserve Bank published Guidelines

on Anti-Money Laundering and Combating of Terrorism for Financial Institutions and Non-Financial Businesses and Professions in May 2006.

In terms of the guidelines, which were intended to complement the Act, information communicated between lawyers and their clients continues to be protected from disclosure to third parties. Each institution has to appoint a transactions reporting officer and must inform the Reserve Bank through the FIIE Unit of the contact details of the officer. Banks are liable to pay a penalty of Z\$1 million (US\$4,000) for not following 'know your customer' principles and Z\$5 million (US\$20,000) for not reporting suspicious transactions. Professional intermediaries are required to indicate categorically that they know their clients when opening accounts. The Regulations require the internal audit function for financial institutions to be staffed by qualified personnel. Banks and cash dealers are required to appoint a compliance officer at management level whose job is to ensure ongoing compliance with regulations against money laundering and the financing of terrorism. Where a professional intermediary is used to open an account, banks have to identify the intermediary, who must give an undertaking that he/she has identified his/her client and obtained particulars of the client's identity. 'Know your customer' principles also extend to correspondent banks. The regulations require due diligence to be exercised in respect of politically exposed persons (PEPS). Lastly, there must be ongoing vigilance of existing clients in order to discern and report suspicious transactions.

The enforcement pillar

1. The Serious Offences (Confiscation of Profits) Act empowers the police to investigate money laundering and enables them to confiscate and, where relevant, to secure the forfeiture of the proceeds of money laundering activities. In addition, the Act empowers investigating officers to obtain information from financial institutions about a person's or an organisation's financial status or about transactions that are important for their investigations.

The Act provides for the lifting of the corporate veil in circumstances where individuals use companies to perpetrate offences. Furthermore, it provides for the seizure, forfeiture and confiscation of tainted property.

The Serious Offences (Confiscation of Profits) Act falls short in that it does not appropriately define money laundering and the penalties it imposes

are small in relation to the crimes that have been committed. As a result, the Act is not a deterrent. On the positive side, however, it provides for the investigation, seizure and confiscation of the proceeds of crime, which is a good starting point for deterring people from committing money laundering.

2. The Prevention of Corruption Act criminalises corruption, which is a major predicate offence for money laundering. Individuals and organisations suspected of having committed a crime can be 'specified' by the Minister of Special Affairs in the President's Office Responsible for Anti-Corruption. This power used to be vested in the Minister of Justice, Legal and Parliamentary Affairs.⁶

The minister can specify individuals or organisations on the basis of suspicion that they have been involved in illegal activities that include corruption. This is done in order to facilitate investigations because people who are specified are stripped of the power to deal in their own right. Once a person is specified, the minister is required to appoint a special investigator who will look into the matter in order to give substance to the suspicion. The investigator has the power to search premises, collect information from witnesses under oath and examine bank records belonging to the specified person or his/her spouse or those associated with him/her.

The relationship between the investigator and the police is blurred. It has been argued that the special investigator could undermine the carriage of justice through lack of expertise in collating information for a successful prosecution or by being corrupt himself. The Act does not clarify procedures for sharing information with the police in circumstances where the police were investigating the matter before the appointment of the special investigator.

3. According to the Bank Use Promotion and Suppression of Money Laundering Act, an inspector or police officer has the power to detain cash where he believes there is reasonable suspicion that an offence has been perpetrated. Of particular significance is the detention of cash that is used to buy or sell foreign currency by individuals or organisations that are not authorised dealers.

The Act also indemnifies designated institutions, officers, employees or other representatives of the institutions from lawsuits arising from information given in the ordinary course of business and in good faith relating to money laundering. The identity of the designated institution cannot be disclosed

in court or without the consent of the institution. Staff of the Reserve Bank and the FIIE Unit are similarly indemnified. This introduces a modicum of witness protection to the country's anti-money laundering measures.

4. In 2004 the Presidential Powers (Temporary Measures) (Reconstruction of State-Indebted Insolvent Companies) Regulations were put into effect to enable the Minister of Justice in conjunction with the Minister of Finance to issue 'reconstruction orders' for state-indebted companies that are unable to repay the state as a result of fraud, mismanagement or any other cause. A reconstruction order can also be issued in circumstances where the state has become or is likely to become liable for payment in terms of a guarantee it has issued for a distressed organisation. The regulations are part of the enforcement pillar of money laundering. The Minister of Justice is entitled to appoint an administrator to run the company in the best interests of all stakeholders. At the same time there is provision for lifting the veil in circumstances where individuals have used the company for fraudulent personal gain.

It has been argued that the regulations were enacted in order to expropriate the assets of one Mutumwa Mawere, purchased by virtue of a government guarantee. The assets comprised Shabanie Mashaba Mines (SMM) and related operations. The companies are involved in the mining and processing of asbestos.

Case study: Mutumwa Mawere

Mutumwa Mawere was charged with allegedly siphoning funds out of the country using his companies in Zimbabwe and South Africa. As a result, the companies under his control became insolvent. Afaras Gwaradzimba of AMG Global was appointed as the administrator of Mawere's businesses.

The state alleges that African Associated Mines (AAM), of which Mawere is chairman and a substantial shareholder, violated exchange control regulations by failing to account for foreign currency received to the Reserve Bank as required by law. According to the state, the amounts involved are US\$50,293,797.80, C\$11,491,423.75 and ZAR19,350,170.80.

According to Reserve Bank regulations, companies are required to fill in Control Document 1 (CD 1), which confirms foreign currency charges and the proceeds received from a transaction, within 90 days of receiving payment.

Police have unsuccessfully tried to extradite Mawere from South Africa on allegations of the externalisation of foreign currency.

The regulations effectively provide for civil forfeiture and could be challenged for being in conflict with the Constitution of Zimbabwe, especially since the regulations have so far been applied in the case of only one individual.

International co-operation

The following international conventions and protocols are reviewed in order to identify gaps in achieving international compliance:

- the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) (Vienna Convention);
- the United Nations Convention Against Transnational Organised Crime (2000) (Palermo Convention);
- the Southern African Development Community (SADC) Protocol Against Corruption (2001); and
- the United Nations Convention Against Corruption (2003).

Zimbabwe has ratified all these international instruments, but has not ratified the Convention for the Suppression of Financing of International Terrorism (1999). As UN Security Council Resolution 1373 (2001) covers the same issues as the convention, non-ratification makes no difference.

The protocols and conventions criminalise dealing in drugs, directly or indirectly. State parties are also required to outlaw the laundering of proceeds related to drug dealing.

The aim of the SADC Protocol Against Corruption (2001) is “[t]o promote and strengthen the development, by each of the State Parties, of mechanisms needed to prevent, detect, punish and eradicate corruption in the public and private sector”.⁷

The United Nations Convention Against Transnational Organised Crime (2000) requires each member state to

institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer identification, record-keeping and the reporting of suspicious transactions.⁸

The United Nations Convention Against Corruption (2003) requires member states to have a comprehensive regulatory framework for banks and non-bank financial institutions. There is a need for customer and beneficial owner identification. State parties are required to put in place an infrastructure to detect the movement of cash and negotiable instruments across borders. Financial institutions are to keep records on the originators of electronic fund transfers.

The Vienna Convention advocates structures to facilitate the confiscation of the proceeds of drug offences. The convention also requires member states to put in place mechanisms to identify, trace, seize, confiscate and forfeit proceeds or property derived from crime. Structures should be in place to ensure that records of banking, financial or commercial transactions are made available or seized if they are connected to criminal activity.

The convention regards it as necessary to ensure that bank secrecy does not interfere with international criminal investigations. Offences related to drugs should be extraditable, and where there is no formal extradition treaty the convention should be used as the basis for the extradition.

The SADC Protocol Against Corruption requires member states to protect individuals who act in good faith and report acts that are related to

corruption. Each state party is required to put in place structures to enable the confiscation and seizure of proceeds emanating from corrupt activities. According to the protocol, acts of corruption should be treated as extraditable offences.

The Palermo Convention requires members to ensure that there are “administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering”.⁹ Like the other protocols and conventions ratified by Zimbabwe, it requires member states to adopt measures that allow for the confiscation and seizure of the proceeds of crime and the extradition of criminals as necessary. At the same time, there should be structures in place for the protection of witnesses and victims of criminal activities. The convention emphasises that “law enforcement personnel, including prosecutors, investigating magistrates and customs personnel, and other personnel charged with the prevention, detection and control of the offences covered by [the] Convention” should receive thorough training in all aspects of money laundering.¹⁰ Furthermore, it encourages member states to consider “the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering”.¹¹

The Vienna Convention requires the parties that have ratified the agreement to co-operate closely with one another. More specifically, it encourages them to establish and maintain channels of communication; to co-operate with one another in conducting enquiries; to establish joint investigative teams; to provide, when appropriate, necessary quantities of substances for analytical or investigative purposes; to facilitate effective co-ordination between their competent agencies; to promote the exchange of personnel and other experts; and to assist one another to plan and implement research and training programmes.

The Palermo Convention requires the parties to “co-operate and exchange information at the national and international levels ...”¹² As in the Vienna Convention, parties are encouraged to develop structures to detect the movement of cash and other negotiable instruments across borders. They are also urged to “use as a guideline the relevant initiatives of regional, interregional

and multilateral organizations against money-laundering”.¹³ State parties should “endeavour to develop and promote global, regional, subregional and bilateral co-operation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering”.¹⁴ Finally, the parties are required to provide each other with mutual legal assistance in investigations, prosecutions and judicial proceedings.

Legislation in Zimbabwe that supports international co-operation

The Criminal Matters (Mutual Assistance) Act (Chapter 9:06) deals with inter-territorial co-operation with other countries on criminal activities. The Minister of Justice, Legal and Parliamentary Affairs may, if satisfied that reciprocal arrangements have been made by another country to facilitate mutual assistance in criminal matters, by way of a statutory instrument declare that the provisions of the Criminal Matters (Mutual Assistance) Act apply to relations with that country. The minister can make specific modifications to the statutory instrument to govern relations with a foreign country. The mutual assistance listed in section 4 of the Act includes:

- obtaining of evidence, documents or other articles;
- providing documents and other records;
- finding witnesses or suspects;
- search or seizure;
- arranging for persons to give evidence or assist in investigations;
- forfeiting or confiscating the proceeds of crime;
- recovering fines and other financial penalties;
- freezing of assets that could be forfeited or confiscated, or that may be needed to satisfy pecuniary penalties;
- finding property that could be forfeited, or that may have to be sold to pay fines; and
- serving court documents.

The Act includes money laundering under offences as defined in section 63 of the Serious Offences (Confiscation of Profits) Act.

The international conventions to which Zimbabwe is a party basically provide for the criminalisation of money laundering and terrorism. They require accountable institutions to be defined, and stipulate that these institutions should observe know your customer principles. According to the conventions, there should be an infrastructure for the seizure and forfeiture of the proceeds of crime. A repository of financial intelligence information should be set up and a facility should be established for mutual assistance in criminal activities, including money laundering. Lastly, there is the need to put in place structures for witness protection.

Regulations that tend to negate the anti-money laundering regime

The Zimbabwe Investment Regulations were put in place to harness capital from potential hard-currency investors in the country. The possession of foreign currency is still virtually a passport to remain in the country: individuals in possession of US\$1 million are granted permanent residence. An amount of US\$300,000 will entitle sole proprietors to a three-year residence permit. If individuals with special skills have access to US\$100,000, they will also be entitled to a three-year residence permit.

In order to improve the inflow of foreign currency, certain measures were taken that tend, ironically, to assist money laundering.

The Homelink system aimed at harnessing foreign currency from individuals was introduced in the quarterly monetary policy statement in April 2004. Under the scheme, individuals can bring money into the country and no questions will be asked about the source of the funds. Initially recipients of funds transmitted through the Homelink arrangement could elect to receive the money in hard currency. It was later discovered that the funds thus transmitted were making their way into the underground parallel market. As a result, funds received through the Homelink system are now converted at the ruling exchange rate into Zimbabwe dollars on the day of receipt. This change came about as part of the monetary policy review of 27 July 2004. In the monetary policy statement of

27 July 2004 the Governor of the Reserve Bank indicated that between 1 May and 19 July 2004, a total of about US\$23 million had been received through money transfer agencies but had not entered the formal system.

In order to attract even greater foreign currency inflows, Zimbabweans in the diaspora were given the opportunity to invest in Zimbabwe a minimum amount of US\$1,000 for a 12-month period. The bills earn an interest rate, payable half yearly, of LIBOR (London Interbank Offered Rate) plus six percentage points. The bills are guaranteed by the Reserve Bank, are tradable, and both interest and capital are fully remittable.

In other words, to attract much-needed foreign capital, the authorities can turn a blind eye to tainted money.

This brings into focus the question of whether the analytical framework referred to earlier is appropriate for a country like Zimbabwe, since the authorities are unlikely to put in place structures that would jeopardise the economic survival of the country. Regulations like the immigration regulations and the special dispensations for those working in the diaspora tend to be more important than the need to curb money laundering.

In October 2006 the Governor of the Reserve Bank issued new regulations to the effect that bank licences would henceforth be reviewed and issued annually, subject to the institutions practising, among other things, acceptable anti-money laundering measures.

The table below summarises the manner in which the legislative and other measures discussed tend to assist or hinder the prevention of money laundering.

Conclusion

Could the infrastructure created over the years have prevented some of the money laundering activities that took place during the review period? One of the reasons why money laundering occurred in the financial sector was that there was inadequate screening of the promoters of financial institutions. It was therefore possible for individuals who should not have been given a

Table 2: Measures that facilitate or impede money laundering

Legislation	Prevention
Serious Offences (Confiscation of Profits) Act	Makes money laundering an offence
Prevention of Corruption Act	Criminalises corruption, a major predicate offence for money laundering. Enables asset seizure, forfeiture and 'specification' of individuals and companies
Exchange Control (Money Transfer Agencies) Order	Promotes money laundering. Banned October 2006
Presidential Powers (Temporary Measures) (Amendment of Criminal Procedure and Evidence Act) Regulations	Suspects can be detained for 21 days without right to bail to facilitate full investigation
Presidential Powers (Temporary Measures) (Reconstruction of State-Indebted Insolvent Companies) Regulations (Statutory Instrument 187 of 2004)	Takeover of shares and penalties for individuals
Criminal Matters (Mutual Assistance) Act	Recognises money laundering as a transnational crime
Reserve Bank Guidelines on Anti-Money Laundering and Combating Terrorism	Financial institution obligations elaborated
Investment Regulations	Tend to be potentially contrary to prevention
Bank Use Promotion and Suppression of Money Laundering Act	'Know your customer' regulations a key measure. Accountable Institutions spelt out. Penalties increased, though still inadequate. Setting up of FIIEU Unit as repository of financial intelligence a key anti-money laundering initiative

Enforcement	Comments
Phenomenon not accurately defined. Paltry fines.	Legislation inadequate to prevent, curtail or control money laundering
Corruption not linked to money laundering in Act	Act deals with some aspects that are important to money laundering, but not explicitly. Administration of the Act now delegated to an authority not within the mainstream anti-money laundering regime. Financial penalties too small
N/A	Money transfer agencies were banned because they were perceived to be facilitators of money laundering
Detention acts as a deterrent, though the constitutionality of this has been challenged	Good legal instrument to build on. Other relevant legislation needs to be incorporated into it
Forfeiture, criminal penalties	Legislation limited to state-indebted companies. Legislation has only been used in one case. In apparent conflict with constitutional provisions
Enforcement regulations extra-territorial	Allows for extra-territorial investigation, enforcement and forfeiture
Penalties for defaulting institutions	Guidelines good for clarification
N/A	Promote money laundering, unless subjected to monitoring by the FIIE Unit
Powers of the central bank for successful prosecution not clear	Positive step towards comprehensive legislation for money laundering. However, needs to be beefed up with provisions for forfeiture and link with corruption as predicate offence to money laundering

banking licence to get one. In December 2003 the central bank took over the licensing and control of financial institutions, including asset managers. However, the licensing of financial institutions reverted to the Ministry of Finance in 2005. Despite this reversal, the central bank is doing a good job of monitoring financial institutions and it is unlikely that a financial institution licence will be granted to unsuitable individuals. Where there are individuals bent on money laundering within an organisation, the top management (screened) would be a deterrent, but this would not completely eliminate the problem. Though there has been a growing awareness of the harm that money laundering can cause, the general public is still not certain what money laundering is.

In conclusion, Zimbabwe has come a long way in putting together an anti-money laundering infrastructure. As a developing country, it is faced with the need to attract foreign capital. Unfortunately the general downward drift of the economy, coupled with some of the measures taken to resuscitate it, have compromised the effectiveness of the anti-money laundering regime. It is ironic, however, that despite rampant money laundering in the country, no prosecutions are taking place. Law enforcement agencies, including the police and the judiciary, are reluctant to prosecute those suspected of money laundering because this would take them out of their comfort zones. They are more comfortable prosecuting the predicate offences. It is therefore extremely important for the law enforcement agencies to be trained in the investigation and prosecution of money laundering. Training should be done in conjunction with the commercial banks and the central bank to take advantage of the practical experience that has been built up over the last few years.

Notes

- 1 A magistrate in Chinhoyi (a small town in Zimbabwe) ruled that bearer cheques were not currency in terms of exchange control regulations. The magistrate was deciding a case where Richard Floyd Mambo and Nigel Mahoko were facing charges of contravening the regulations by attempting to cross the border between Zimbabwe and Zambia without declaring Z\$575 million (US\$5,75 million) worth of bearer cheques concealed in their Toyota Corona vehicle. The accused successfully argued that the bearer cheques were not the official medium of exchange in terms of existing legislation. New regulations introduced in July 2006 have incorporated bearer cheques into the definition of currency.
- 2 As part of currency changes, the Zimbabwe dollar was divided by a factor of 1 000.
- 3 On 25 October 2006 Raphael Magate was arrested for purchasing fuel on the black market using fake bearer cheques. In a similar incident a shop owner in Borrowdale, Zoran Savic, was duped of \$7 million after conmen bought a colour television using fake bearer cheques.
- 4 Reuter & Truman 2004, p. 132–3.
- 5 See *Financial Gazette*, 29 July 2004.
- 6 The authority to specify delinquent individuals and corporations was shifted by statutory Instrument 128 of 2006. This shift may create undesirable tension and inefficiency. It was logical to assign specification power to the Minister of Justice, as he or she presides over a ministry of which the Attorney-General is a senior member. Police traditionally work closely with the Attorney-General's office. The functional relationship between the police, the FIIE Unit, the Attorney-General and the Minister of Special Affairs in the President's Office Responsible for Anti-Corruption is not as well streamlined. The roles of these bodies still need clarification in order to improve the administration of justice.
- 7 SADC Protocol Against Corruption (2001).
- 8 United Nations Convention Against Transnational Organised Crime (2000).
- 9 Ibid.
- 10 Ibid.
- 11 Ibid.
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CHAPTER 4 CONFRONTING MONEY LAUNDERING IN SOUTH AFRICA: AN OVERVIEW OF CHALLENGES AND MILESTONES

Charles Goredema

Introduction

The website of the East and Southern African Anti-Money Laundering Group (ESAAMLG) sets out the expected impact of adopting and implementing measures against money laundering and the financing of terrorism. As part of the argument for advocating the implementation of a three-year strategic plan covering 2005 to 2008, ESAAMLG (2005) claims that¹

[t]he benefits of implementing these measures are great and include the increased stability of a country's financial sector, the potential for increased credit-worthiness and greater investment, as well as providing law enforcement with additional tools in order to protect countries from the negative effects of crime and the activities of criminal syndicates. These measures will lead to the financial institutions and others becoming more robust and better able to participate in the global financial and trading systems.

This claim, which has an implicit development orientation, addresses itself to four sectors – policy makers, law enforcement agencies, financial institutions and the public, and assigns to each a stake in combating money laundering. At the same time, it sets benchmarks for evaluating the impact of the measures comprising the strategic plan. Rather controversially, the statement appears to attribute financial instability and other manifestations of the development crisis to criminal syndicates, specifically to money laundering. It is not the purpose of this chapter to debate the validity of what is certainly a questionable assertion.

South Africa's initiatives to address money laundering date back to the 1990s, while measures to combat funding of terrorism are more recent. This chapter

reviews developments in establishing systems to combat money laundering and the financing of terrorism since 2004. The strategic plan offers a convenient backdrop, partly because the plan is due for implementation during a period that overlaps with the survey period and partly because South Africa has played a critical role in ESAAMLG since its establishment.

The strategic plan can be seen as a source of some intermediate benchmarks for evaluating both the quality and, to a limited extent, the performance of anti-money laundering measures adopted by ESAAMLG member states. The following can be distilled from the plan:

- The measures against money laundering and the financing of terrorism provide law enforcement with additional tools to combat the negative effects of organised crime.
- These measures will make financial and other institutions better able to participate in the global financial and trading systems.

Anti-money laundering mechanisms should be seen as part of broader initiatives against crime. It is now accepted that such initiatives are not likely to succeed unless they are systematic, strategic and sustainable.

The chapter does not just describe money laundering and terrorist financing but analyses the emerging infrastructure of 'additional tools' that have been specifically introduced to deal with money laundering, and considers their quality in the light of the available evidence of performance. It evaluates the emerging measures in the environment they are meant to impact on. It further discusses anti-money laundering measures as an element of strategies to combat organised economic crime against the recorded incidence of such crime and predicts the kind of outcomes these measures are likely to achieve.²

The challenges of confronting money laundering have been compounded somewhat by the relatively recent addition of measures to detect and disrupt the flow of funds to support terrorist activities. The Financial Intelligence Centre (FIC) has been mandated to monitor and enforce compliance with the legislation introduced for this purpose.

Analytical framework

For various reasons, the inauguration of the Financial Action Task Force (FATF) in 1989 is regarded as a watershed in anti-money laundering strategy. Among other accomplishments, the FATF is credited with lobbying successfully for a strategy underpinned by three complementary but distinct structural pillars: prevention of money laundering through financial institutions, retrospective enforcement of measures against money laundering and international co-operation.

The United Nations Security Council formally endorsed the FATF standards in Resolution 1617 (2005), 'strongly' urging all member states to implement the standards embodied in the FATF Forty recommendations on money laundering and the nine special recommendations on terrorist financing.

Prevention

The prevention pillar seeks to deter criminals from using individuals and institutions (in all sectors) for converting or moving the proceeds of crime. Reuter and Truman (2004) analyse the four constituent elements of prevention, which present themselves as obligations imposed on institutions that are likely to come into contact with the proceeds of crime. These elements are customer due diligence, reporting obligations, submission to supervision, and sanctions for non-compliance.

Enforcement

The primary objective of enforcement is to punish criminals who attempt to breach, or succeed in getting beyond, the preventive infrastructure. This pillar comprises:

- criminalisation of certain underlying (predicate) activities;
- an investigative infrastructure that complements detection by vulnerable institutions or provides forensic analysis by financial intelligence units;
- asset tracing, seizure and confiscation of proceeds of crime through civil law action;
- prosecution and punishment.

International co-operation

Combating money laundering inevitably involves profiling and tracking unlawfully acquired resources. Typology studies have shown cross-border transmission to be a characteristic behaviour pattern of such resources. The source of dirty money is not always its destination, which makes it imperative for detection systems to work together in tracking its movement and location. The capacity of the infrastructure in South Africa to function in co-operation with relevant foreign systems is therefore relevant to this review.

Measures against terrorist funding

Despite the sustained efforts to integrate anti-money laundering with combating terrorist financing, the conceptual and practical distinctions between the processes involved lingers (Reuter & Truman 2004, p. 139–48). The point has been made often enough that the difference lies in the stage at which the concerned assets acquire a ‘dirty’ character. With money laundering as it is conventionally understood, assets tainted by their origins are converted by being used in the same manner as legitimately acquired assets, whereas with terrorist financing, the assets are only tainted by the intention to use them to commit terrorist acts, directly or otherwise. The existence of such an intention is often only inferred in retrospect, by which time the assets have been expended. If not used to support terrorist activities, the money never gets tainted and cannot be laundered. If the intended beneficiary of funds raised legitimately cannot be linked to terrorist activity, no offence arises. On this account, the prevalent approach in combating terrorist financing is to use lists of suspected terrorist organisations and then to trace any funds and other assets in which these organisations have or appear to have a beneficial interest.³ This approach has not received universal approval, even within the FATF, because in some cases, organisations and/or individuals may have been placed on a list without having been proved either to exist as institutions or to be involved in terrorism.⁴

Notwithstanding unresolved conceptual arguments about the difference between them, measures against the funding of terrorist activities have been superimposed on the anti-money laundering infrastructure. The grafting process

was accomplished in South Africa by the advent of the Protection of Constitutional Democracy against Terrorist and Related Activities Act (Act 33 of 2004), which became effective in May 2005. Colloquially referred to as POCDATARA, the Act adapts the framework around which anti-money laundering measures against tainted funds are constructed. The same measures relating to prevention, enforcement and international co-operation outlined above are applied to terrorist activities.

Impact: a brief situation report

African initiatives to combat the transfer of tainted funds through the economy are informed by a history of economic plunder and large-scale looting of resources at various stages of its history. Corruption, committed by imperial powers and indigenous elites alike, is at the centre of the adopted measures. Its enduring manifestation is capital flight from African countries to other parts of the world, predominantly western Europe. In the ultimate analysis, the success or failure of anti-money laundering measures should be measured against the extent to which they stem corruption and capital flight.

South Africa’s regime against money laundering and the funding of terrorism comprises a three-tier framework, constructed through primary legislation, regulations and sector-specific guidelines. The period reviewed was a predominantly formative one, hence the flurry of activity in all tiers.

By 2004, the criminalisation of money laundering was substantially complete. By mid-2005 provision of financial assistance to sustain terrorist activities was also criminalised. In response to the legislation, various institutions set about making innovations to procedures to prevent the laundering of tainted funds. Particular focus was on the banking sector. Feedback from the FIC indicates a high level of compliance by banks by the middle of 2006.

Feedback from the law enforcement agencies, with which the FIC is mandated to work closely, tends to reflect the impact made by the centre in the economic crime environment. In terms of the Financial Intelligence Centre Act (FICA), the FIC directs reports of suspicious transactions considered to warrant further investigation to any of the following:

- the South African Police Service;
- the Directorate of Special Operations (Scorpions);
- the Asset Forfeiture Unit (AFU);
- the South African Revenue Service;
- the intelligence agencies; and
- the exchange control department of the South African Reserve Bank.

The release of official crime statistics for 2005–6 by the South African Police Service in September 2006 prompted much debate about the high levels of crime. Commentators and the business sector drew particular attention to increases in violent crimes. Equal attention does not appear to have been paid to commercial and economic crimes. In this regard, police information needs to be supplemented by data from other sources, particularly because of significant under-reporting of such crimes. The period 2004 to 2006 experienced a generally high level of economic crimes committed using violence, most notably armed robbery. The most problematic kind of armed robbery was that of vehicles transporting cash, which saw a spike of 74% between 2005 and 2006.

The proceeds of commercial fraud also pervaded the criminal markets. No precise figures are available, but information from surveys during this period indicates a high level of losses to key sectors. A 2005 survey of 100 companies in South Africa by PriceWaterhouseCoopers found that 83% of them had been subjected to economic crime.⁵ At the end of 2004, South African companies were reported to be losing ZAR40 billion (about US\$6,452 billion) per year to white-collar crime. In 2005 this figure was reported to have doubled.

The scale of economic and commercial crime has yet to be measured. Regardless of this, anti-money laundering institutions in South Africa would be interested in the destination of the proceeds of the known crime. Of particular importance is whether such proceeds passed through institutions that are obliged to be vigilant about money laundering. They would be highly concerned if any such institutions actually facilitated the concealment of proceeds of crime.

An analysis of the nature and magnitude of the threat to an economy emanating from money laundering activities should draw a distinction between three

kinds of scenarios (Reuter & Truman 2004, p. 132–3). The first is where the institutions involved are either corrupt from inception or are subsequently corrupted by changes in ownership, management or economic environment. Such institutions are primed to be vehicles for money laundering and their use to launder proceeds of crime is thus inevitable. The second scenario, as stated by Reuter and Truman (2004), involves institutions with “willing or rogue employees who provide [money laundering] services on an ad hoc and non institutionalised basis”. In other words, the leadership of the institution is not corrupted, but corrupt insiders infiltrate the institution. The third scenario involves institutions that facilitate money laundering transactions unwittingly, either because they do not have mechanisms to detect them or because of dereliction in applying existing mechanisms.

The challenge for law enforcement and regulatory authorities is to come up with reliable indicators to determine each kind of threat. The evolving practice is to attempt to do this through analysing suspicious transaction reports (STRs).

The South African FIC has been receiving information, primarily in the form of reports of suspicious transactions from financial and non-financial institutions, since 2003. The reports are followed up and analysed and, if necessary, they are passed on to investigating agencies. Between April 2005 and March 2006, the FIC received 19,793 STRs, of which 94% were received from financial institutions (FIC 2006). These include banks, brokers, foreign exchange dealers, insurance providers, investment managers and services and money remitters.

The rest came from other sectors, particularly casinos, estate agents, coin dealers, companies, accountants and auditors, attorneys, car dealers and individuals. Since opening its doors, the FIC has received more than 44,000 suspicious transaction reports. If the flow of reports witnessed in the first three years was maintained, the FIC was expected to have received a further 12,000 reports by the end of 2006.

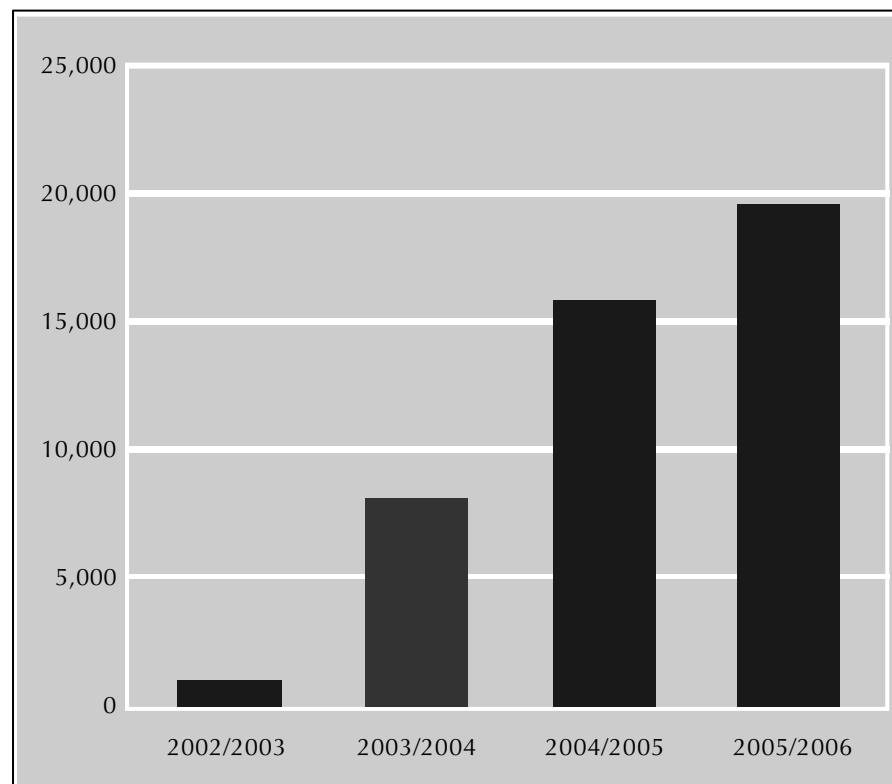
The FIC attributes the steady increase in the number of reports to a number of factors, singling out:

- regular contact and feedback sessions with the accountable and reporting institutions;

- development of a reporting tool to simplify reporting, by enabling batches of reports to be submitted electronically;
- increased profiling of obligations through the media; and
- regular compliance initiatives such as presentations to various reporting institutions and sectors.

It also concluded that accountable and reporting institutions may have “consolidated their compliance and reporting environments” (FIC 2006).

Figure 1: STRs received by the FIC



Source: FIC 2006.

While the volume of reports has steadily escalated, the quality may not be adequate to enable the kind of analysis advocated above, or to distil indicators to facilitate the analysis. Indeed, the FIC may not regard that kind of analysis as necessary, notwithstanding its implications for policy making.

In the absence of threat-type indicators, one is left to refer to anecdotal occurrences that have exposed vulnerabilities in South Africa.

The most glaring forms of money laundering that emerged in the period under review involved companies that were either set up as vehicles for pilfering public funds, or were captured after to their formation and diverted to fraudulent enterprise. The theft of large sums of investment deposits and pension funds represents predicate criminal activity that continued to occur almost at regular intervals. The most recent example (at the end of 2006 and continuing into early 2007) was the abuse of pension and retirement funds by Cape Town-based Fidentia Asset Management. Of an asset base of about R2.2 billion, more than R650 million is alleged to have been used in private investment ventures under the control of the chief executive officer but inconsistent with the interests of investors. The Financial Services Board launched an investigation, which had yet to be concluded at the time of writing. A curator was appointed to attempt to salvage some value for investors.

Fidentia followed in the wake of similar large scams Masterbond and LeisureNet, and numerous ‘pyramid schemes’. It emerged almost simultaneously with the launch of the prosecution of the management of nine pension funds and another large asset firm, Alexander Forbes, on multiple counts of fraud and money laundering in Johannesburg.

There were just over 45 money laundering cases prosecuted between 2004 and 2006. There has not yet been a conviction of an intermediary for ‘professional’ money laundering.

It appears that in the immediate future more focus will be given to the unwitting money laundering institutions, which in a sense are the soft target for law enforcement. In a discussion document inviting submissions on several proposed changes to the existing anti-money laundering regime, the FIC drew attention

to the absence of effective regulatory powers for supervisory bodies and pointed out that there were⁶

certain structural deficiencies concerning the supervision of compliance with the FIC Act. These deficiencies impact on the proper administration of the FIC Act, and are limiting the effectiveness of the framework to combat money laundering and terrorist financing, particularly in the compliance and enforcement areas. The current deficiencies should therefore be addressed.

Supervisory bodies are an integral part of the preventive infrastructure of the current anti-money laundering regime. To enable them better to regulate accountable institutions (financial and non-financial) – in other words, to compel them to exercise vigilance and diligence – it is proposed that these bodies be strengthened through a raft of third-tier legislation. Along with conferring greater authority to enforce compliance with anti-money laundering and anti-terrorist funding regulations, the legislation will impose on them the responsibility to contend with indifference and in some cases, resistance to implementing such regulations.

The issue which arises is whether supervisory authorities are to have access to more information on which to base decisions to intervene. In other words, will supervisory bodies be entitled to receive STRs? Or will they be privy to reports submitted to the FIC? The proposed new powers are expected to evoke mixed reactions, as some supervisory bodies have tended to be wary of taking on a more intrusive law enforcement role.⁷

Financial sector: challenges and performance

The predominant challenge for financial intermediating institutions, such as banks, is detecting suspicious origins of funds. While the methods by which 'dirty money' is acquired differ from case to case, the factors influencing the decision by a criminal on whether to use banking services appear to be universal. Generally, a big-time economic criminal is not likely to use banking services which are proximate (geographically or in terms of time) to the source of the dirty money. A transnational drug trafficker is unlikely to deposit the proceeds directly in a bank in the jurisdiction where the drugs have been sold. He will

rather use the proceeds to purchase marketable commodities, export them, and only come into contact with a bank to deposit the proceeds of the sale of the imported commodities. The bank is therefore unlikely to be the first point of contact with the dirty money. It is difficult, if not impossible, for it to perceive the complete transaction or series of transactions preceding its contact with the criminal. As the FATF observed in 2005, "Each jurisdiction might hold a part of the evidence or intelligence impacting on the transaction. Therefore obtaining an overall view of particular operations from beginning to end is made more difficult" (FATF 2005).

One of the lingering issues in anti-money laundering in South Africa is the degree of market penetration by financial institutions. For instance, the higher profile accorded to banks in preventing money laundering is premised on the assumption that they occupy a front-line role in detecting transactions involving the proceeds of crime. The extent to which this is true depends largely on the nature of the banks' presence in the susceptible market. Progress has been registered in this regard. Commercial banks in South Africa introduced a regime of low-cost banking accounts specifically designed for previously unbanked South Africans. In August 2006, it was reported that in 18 months, the Mzantsi accounts, as they are collectively called, had acquired 3,3 million new account holders.⁸ This represents a significant inroad into the economically active population that is not exposed to banks. It can be assumed that the mandatory due diligence processes required by FICA occurred, producing valuable data for future implementation of anti-money laundering measures.

Alternative remittance systems

A discussion of money laundering in a multi-cultural developing economy should necessarily include the issue of alternative remittance systems. After pondering the subject for long, the FATF described alternative remittance as

any system used for transferring money from one location to another and generally operating outside the banking channels. The services encompassed by this broad definition of alternative remittance range from those managed by large multinational companies to small local networks. They can be of a legal or illegal nature and make use of a

variety of methods and tools to transfer the money. (FATF 2005)

A variety of methods and tools to transfer value, rather than just money, have long been in use in South Africa, given the relatively low level of penetration of the communities by formal retail banks and other financial services. Following democratisation in 1994, the resort to these methods increased with the growth in size of cross-border migrant communities from countries such as Mozambique, Angola, the Democratic Republic of Congo and Zimbabwe. Bank intermediation in the transfer of funds between the diaspora and home countries has tended to be low. As the FATF acknowledges, there is nothing inherently illegal about alternative value transmission. Where, however, exchange control or tax regulations are evaded, the transmission constitutes illegal placement or smurfing. Large-scale transportation of currency is still prevalent between South Africa and neighbouring countries. The rate of prosecutions is as low as the rate of detection.

At the same time, the new requirements to prove identification through multiple documentation as a prerequisite to opening banking accounts is having an adverse impact on certain immigrant communities. It alienates them from both the mainstream financial service institutions and the tax system.

Somali refugees engaged in retail trading are unable to open banking accounts as they do not have identification documentation acceptable to banks. As a result, any takings are kept outside the banks, in private residences or pooled together in informal stokvels. The exclusion of these retailers from banks continues to expose them to crime, such as robberies and exploitation by protection rackets.

Further observations

The fault lines in the capacity to 'follow the money' in economic crime were identified in a seminal contribution by Professor Michael Levi. Commenting on the reasons for adopting a new asset confiscation regime in the Proceeds of Crime Act (2002) in England and Wales he attributed failures to:

- moderate investigative knowledge, due to the inherent secrecy of the activities and inadequate resource allocation to financial aspects of crime;
- inadequate co-ordination and intelligence exchange between police and the revenue department, due partly to legislative prohibitions on data sharing but also reflecting differences in cultural and policy objectives;
- inadequate use made of suspicious transaction reports by the police and customs agencies due to a lack of resources and the inherent difficulty of following up many reports without contacting the accountholder for an explanation; and
- inadequate powers to detain cash of unexplained origin other than drugs money at borders. (Levi 2003).

The infrastructure in South Africa has to be assessed in terms of the extent to which it meets the challenges identified above.

The Directorate of Special Operations (Scorpions) is the primary investigator of money laundering cases. It is also the primary prosecuting agency. To what extent does the existing investigative capacity address the identified fault lines?

There has been a marked improvement in the allocation of resources to investigating the financial aspects of crime. The budget of the FIC, which was originally in tens of millions of rand, now exceeds ZAR100 million annually. So do those of the AFU and its related Special Investigations Unit, as well as the Directorate of Special Investigations, itself a component of the National Prosecuting Authority.

The AFU describes itself as a "potent new weapon in the arsenal of the State in fighting crime". It has grown from a small establishment of 24 staff members in 1998 to nearly 600 people, "consisting of mostly advocates, as well as a few seconded investigators and a number of admin staff members" and has "contributed to removing instruments used in the commission of crime as well as proceeds of crime from criminals and ... seized assets in excess of R1.25 billion" in nearly 1000 cases (Chinner 2005). It has claimed a success rate of more than 90% in these cases.

Can it be said that the incidence of money laundering has abated or increased since 2004? Or, to use the aspirations expressed in the ESAAMLG strategic plan, has the implementation of measures against money laundering enhanced the stability of the financial sector, and provided law enforcement with additional tools to protect the country “from the negative effects of crime and the activities of criminal syndicates”?

In the absence of uncontroverted figures on the magnitude of money laundering at the beginning of the period, it has become conventional to accept Finance Minister Trevor Manuel’s 2001 estimation that “anything between 2 billion and 8 billion US dollars are laundered through South African institutions every year.” (Manuel, 2001)

It is premature to judge the impact of the measures implemented to date on the scale of, on one hand, capital flight, and on the other, infiltration of dirty funds into the economy. There has certainly been an increase in the reported incidence of questionable (suspicious) transactions, but it cannot be inferred that this indicates an increase in the amount of unlawfully acquired funds entering the system. A proportion of STRs prompts successful money laundering investigations. The size of such proportion has not been determined yet.

Has the hand of law enforcement been strengthened as a result of the measures under discussion? This question can only elicit an ambivalent response. The agencies established with an anti-money laundering agenda have certainly been strengthened – but predominantly in their capacity to regulate the institutions required to report suspicious transactions. The FIC and the AFU, fledgling agencies in 2004, are now well established. The latter has demonstrated its capacity to act even against proceeds of crimes committed in foreign jurisdictions. Part of the reason for this is the resolution of the dilemma between criminal and civil forfeiture, achieved by the Prevention of Organised Crime Act (POCA) in 1998.

The connection between assets and the crime from which they were produced makes it very difficult to conceive that their recovery can ever be regulated differently from the determination of the guilt or innocence of the alleged

criminal. This obviously makes the efficiency and effectiveness of the recovery regime dependent on the efficiency of the rest of the criminal justice process, which, in turn, means that the fewer the number of convictions in corruption and economic crime cases, the smaller the level of recoveries. A system that is premised on economic justice, on the other hand, is more likely to recognise that organised crime and corruption, as well as the myriad other sources of criminal income, cannot be confronted only by the criminal justice system. The process of detecting and recovering criminal income is separated from the rest of the criminal justice process, especially from the criminal trial. The goals are to bring criminal income into the legitimate mainstream, if it is circulating outside; or, if criminal income has already penetrated the legitimate economy, the objective is to remove it from the possession or control of the suspect beneficiary, even though he/she may never be convicted of any crime. Asset seizure as an instrument of economic justice will easily use amnesties and taxation measures to mop up illicit income. Such measures have been used in South Africa without much controversy.

Asset forfeiture has not been indifferent to corruption committed abroad, as shown by the number of mutual assistance cases in which South Africa has been actively engaged. In February 2006, the AFU secured a court order to freeze a residential property belonging to a former Nigerian state governor, Diepreye Alamiyeseigha, on the Cape Town Waterfront. Alamiyeseigha had been charged with 39 counts of money laundering in Nigeria. An application to sell the apartment, valued at ZAR14 million (US\$ 2.06 million) was granted by the High Court in Cape Town in late July 2006.

In mid-2006, the AFU secured an order from the Royal Court of Guernsey in the Channel Islands to freeze about ZAR1 billion (US\$147 million) held in the name of a businessman who was charged with more than 300 counts of fraud, exchange control violations, tax evasion and money laundering by the South African authorities.⁹

Among the recoveries of proceeds of crime recorded by the AFU is that of about R10 million from two attorneys convicted of defrauding the Road Accident Fund.

In the Schabir Shaik case, the AFU also relied on a conviction as a basis for the application for confiscation of ZAR34 million (US\$5 million). The court granted the application, which comprised several alleged benefits found to have accrued to the accused and the group of companies under his control on account of corruption, namely:

- shares to the value of ZAR21million in African Defence Systems (ADS) held by the accused;
- ADS dividends to the value of ZAR12.7million;
- ZAR500,000 received by the accused's Nkobi Investments for the sale of its shares in a company called Thint Holdings to Thales; and
- ZAR250,000 paid by Thales to the accused's Kobitech company as a 'bribe' for former Deputy President Jacob Zuma.

The court found that there was an "overwhelming possibility" that Shaik's relationship with Zuma was the main reason for Thales to do business with Shaik.

South Africa has therefore had a relatively sensational experience with civil asset forfeiture. The AFU has enjoyed a high success rate. Some analysts have linked the motivation of the AFU to considerations of self-interest, in that the proceeds of crime can be used to augment the law enforcement budget. In fact, POCA established a Criminal Assets Recovery Fund, part of which can be used to fund the AFU.

In terms of enhancing capacity for international networking, success has been recorded. Since its formation, the FIC has established itself as an active player in the FATF, the ESAAMLG and the Egmont Group of financial intelligence units. It is able to access financial intelligence from more than 100 other repositories around the world, some of which can be shared with the AFU and the Directorate of Special Operations. The FIC has also entered into formal co-operation agreements, in the form of memoranda of understanding, with collegiate institutions in the region, for example with the Financial Intelligence Inspectorate and Evaluation Unit of Zimbabwe.

There is evidence of growing co-operation between other law enforcement agencies in South Africa and their counterparts. The AFU's joint work with Nigeria's Economic and Financial Crimes Commission is yielding results. Joint work is also occurring with the Financial Services Authority of Namibia in tracking down proceeds of crimes committed in Namibia.

Observations made about the way illicit funds behave raise another salutary lesson, namely that speed is essential. Reporting institutions should be able to quickly determine suspicious fund activity and report it. Thereafter, the authorities have to act speedily to freeze activity on suspect accounts, or stop suspect transactions, such as sales of real estate, pending investigation. Because of the potential for wrong decisions to be made with serious consequences for innocent parties, the capacity to investigate should be good. Inevitably, there will be legal challenges to freezing directives. The relevant authorities need the support of competent lawyers, and the funds to pay or hire them.

Setbacks

In following the proceeds of crime, law enforcement suffered a setback in the case of *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd*; *National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd*; *National Director of Public Prosecutions v Seevnarayan* [2004] 2 All SA 491 (SCA). The respondent, who was liable to pay income tax, invested some of his income with insurance and investment company Sanlam. He used false names to avoid paying tax on the investment yields. The National Director of Public Prosecutions (NDPP) applied for the investments to be forfeited. The court of first instance did not grant the application in its entirety, but ruled that "the property retained as a result of unlawful activity referred to that portion of the property that would otherwise have been subject to tax". At most this represented 40% of the investment yield concerned. The NDPP having appealed, the Court of Appeal took the view that there was no connection between the tax evasion and the interest earned, as "the interest did not accrue to him in consequence of his conduct in proffering false information to Sanlam, but from his conduct in making the investments. Nor did the interest accrue to him in consequence of his conduct in proffering false income tax returns."¹⁰

While the legislative infrastructure in South Africa has built up a record of implementation, the perception persists that proceeds of unlawful activity are still attracted to South Africa, either in transit or to be integrated into the lawful sectors of the economy. Salter reviewed the position regarding the attraction which real estate holds for illicit income. By the admission of the FIC itself, more attention should be paid to anti-money laundering compliance by intermediaries involved in real estate transactions. The susceptibility of gambling outlets to the infusion and conversion of tainted funds continued to be a matter of concern in the period under review.

In an overview of the threat arising from money laundering (Goredema 2003), I drew attention to investment transactions, particularly in stocks, fixed property and tourism as being potentially attractive to proceeds of economic crime. The JSE Securities Exchange South Africa remains the largest in Africa, with a market capitalisation of US\$409 billion in 2005 (Bond 2006).¹¹ A significant proportion of transactions on the JSE involve foreign investors. Susceptibility to money laundering arises from vulnerability of the JSE to speculative investment conduct using tainted money. This might be in the form of the use of proceeds of fraud to trade in securities. In theory, investment intermediaries are supposed to ensure that funds with illegal origins are not so used, but this is quite difficult to do.

Notes

- 1 In connecting anti-money laundering to the integrity of the financial system, ESAAMLG echoes sentiments expressed in the Strategic Plan (for 2003 to 2008) of the Financial Crime Enforcement Network (FinCEN) in the United States.
- 2 Measuring performance is an important aspect of public policy. It is even more so in the case of innovative interventions such as structures to combat crime, given the significant cost implications of setting them up and maintaining them.
- 3 See the cryptic concession attributed to former US Treasury General Counsel David Aufhauser: "It was almost comical. We listed out as many of the usual suspects as we could and said, 'Let's go freeze some of their assets.'" (quoted in Reuter & Truman, p.144).
- 4 South Africa was caught up in a dilemma at the beginning of 2007, following the placement of two South African business personalities (the Dockrats) on a United Nations list of terrorist financiers. The listing was at the instance of the United States. The listed persons have continued to protest their innocence, causing the South Africa government to suspend action against them. The controversy was unresolved at the time of writing.
- 5 <www.pwc.com/za/ENG/pdf/pwc_GECS05SA.pdf>
- 6 <www.fic.gov.za>
- 7 Examples are the Law Society and the Gambling Board.
- 8 *Business Day*, 30 August 2006.
- 9 Reported in the *South African Sunday Times*, 30 July 2006.
- 10 *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd; National Director of Public Prosecutions v Seevnarayan* [2004] 2 All SA 491 (SCA), paragraph 73.
- 11 The other significant sub-Saharan stock markets are in Nigeria, Kenya, Zambia, Mauritius, Ghana, Botswana and Zimbabwe.

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CHAPTER 5

DEVELOPING A COMPREHENSIVE PREVENTION AND ENFORCEMENT FRAMEWORK AGAINST MONEY LAUNDERING AND TERRORIST FINANCING IN NAMIBIA, 2004 TO 2006

Ray Goba

Introduction

This chapter attempts, firstly, to analyse the nature of money laundering activities observed during the period 2004 to 2006. Real cases are relied upon to highlight the predicate crimes that generate funds that are subsequently laundered, the manner in which such funds are laundered and the state's initiatives to counter these activities.

Secondly, the presentation of case studies helps to distinguish between entities that were set up to corrupt and facilitate criminal enterprise and those that were corrupted by subsequent changes in ownership or changes in the economic environment.

Thirdly, the chapter describes legitimate entities that are corrupted by criminally exposed employees who facilitate the theft of funds from their employers through various corrupt activities. These funds are subsequently laundered by the employees and their external associates on a non-institutionalised basis. In other words, the leadership is not corrupt, but the entity is infiltrated by corrupt insiders.

Fourthly, there is an examination of entities that unwittingly or unknowingly become embroiled in money laundering, either because unqualified and inexperienced personnel are unable to detect money laundering, or because they are negligent in applying existing anti-money laundering mechanisms.

In Namibia during the last few years the entities that have been prone to the second and third scenarios are government institutions that generate large

sums of money through employee or public contributions and have an investment responsibility towards depositors. These include but are not limited to the Social Security Commission (SSC), the Overseas Development Corporation (ODC) and the Government Institutions Pension Fund (GIPF). The adverse consequences of the absence of anti-money laundering legislative and regulatory mechanisms are brought into sharp focus through a diagnostic examination of the criminal activities that have occurred at some of these institutions.

Fifthly, real cases are used to highlight the vulnerability of a developing country such as Namibia to money laundering as a result of the competition for foreign direct investment. On the one hand there is a need to ensure that the country complies with international obligations by adopting measures to promote and protect the integrity of its financial sector against money laundering, while on the other there is the socio-economic necessity to attract and retain foreign investment. Caught between a rock and a hard place, Namibia has decided in favour of fostering a clean business and investment environment by criminalising all forms of money laundering, preventing the financing of terrorism, and establishing institutions to enforce these objectives. As the cases show, it is not always possible to distinguish a genuine investor from a fugitive money launderer from another jurisdiction. The true circumstances of an individual's professed desire to invest in and make Namibia his home may or may never be revealed, even with the best mechanisms in place to detect and prevent money laundering.

Finally, the prevailing anti-money laundering framework and the adequacy of the state's responses are examined and measured against the backdrop of the successful perpetration of fraud and corruption against the institutions concerned.

Although law enforcement efforts in the area of prevention, prosecution and punishment have largely been preoccupied with predicate crimes, money laundering is so significant and pervasive that it deserves serious attention.

In Namibia, organised crime involves not only the traditional drug-trafficking associated with money laundering but other profit-influenced criminal activities such as illegal dealing in precious minerals, trafficking in endangered species, exchange control crimes, armed robberies involving huge amounts of money, fraud and corruption, and human trafficking.

A further worrying trend is the involvement of migrants in varying types of syndicated and sophisticated crimes such as piracy of intellectual property, abuse of telecommunications technology, kidnapping and extortion.¹

The falsification of identity documents and residence permits has been widely reported.² This is a troubling issue because it has the potential to facilitate the migration of money launderers and organised crime groups to Namibia.

Anti-money laundering framework: the banking institutions sector

The Bank of Namibia's regulatory and supervisory role

The Bank of Namibia (BoN), which was established in terms of the Bank of Namibia Act 1997 (Act No. 15 of 1997), is the central bank. It has regulatory and supervisory powers over the operation of banking institutions and bureaux de change in terms of the Banking Institutions Act 1998 (Act 15 of 1998). An important component of its supervisory role is the governor's power to issue directives (called "determinations") on any matter of banking activity. The BoN has the power under section 71(3)(b) of the Banking Institutions Act to issue general determinations on any matter for the proper regulation of the financial sector.

The Banking Institutions Act provides the regulatory framework within which banking institutions operate and defines the powers and authority of the BoN in its relationship with defined banking institutions.

The BoN is the licensing and regulatory authority for banking institutions and has powers to investigate instances of illegal banking activity, including the power to examine the financial affairs of any banking institution to ascertain its liquidity and viability. It can also require banking institutions to report to it any money transactions that indicate illegal activity.

Customer due diligence

Before the advent of legislation to criminalise money laundering in Namibia, the power to compel banks to be vigilant against money laundering was vested in the Governor of the BoN. In the exercise of such powers the current governor,

Tom Alweendo, issued determinations on money laundering and ‘know your customer’ policy.³ The determinations were influenced by the 1988 Statement on the Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering, issued by the Basel Committee on Banking Regulations and Supervisory Practices (the Basel Committee). The object was to encourage the banking sector, through “a general statement of ethical principles”, to adopt a common position in order to ensure that they were not used to hide or launder funds acquired through criminal activities, in particular through drug trafficking.

As stated in Drage (1993), the central principles of the Basel Statement were:

- the implementation of ‘know your customer’ principles, requiring banks to determine customers’ true identity through effective procedures for verifying identity particulars;
- compliance with laws, requiring the management of banks to ensure that business is conducted in conformity with the law and with high ethical standards, and that a service is not provided where there is good reason to suppose that transactions are associated with laundering activities;
- co-operation with law enforcement agencies, requiring banks – within the constraints imposed by rules relating to customer confidentiality – to co-operate fully with national law enforcement agencies, including instances where there are reasonable grounds for suspecting money laundering;
- attention to staff training in matters covered by the statement; and
- implementation of specific procedures for retaining the internal records of transactions.

The BoN was also influenced and guided by the Forty Recommendations of the Financial Action Task Force (FATF) on the prevention of money laundering, which it adopted. Recommendations 9 to 29 deal with the enhancement of the financial system and are particularly significant.

Reporting obligations

The BoN adopted a proactive approach to promote and protect the integrity of the Namibian banking system. Section 50 of the Banking Institutions Act obligates banks to report suspicious transactions to the BoN. To implement this provision, the governor issued a determination specific to money laundering and another on reporting suspicious transactions and transactions above a stipulated threshold. A suspicion-based and threshold-based reporting regime is thus applied in Namibia.

The BoN set the agenda for banking institutions, determining minimum safeguards for them to detect and prevent money laundering. It specifically warned banks to be particularly careful with fund transfers, especially those involving international funds, as these could be used for layering the proceeds of crime or disguising the identity of the beneficiary.

The BoN has the power to suspend operations or, in the event of conviction under the Act for illegal banking activity, to close down the business altogether.

The banking sector’s response

Core banks carrying on business in Namibia are First National Bank, Nedbank, Standard Bank and Bank Windhoek. All have significant foreign shareholding, primarily South African. This has a number of positive implications for anti-money laundering efforts: important policy decisions are directed from South Africa; the banking practices pursued by these banks are the same as those followed in South Africa; and South African legal requirements, such as anti-money laundering provisions applicable in South Africa, are applied to Namibian banks.

In line with international standards and the directives of the BoN, banking institutions register and verify the identity of a customer before entering into any transaction or providing a service to the customer. In practice they register and verify financial transactions concluded in or from Namibia for establishing a long-term business relationship with a customer. The transactions and services include

- opening savings, current, securities and deposit accounts;

- providing safety deposit facilities;
- taking custody of securities, bank notes, cash, precious metals and other valuables;
- collecting dividends and interest;
- issuing bonds and negotiable instruments;
- making payments on life insurance contracts (in such cases the person paying the premium and the beneficiary are recorded and verified):
- payments by a customer to an unfamiliar individual beneficiary;
- transactions of an unusual nature; and
- issuing credit cards.

Banking institutions do not normally verify the identity of individual customers who exchange Namibian dollars in cash for South African rand as both are legal tender in Namibia because the country is a member of the Common Monetary Area (CMA). This may potentially facilitate money laundering.⁴

Identity verification for Namibian citizens is by means of a national identity document. In the case of foreign nationals, a passport with proof of temporary or permanent residence as well as proof of employment or business, may suffice. When additional verifying documentation is required, this may include municipal or telephone accounts. For companies and other corporate entities, proof of incorporation and registration is required. Legal entities incorporated abroad need to produce a notarised proof of foreign registration.

Banking institutions typically record the name and address of the client, and the nature, number, date and place of issue of the identification document produced by the client. A bank official will make a photocopy of the original identity document and record the nature of the transaction, including a description of the account opened and details about the value of the instruments or cash deposited. Banks rely extensively on their branches to implement 'know your customer' principles and to maintain accurate records. Bank clerks and branch managers therefore have an important responsibility as the first line of defence against the abuse of banking institutions for money laundering purposes.

Internal audit departments and money laundering control officers are a feature of the organisational and operational structures of banks. Reports relating to suspicious transactions and transactions involving amounts exceeding the limits set by the central bank must be made to them. Money laundering compliance officers are usually members of the internal audit departments or senior legal officers of the bank. They investigate reports made to them and decide whether the cases should be referred to the central bank in accordance with the determinations. In certain banking institutions they are authorised to report to the central bank before reporting to internal superiors. This enables them to make independent, objective and timely judgements when exercising the discretionary power vested in them, and reduces the incidence of baseless reports.

In addition, banks have defined training programmes on money laundering for staff members, including bank tellers, branch managers and senior personnel. These programmes are conducted continuously and involve in-house as well as external training in the form of seminars, conferences and workshops.

Over the years banking institutions have been united in combating money laundering. A clear manifestation of this unity of purpose is "Vigilance on Money Laundering Activities" – a public statement issued jointly on 22 March 2005 by the 'big four' banks, comprising First National Bank, Standard Bank, Bank Windhoek and Nedbank. This statement was significant for several reasons: it sensitised the public to the nature and threat of money laundering; it sent out a clear message to money launderers of the commitment by the banking sector to adopt measures to deal with the problem; and it prepared customers for impending legal and operational changes under the Financial Intelligence Centre Act (FICA), which would have far-reaching effects on the relationship between banks and their customers.

The Financial Intelligence Centre Bill has now been passed by Parliament after it was referred back in 2005 for corrections and amendments to key provisions. It awaits approval by the National Council, the reviewing body for legislation, before it is submitted to the President for signature into law.

The recent arrest of 54-year-old multimillionaire fugitive Kobi Alexander, an Israeli citizen and a resident of the United States of America, has significantly

vindicated the proactive approach of the central bank and banking institutions in the absence of legislation criminalising money laundering.

Money laundering prevention and enforcement: the non-banking financial sector

There is at present no prevention or enforcement framework for money laundering in non-banking financial institutions. However, a regulatory and supervisory body was set up in accordance with legislation to supervise and regulate activities within this sector. The body – the Namibia Financial Institutions Supervisory Authority (NAMFISA) – was established by legislation in 2001.⁵

The functions of NAMFISA are “to exercise supervision in terms of the Act or any other law over the business of financial institutions and over financial services; to advise the Minister of Finance on matters related to financial institutions and financial services, whether of its own accord or at the request of the Minister”.⁶

Financial institutions subject to supervision by NAMFISA include public accountants and auditors who are members of the Institute of Chartered Accountants of Namibia, pension and provident funds, friendly societies, money lenders, unit trust schemes, participation bond schemes, managers of participation bond schemes, licensed stock exchanges and brokers, medical aid funds, persons registered as Lloyds intermediaries, insurers and re-insurers, insurance agents and insurance and re-insurance brokers, boards of executors or trust companies, and any persons who render financial services as a regular feature of their businesses even if they are not registered.

Money laundering is not a matter within its statutory mandate. Adolf Denk, NAMFISA’s legal adviser, confirmed this, notwithstanding the fact that in the normal course of on-site supervisory inspections NAMFISA does cover vulnerability and exposure to money laundering and terrorist financing. However, in anticipation of financial intelligence legislation and the additional reporting obligations expected under such legislation as part of its supervisory requirements, NAMFISA has drafted a Bill that has been distributed within the non-banking sector for consideration. Among other things the bill seeks to combat financial crime, the definition of which includes money laundering and terrorist financing.

Prevention and enforcement: other commercial sectors and the informal sector

The current absence of anti-money laundering legislation is a serious weakness because money launderers use the broader commercial/retail sector to conceal the proceeds of crime by purchasing property, valuable movables and luxury goods. The informal sector can also be abused by operating small businesses and passing them off as the source of funds when in fact legitimate and illegitimate funds are being mingled to obscure the criminal source. There is a proliferation of informal liquor outlets, restaurants and taxis in Namibia. These are small but rapid cash-intensive businesses through which money laundering can be carried out. It is therefore necessary to implement measures to prevent money laundering in this area. A ministerial task force is looking into this, and the Prevention of Organised Crime Act (POCA), once it comes into force, will address this loophole.

Although the Namibian initiatives to address the phenomenon of money laundering were influenced by developments on the international front, an important role was played by civic, academic and research organisations inside the country and the influence of the BoN was crucial.

The cases described below demonstrate the rising incidence over the years of predicate crimes associated with money laundering, which galvanised efforts to criminalise this activity and adopt prevention and enforcement measures through legislation.

Anti-money laundering enforcement measures: the emerging regime

The criminalisation of predicate (underlying criminal) acts

Fraud and crimes involving theft and robbery are criminalised in terms of the common law of Namibia.

Legislation to combat corruption was passed in 2003 and came into force in 2005. The reach of this legislation is broader than that of common law bribery, which deals only with public officials. Corrupt activities in both the public and private sectors are encompassed by the legislation. An independent body

to investigate corruption, the Anti-Corruption Commission (ACC), was established in terms of the Act in February 2006. It consists of a director, deputy director and other members of staff. The director and deputy director are appointed for five years by the National Assembly after nomination by the President.

The ACC will now be the primary organ to investigate corruption cases, but is not the only organ that has this function. In terms of article 91(f) of the Namibian Constitution the ombudsman has “the duty to investigate vigorously all instances of alleged or suspected corruption and the misappropriation of public monies by officials and to take appropriate steps, including reports to the Prosecutor-General and the Auditor-General”.⁷ It was in fact through the exercise of the ombudsman’s function in this regard that the first SSC scandal came to light.

Illicit dealings and trafficking in drugs and prohibited substances are criminalised under the Combating of the Abuse of Drugs Act, a new piece of legislation passed in October 2006. It prohibits the consumption, trafficking, sale and possession of dangerous, undesirable and dependence-producing substances and prescribes jail terms ranging between 20 and 40 years and/or fines of between N\$300,000 and N\$500,000.

Namibia has not ratified the United Nations (UN) Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 because the legislation then in force was archaic. Deputy Minister of Safety and Security, Gabes Shihepo, told Parliament when he tabled the new Bill that ratification would be made once the new Act became operational.

Illicit dealing in diamonds is dealt with under the Diamond Act. In addition there is legislation in force to address illegal dealing in protected resources such as wildlife and natural resources. Motor vehicle theft is recognised as a serious and specific problem on its own and is dealt with under the Motor Vehicle Theft Act.

Criminalisation of money laundering and organised crime

The POCA was passed by Parliament in 2004 and assented to by the President. It is a comprehensive piece of legislation that deals with, among other things, money laundering control. It is not yet operational and has been dormant

since 2004 pending the fixing and publication of the commencement date and the promulgation of subsidiary legislation necessary to implement the provisions of the Act. The effectiveness of the Act will only be measurable over time, but the application and enforcement of its provisions is sure to determine the course of money laundering and organised crime control in Namibia.

The Act provides for measures to combat organised crime, money laundering and criminal gang activity. The Act creates an enforcement framework by prohibiting racketeering and criminal gang activities, creating the crime of money laundering, and making provision for the reporting of financial transactions. It further provides for the seizure, confiscation and forfeiture of assets associated with the criminal activity that falls within the framework of the Act. It also establishes a unit to deal with asset forfeiture, creates a Criminal Assets Recovery Fund and a Criminal Assets Recovery Committee, and criminalises human trafficking.

The essence of the crime of money laundering is disguising the unlawful origin of property. The crime is committed when persons who know or ought to have known that property is part of the proceeds of unlawful activities conceal or disguise the nature, origin, source, location, disposition or movement of such proceeds or their ownership or interest in them, or enable or assist other persons who have committed offences in or outside Namibia to avoid prosecution, or remove or diminish property acquired as a result of the commission of an offence, whether that acquisition occurred directly or indirectly.

The crime is also committed when a person assists another to benefit from the proceeds of unlawful activities. This occurs when a person who knows that someone has obtained the proceeds of unlawful activities enters into an agreement, arrangement or transaction with the other person to facilitate the retention or control of the proceeds. In addition, it is committed when a person acquires, uses, has possession of or brings into or takes out of Namibia property with the knowledge that it forms part of the proceeds of unlawful activities. The crime is also committed by a director, manager or secretary of a corporate body that commits a money laundering offence.

Forfeiture will take place within a framework in which the rights of innocent third parties are protected. Criminal and civil forfeiture are both provided for, and forfeiture is possible without a criminal conviction.

The Act further creates reporting obligations and duties if there is suspicion of money laundering. As the proposed FICA will also require the reporting of certain activities, there is a danger that two parallel reporting regimes will be created unless the two statutes are harmonised.

The Financial Intelligence Centre Bill

This Bill, which was initially tabled in Parliament in February 2006 but withdrawn to rectify numerous deficiencies, was tabled again in September 2006. It introduces mechanisms and measures to prevent and combat money laundering, and sets up a framework procedure that encourages voluntary compliance and self-regulation by institutions that can be exploited for money laundering purposes. It aims to promote and protect the integrity of the financial sector.

The Bill proposes the establishment of a Financial Intelligence Centre (FIC), described in Parliament as “a purely administrative institution whose main objective is to collect and analyse financial information”.⁸ However, it will have the power to freeze suspicious money found in the financial system and to investigate money laundering. Other functions include receiving reports, collecting information considered relevant to money laundering or the financing of terrorism, processing and analysing information, disseminating reports to law enforcement and supervisory bodies, directing accountable institutions, and issuing determinations to any supervisory body to enforce compliance by accountable institutions. It will also compile statistics and records, disseminate information territorially and extra-territorially and make recommendations. The FIC will have training and research responsibilities, and will report back on the outcomes of investigations to accountable institutions.

The FIC will operate within the BoN, although the latter, as a supervisory institution, will be required to report to the FIC.

The findings of the FIC will be sent to the relevant law-enforcement agencies for further investigation. One of the criticisms raised when the Bill was first tabled was that the functions of the FIC would overlap with those of other enforcement

bodies such as the Namibian police (NAMPOL), the Namibia Intelligence Services and the ACC. Deputy Finance Minister Tjekero Tweya insisted that these institutions would be complementary as “all cases investigated by these institutions will ultimately end up with the Prosecutor-General’s office and the courts”.⁹

The Bill lists 22 accountable institutions, including banks, insurers, auditors, accountants, lawyers, estate agents and casinos. Supervisory bodies include the BoN, NAMFISA, the Law Society, the Registrar of Companies, the Estate Agents Board, the Public Accountants and Auditors Board, the Namibia Stock Exchange and the ACC.

The Bill spells out the duties of accountable institutions in identifying clients when business relationships are established or single transactions are concluded, and in record-keeping.

Accounts may be monitored if a court order by a judge in chambers is obtained directing an accountable institution to report transactions of a specified person. There have to be reasonable grounds for suspicion of money laundering. Provision is also made for the protection of persons making reports, including whistle-blowers, and for the protection of confidential information.

The FIC will have the power to institute enquiries against accountable institutions reasonably suspected of committing an act, including negligence, which may constitute an offence, and to make findings and impose sanctions. The procedure for this is also set out in the Bill, which prescribes various general offences, severe monetary penalties up to N\$100,000, and prison terms of up to five years. In addition, specific offences by listed accountable institutions and supervisory bodies are spelt out.

The provisions of the Bill broaden the scope of institutions that may be abused for money laundering and the financing of terrorism, and the measures for prevention and enforcement. Currently only banking institutions supervised by the central bank are covered.

After the experiences of the SSC, the ODC and GIPF – statutory bodies that handle large portfolios of depositors’ funds – it is imperative to extend the reach of the FIC legislation to cover these institutions and to improve corporate

governance and accountability. A major weakness of the proposed legislation is its failure specifically to encompass these institutions.

Investigation of predicate activities and money laundering

The investigation of corruption falls primarily within the mandate of the ACC. The ombudsman also has a duty to investigate corruption and misappropriation of money by public officials. However, NAMPOL has the power and authority to investigate all criminal matters including corruption.

NAMPOL has specialised units within its structures that investigate criminal conduct of specified kinds. These units include the Protected Resources Unit (PRU) for diamond legislation transactions, the Commercial Crimes Unit (CCU) for serious fraud and theft, the Motor Vehicle Theft Unit (MVTU) for theft of motor vehicles and related conduct, the Drug Law Enforcement Unit (DLEU) for drug-related criminal activity, and the Serious Crime Unit (SCU) for crimes such as armed robbery that involve violence. When POCA becomes operational it is conceivable that a new specialised unit may be required with a mandate to investigate money laundering, organised crime and racketeering activities, and to handle asset forfeiture.

Prosecution and punishment

In general, criminal proceedings commence with a complaint filed with the police. However, complaints relating to alleged corruption can also be filed with the ACC in the first instance. The decision to prosecute rests in all cases with the Prosecutor-General, an independent constitutional authority responsible for prosecution in terms of Article 88 of the Namibian Constitution.

Namibian courts are independent. Magistrates' courts and the High Court of Namibia have jurisdiction to try criminal matters as courts of first instance, depending on the level of sentencing jurisdiction required in each case. The sentences stipulated in legislation generally represent the maximum sentences permitted. Legislation may also provide for mandatory sentences. However, whether a person is convicted of a common law crime or a statutory offence, sentencing remains largely a matter within the discretion of the court with due regard to precedent under the *stare decisis* principle.

Tracing and confiscating the proceeds

When POCA comes into force the tracing and confiscation of the proceeds of criminal activities will assume great importance. The Act provides for comprehensive measures and procedures to facilitate seizure, confiscation and forfeiture.

For the moment, confiscation and forfeiture procedures continue to be applied within the parameters established by the Criminal Procedure Act. This entails confiscation as part of the sentencing process or disposal of seized exhibits.

At present the court may deprive a criminal of the proceeds of his criminal conduct by suspending a portion of any prison sentence on condition that the convicted person makes full restitution.

Another way of recovering the proceeds of crime is through sequestration proceedings. In the scandal involving the SSC and Avid, the court turned sequestration proceedings into a public enquiry to trace and recover N\$30 million that had been invested by the SSC with Avid Investments. Andrew Corbett, counsel for the SSC, informed the court that the SSC expected to recover about \$25 million of the money that was misappropriated. The sequestration of Avid, Namangol Investments and the estates of their directors was not finalised during the period under review.

Measures to foster transnational co-operation

Awareness of global trends

The early adoption of the Basel Statement and the FATF recommendations by the BoN, and the subsequent application of the principles they contained even before money laundering legislation was enacted, are testimony to the awareness of global policy trends.

This awareness has grown as a result of Namibia's participation in international affairs. In addition, international bodies and academic and research institutions such as the Institute for Security Studies have facilitated training workshops, seminars and conferences on money laundering and

related issues that have been attended by government officials and by banking and law enforcement personnel.

Namibia is a member of the community of nations. Article 144 of the Namibian Constitution declares that “[u]nless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia”.¹⁰

Namibia is therefore bound by the provisions of Security Council Resolution 1373 of 28 September 2001 dealing with terrorism. It is also a party to the International Convention for the Suppression of the Financing of Terrorism (1999), having signed it on 10 November 2001.

Effectiveness of mutual assistance processes

Legislation is in force to facilitate the extradition of suspects.¹¹ A mutual legal assistance law also exists.¹² The International Co-operation in Criminal Matters Act 2000 (Act 9 of 2000), which deals with mutual assistance in criminal matters, has been in force for several years. The object of this Act is to facilitate the provision of evidence and the execution of sentences in criminal matters and the confiscation and transfer of the proceeds of crime between Namibia and foreign states. The states to which the provisions of the Act apply are those specified in a schedule to the Act or states that are party to an agreement with Namibia. At present the only states covered are SADC members, which clearly limits the ambit of co-operation.

Despite this apparent limitation the application of the Act is flexible, as shown by the level of co-operation between the United States of America and Namibia in the extradition request for Jacob Alexander (whose case is discussed below). A presidential proclamation specifying the United States of America as a state to which the Act applied was passed in record time to facilitate Alexander’s extradition.

The Extradition Act 1996 (Act 11 of 1996) recognises the principle of dual criminality. Extradition is authorised only in cases of what is termed “an extraditable offence”. This is an offence committed within the jurisdiction of a

country that has an extradition treaty with Namibia or is a specified country, and which constitutes an offence under the laws of that country, punishable by a imprisonment of 12 months or more, and which, had it occurred in Namibia, would have constituted an offence punishable by imprisonment of 12 months or more. Differences in terminology, categorisation or the constituent elements of the offence between Namibia and the requesting country are immaterial to whether Namibia would grant an extradition request.

In the past Namibia has pursued criminal suspects to South Africa and obtained their extradition. These include Ivan Ganes for fraud committed at Telecom Namibia, Hyacinth Nangisa and, most recently, Jason Awene for armed robbery. Extradited suspects have included both South African and Namibian citizens.

However, the extradition of Juergen Koch has been unsuccessful. The Namibian Supreme Court ruled that the state and through it Germany had failed to establish a prima facie case for extradition. The court cited shortcomings in the evidence presented by the requesting authority and technical failures, such as the failure to translate apostilles used to authenticate German documents. In freeing Koch, the court pointed out that the Extradition Act is cumbersome and the threshold of proof required so high that it is virtually impossible for the state to establish a prima facie case for extradition. It recommended the overhaul of the Act to make it easier to extradite criminal suspects.

The Koch judgement is potentially beneficial to Jacob Alexander when his extradition hearing commences. It further underscores the imperative for user-friendly and effective extradition legislation and the adverse consequences of the absence of such legislation.

Transnational structures to trace and confiscate the proceeds of crime

At present little priority is given to tracing and confiscating the proceeds extra-territorially because there is no legislative framework in force to deal with such issues. However, this does not imply that extra-territorial tracing and confiscation within the parameters of existing legal structures is impossible. For example, in the Jacob Alexander case the USA has indicated that it will seek to confiscate and forfeit a substantial amount of allegedly

laundered funds, some of which are held by banking institutions in Namibia. Namibian law enforcement authorities and the BoN have accordingly frozen these funds, pending further proceedings, in terms of their existing powers under the BoN Act, the Banking Institutions Act and the Criminal Procedure Act.

Once POCA and FICA become enforceable, appropriate structures to address these matters will be established. These will involve NAMPOL, Interpol, the BoN, the FIC, the Prosecutor-General, an envisaged asset forfeiture body, and the Directorate of International Affairs and Co-operation in the Ministry of Justice, which is the “competent authority” in matters of mutual legal assistance and extradition.

Co-operation agreements

Namibia has signed a number of SADC, African Union and UN conventions. These include the UN Convention against Transnational Organised Crime and two of its protocols, the UN and African conventions on combating corruption and SADC protocols on combating corruption.¹³ Namibia is not a party to the SADC Protocol against Trafficking in Illicit Drugs. It has not yet signed or ratified the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances because it is in the process of promulgating new legislation in the area of licit and illicit drugs. In October 2006 the Namibian Parliament ratified the SADC Protocol on Extradition and the SADC Protocol on Mutual Legal Assistance in Criminal Matters.

Namibia is also a signatory to the memorandum of understanding establishing the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG) and subscribes to its objectives and programmes on money laundering control. It has undergone the mutual evaluation programme as part of its obligations.

Also ratified are seven of the universal instruments against terrorism, including the International Convention for the Suppression of the Financing of Terrorism (1999). It is also bound by Security Council Resolution 1373 of 28 September 2001. An anti-terrorism Bill is still being drafted and it would serve no useful purpose at this stage to comment on its proposed content.

Indicators of money laundering: some notable case studies

Money laundering occurs within and across territorial boundaries, and involves both local and foreign nationals. The cases examined below highlight the international dimension that often characterises money laundering, underscoring the imperative for international co-operation in countering organised crime, money laundering and financial crime in general.

The cases underscore the unlimited possibilities open to potential money launderers with huge financial resources. They can flee to countries where there are good prospects that they will be allowed to enjoy the proceeds of their criminality. In the process the proceeds of crime are moved through legitimate and illegitimate banking channels, and business links are established with influential locals, including lawyers or accountants. Such links are indispensable – not only for successful relocation and settlement but also to obtain advice on pertinent legal issues such as extradition, money laundering laws, immigration requirements and investment opportunities. Investments are made in legitimate business ventures and property. If the money launderers are not detected they can escape the reach of the law and live as respectable business people in their adopted countries. In the absence of effective anti-money laundering laws, as well as extradition and mutual legal assistance regimes, the possibility of arrest, detention and extradition becomes nothing more than a consequential business risk, and with unlimited financial resources the prospect of drawn-out legal proceedings becomes a challenge to be met and resisted at all costs.

The cases also demonstrate the vulnerability of developing countries desperate to attract foreign investment, and the extent to which they can be exposed to money laundering activities.

Case study: Vito Biggioni

Vito Biggioni di Mazara, an Italian millionaire, had been living in Namibia with his wife and children for several years. In 1999, with funds brought from abroad, he purchased La Marina, a three-coach train restaurant on the beach north of Langstrand between the towns

of Walvis Bay and Swakopmund on the Atlantic coast. He then spent millions of Namibian dollars¹⁴ to upgrade it to an ultra luxury restaurant and accommodation facility. He also invested in a fourth coach from Namrail (Transnamib), which was paid nearly a million Namibian dollars to place the coach on tracks in front of the other coaches. He made this huge investment intending to live in Namibia. The restaurant was later destroyed in a fire.¹⁵ At the request of the Italian government he was arrested pending deportation on allegations of involvement in organised crime and drug trafficking. The Italian authorities alleged that he was a member of the Sicilian Mafia and had been sought since 1995. However, the court found that the evidence produced for extradition purposes was insufficient and ordered his release from custody.¹⁶

In May 2004 the Italian authorities reported that he had been arrested in Venezuela following a joint international police operation. It was reported that he was one of Italy's most wanted suspects who had played a key role in international drug trafficking as the link between the Sicilian Mafia and Colombian drug cartels. Palermo prosecutor Pietro Grasso alleged that his role in cocaine trafficking "brought huge profits into the coffers of Cosa Nostra bosses in recent years".¹⁷ He was on a list of Italy's 30 most wanted fugitives, and Italian authorities claimed that during his years as a fugitive he had taken a larger role in the Trapani branch of the Mafia. He also helped other mob fugitives seeking refuge in Africa.¹⁸

According to reports, Biggione denies all the allegations. The current status of this investigation is not yet known.¹⁹

Case study: Hans Juergen Koch

A German citizen, Koch has been in custody since 14 October 2002 following his arrest at the instance of German authorities and has been fighting extradition since then in the magistrates' court, which ruled in favour of extradition, in the High Court of Namibia, which dismissed his appeal (prompting the Minister of Justice to sign the relevant authority) and in the Supreme Court of Namibia, where his final

appeal was heard in October 2006. The Supreme Court has since upheld his appeal against extradition.²⁰

Koch is wanted in Germany on 203 charges of fraud, involving the equivalent of N\$440 million, 12 counts of tax evasion involving the equivalent of N\$24 million, and four counts of falsifying documents. He allegedly defrauded dozens of German local authorities through the activities of a finance company that he ran in Germany between 1987 and March 2000. In the process he allegedly diverted millions of Deutsche Mark into his own bank accounts. The German ambassador claimed in the extradition request that between 1996 and 1999 Koch had misappropriated the equivalent of some N\$110 million for his own benefit from the financial transactions he had had with local authorities. It is believed that some of the proceeds of his alleged activities in Germany were transferred to Namibia and invested there.

Koch had been living and running La Rochelle, an upmarket game farm near the northern mining town of Tsumeb, which he had bought in 1994. The farm was a favourite destination for international hunters, mostly German.

Case study: Jacob Alexander

If the allegations against him are true, the Jacob 'Kobi' Alexander case shows the unlimited doors that ill-gotten wealth can open for a money launderer.

Alexander is an Israeli-born permanent resident of the United States of America, a former intelligence officer turned high-technology entrepreneur. He founded Comverse Technology Inc, a NASDAQ-listed telecommunications software company, and was its chief executive officer. Comverse is said to be the world's largest maker of voice-mail software.²¹

On 27 September 2006 he was arrested in Windhoek pending extradition at the request of the US Federal Bureau of Investigation (FBI). He had been on the FBI's 'Most Wanted' list since 31 July 2006 for failing

to appear in a New York court to answer charges of securities fraud. An international manhunt was launched after Alexander's disappearance from the United States in July 2006.

He "allegedly had a role in orchestrating a scheme to manipulate the granting of millions of dollars worth of company stock options to himself, his co-conspirators and other employees", achieving this "by fraudulently backdating options and operating a stock options slush fund".²²

His alleged co-conspirators – David Kreinberg, former chief finance officer of the company and William Sorin, former senior general counsel – surrendered in August and were released on bail. Both have since pleaded guilty to conspiracy and are now 'co-operating witnesses' for the government in the case against Alexander.

The case against the three men accuses them of making stock options more lucrative by backdating their exercise price to a low point in the stock value. This was possible because a stock option's exercise price usually coincides with the market value at the time of grant to give the recipient an incentive to drive the price higher.²³

It was further alleged in the complaint that from 1996 to 2006 Alexander exercised options and sold stock worth approximately US\$150 million (N\$1.152 billion), making US\$138 million (N\$1.05 billion) profit. Of that profit, US\$6.4 million was generated by backdating stock options.

Prosecutors also alleged that that Kreinberg and Sorin earned US\$1 million each from backdated options. The company also awarded thousands of stock options to fictional employees, then transferred the awards to an internal account under the name IM Fanton. The scheme enabled Alexander to award those options to real "favoured employees" and to himself without the approval of the board of directors.

Alexander faces a maximum 25 years if convicted for securities fraud, the most serious of the charges against him. The indictment also seeks an order for the forfeiture of about US\$138 million (N\$1.05 billion) of his assets. He faces 32 counts of crimes relating to an alleged 'slush fund', the backdating of stock options between 1998 and 2006, and money laundering.

Alexander was traced to Namibia through tracking the movements on bank accounts in the United States, Israel and Namibia. It is alleged that the funds were received through a lawyer's trust account in Namibia, which reported the largish receipts to the BoN. This led to further investigations, which ultimately involved US authorities.

He is alleged to have conducted a series of financial transactions with the proceeds derived from backdated stock options that he had exercised. He transferred US\$64.8 million from his accounts with Citigroup Smith Barney to two banks in Israel with the intention of concealing the tainted funds from law enforcement.

In the two months after his arrival in Windhoek from Israel with his family, Alexander transferred about US\$16 million²⁴ (N\$120 million) to Namibia from Israel, bought a house for N\$3.8 million, acquired a luxury motor vehicle, and enrolled his children at a local school. He established links with powerful lawyers, business partners and friends as he sought to make Namibia his temporary home while fighting attempts by the United States to extradite him. He invested US\$1.5 million (N\$11 million) in local low-cost housing and other start-up business ventures in partnership with certain Namibian citizens.

He obtained support from the Namibian Investment Centre and the local Jewish community, and was granted a two-year residence permit, having demonstrated a capacity to invest in Namibia and a commitment to making the country his home. He is on bail pending the conclusion of the extradition proceedings, which are scheduled to commence in the Windhoek magistrates' court in April 2007.

Predicate crimes associated with domestic money laundering

Predicate crimes associated with money laundering in Namibia have included fraud and corruption, theft, drug trafficking, illegal dealing in precious minerals (in particular diamonds), motor vehicle theft, armed robbery and exchange control violations. The motivation for the crimes is economic gain.

Fraud and corruption (investment fraud)

Two scandals rocked the SSC in the space of three years. In the first of these, insurance brokers with the collusion of certain employees of the commission were entrusted with millions of Namibian dollars worth of investment funds in return for kickbacks. The proceeds of fraud and corruption were subsequently laundered by the beneficiaries through various channels including 'splashing', the physical transportation of cash in and out of Namibia, and the purchasing of luxury goods as well as movable and immovable property. In one instance money was laundered through the trust account of a law firm.²⁵

In the second case, some of the persons originally involved in the first scandal connived to defraud the SSC, again with the assistance of certain employees, by channelling N\$30 million through Avid Investments, a special purpose vehicle set up to receive and launder the money. Once the SSC released the money to them, a portion of it was distributed among associates, friends and family while some was donated to churches. A substantial amount was exported to South Africa through normal banking channels. Some of it was subsequently transferred back in a similar manner to Namibia. The money was dissipated through various processes, including 'splashing', illicit diamond dealing, illicit foreign currency transactions, and the purchasing of movable and immovable property. None of the money has yet been recovered.²⁶

The prosecution and subsequent conviction of Emmanuel Mununga, a former Ministry of Defence official who abused his position in the ministry to defraud SANLAM Insurance of N\$5,425 million also highlights the incidence of fraud in the public sector.²⁷ Mununga, convicted on 186 counts of fraud, admitted that while employed as a personnel officer in the Ministry of Defence he submitted false claims for the payment of death benefits allegedly due to relatives of Namibia Defence Force (NDF) members who had died. He used the names of NDF members who had either resigned or retired and put these on old death certificates retrieved from the ministry's archives. He then submitted the claims to SANLAM Namibia. The payments were then laundered through bank accounts belonging to relatives and acquaintances. The money was invested in the popular, lucrative small businesses of shebeens, which were managed through third parties.

Acting Judge Christie Liebenberg sentenced him to a total of 20 years in prison. He also made a compensation order in favour of SANLAM for N\$5,425 million in terms of section 300 of the Criminal Procedure Act, which has the same effect as a civil judgement.²⁸ Mununga was initially charged jointly with the persons through whose accounts the monies were received, but charges against all of them were dropped after he decided to take full responsibility. This case underscores the need for anti-money laundering mechanisms in the public sector, particularly in those government departments or directorates that handle money.

The Offshore Development Corporation of Namibia (ODC) financial scandal, like the SSC scandals before it, is a *locus classicus* of investment fraud, corruption and money laundering.

The ODC is a government-owned company with a mandate to seek offshore investment opportunities and to accept funds placed with it for the purposes of such investment. The government has a 95% shareholding while board chairman Gerdus Burmeister holds the remainder. Since 2003 the ODC has invested N\$100 million with a Botswana-registered entity called Great Triangle Investments (GTI). When the investment became due the money was not paid to the ODC, prompting it to engage lawyers to assist in recovering the money. Investigations revealed that GTI was a private company registered with the Botswana Ministry of Trade in 1997. It operated a bank account. The directors were listed as Knight Maripe, a retired president of the Botswana People's Party, and a certain Philip Fourie, based in South Africa. At the time of registration, Maripe was about 80 years old and ailing at his village in Botswana and could not have known much about the investments. Fourie was believed to be in South Africa, having lost his job as CEO of the South African Water Board following allegations of improper financial dealings involving public funds. Apparently the ODC investments were handled by Tertius Theart of Stellenbosch, an alleged director of GTI, and a certain Vloog Theron, said to be "notorious for conning South Africans in the 1980s through a variety of imaginative investment and get-rich-quick schemes".²⁹ Investigations could not establish GTI's physical address.

The funds transferred from banks in Namibian to banks in Botswana were thereafter moved to bank accounts in South Africa and from there to banks in

Europe, and then back to South Africa. They vanished in an apparent money laundering process. Joint investigations by the Directorate of Corruption and Economic Crime (DCEC) of Botswana and South Africa's Directorate of Special Operations (Scorpions) revealed that GTI was an operational front for Fourie and Theart and that the two moved the money between other company accounts operated by them such as Comserve Investments (not to be confused with Comverse).³⁰

Subsequent investigations in Namibia indicated that Pieter Boonzaaier, one of the brokers involved in both SSC scandals, was the link between the ODC and the representatives of GTI and that he received commissions for his involvement. A sum of N\$100,000 has been traced to him. Investigations are still continuing.

In a related case Helene Naudé's investment with GTI disappeared.³¹ Windhoek pensioner Helene Naudé, 70, wishing to raise funds for a charitable bursary project she intended to set up, invested N\$7 million with GTI after being induced to cancel some of her Old Mutual investments by Johan Deysel, an Old Mutual adviser allegedly acting in concert with Pieter Boonzaaier. She was duped into believing that her funds would be invested with the United States Federal Reserve and that she stood to realise N\$9.8 million. The investment did not materialise on the due date. Subsequently Naudé instituted civil proceedings for the sequestration of the estate of Fourie and his wife in the Cape Town High Court. She also filed an application before the High Court of Namibia seeking an interdict to prevent the transfer of N\$3.2 million of Deysel's terminal benefits from Old Mutual to another fund. The civil proceedings are still pending.

These cases are significant for a variety of reasons:

- An analysis of the SSC and ODC cases reveals that these institutions were victims of premeditated fraud under the pretext of investment.
- They show a similar *modus operandi*, typified by the use of inside information, shell companies, collusion between insiders and outsiders, the use of family and social ties, and the targeting of institutions with

weak management, operational and internal control. All of this provides ample testimony of syndicate fraud and organised criminal activity of the racketeering variety.

- The same individuals tend to be involved, indicating a degree of specialisation in this type of conduct. Important criminological lessons can be drawn from these cases.
- They underscore an urgent need for the application of the same due diligence measures that have been implemented in the banking sector and for the operation of government institutions such as the SSC, GIPF and the ODC to be properly regulated and supervised.
- They show an imperative need for the appointment of suitably qualified and experienced managers with integrity in such institutions.
- The cases demonstrate a crying need for the ACC to probe the sources of income of people who lead ostentatious lifestyles not justified by their known sources of income.
- They demonstrate the importance of harmonising legislation and institutions to facilitate international co-operation among law enforcement agencies.
- They demonstrate that despite the best intentions of the BoN and banking institutions in Namibia, it is difficult to detect criminality in an environment where money, most of it legitimate, is routinely moving within the CMA.

Drug trafficking

When tabling the Combating of the Abuse of Drugs Bill, Deputy Minister of Safety and Security Gabes Shihepo told Parliament that drug abuse had reached "alarming proportions". He further told the house that Namibia was now internationally regarded as a consumer country for "all kinds of illicit drugs" and as a transit route for drugs destined for other countries. Of all the drugs seized by the Namibian Police, 90% were destined for the Namibian market. He further stated that drugs worth about N\$2 million were confiscated between May 2005 and November 2006 and there were 800 arrests.³²

Illicit diamond dealing

This is a historical phenomenon dating back to pre-independence times when it was considered part of the legitimate struggle against the apartheid regime. Those working in the apartheid-controlled mining companies who were able to steal diamonds from the mines were regarded as heroes and latter-day Robin Hoods. The pilfering of diamonds continued after independence, in spite of stringent security measures adopted by mining companies such as Namibia De Beers Mining Company (NAMDEB) and its subsidiaries. Some of these measures include incentives such as rewards consisting of large percentages of the value of recovered diamonds. The main reason for persistent illicit diamond dealing is that the profits from a successful operation far outweigh the risks involved.

Diamonds are typically stolen by mine employees, who smuggle them out of the mining areas and sell them to illicit dealers. One noted case involved an employee of NAMDEB at Oranjemund, an exclusive diamond mining area and security zone, who deposited ZAR1 million into a South African bank. The bank submitted a suspicious transaction report to the South African Financial Intelligence Centre which in turn alerted NAMDEB. However, no action was taken because there was insufficient evidence to prosecute the employee for violation of the Diamond Act or for money laundering. The latter was, in any event, not yet an offence. With the criminalisation of money laundering and the passing of financial intelligence legislation and the establishment of the FFICA, cases such as this one will not escape prosecution and the proceeds will be liable to forfeiture.

Another case involved two Namibians who were employed by NAMDEB at Oranjemund as sweepers in diamond processing areas. They became targets of a criminal investigation after being implicated in a cash-in-transit vehicle robbery involving N\$5.3 million at Brakwater near Windhoek. Shortly after the robbery largish sums of cash were deposited into their bank accounts at Oranjemund, a possible indication of the use of the proceeds of the Brakwater heist to purchase diamonds from them. The money had been deposited in batches of 50-dollar notes totalling N\$20,000 on each occasion over a period.

In total, N\$150,000 was deposited. The deposits were clearly not commensurate with their legitimate sources of income, but the state was unable to prove that they were involved in the robbery. This did not dispel the suspicion of involvement in illicit diamond dealing, for which they were not charged. Despite the evidence, they could not be charged with money laundering because no such crime existed at the time. Cases such as this will in future be investigated effectively and prosecuted as money laundering crimes. The absence of appropriate laws meant that they probably escaped punishment for criminal conduct and benefited from such conduct.³³

In a third case, evidence of illicit dealings in diamonds came to light during the hearing of a labour complaint brought by two Namibian males after they were dismissed from employment with NAMDEB. Evidence presented before the district labour court showed that in 2002 the Diamond and Gold Branch and the Organised Crime Unit of the South African Police, following a two-year covert operation into the illegal diamond trade (dubbed Operation Solitaire), searched the Scotia Inn at Port Nolloth after receiving information that illegal diamond transactions were being conducted there by a certain Carlos Viljoen with persons from Namibia. Documents recovered during the search yielded names of persons, account deposit slips and other evidence, including diamonds and ZAR1,585,900 and N\$11,710. Deposit slips were found for large amounts paid into the FNB Windhoek account of P.P. Enkali, a NAMDEB employee at Oranjemund, and similar payments into the FNB Ondangwa account of Malakia Petrus, also a NAMDEB employee at Oranjemund.³⁴ Further investigations confirmed substantial bank transfers and deposits into their bank accounts in Namibia, which led to their dismissals. NAMDEB drew the only reasonable inference it could from the facts, namely that the employees were involved in the theft of diamonds from its mining areas and were dealing illegally in such diamonds. Their joint complaint for unlawful dismissal was dismissed in 2006.

Against the background of acquittals in the courts and lack of effective criminal sanctions, this case is an example of the victim resorting to an alternative way of dealing with suspected theft. It is also illustrative of the predicate activities indicative of money laundering in the area of illicit diamond trading.

Conclusion

The influence of global anti-money laundering initiatives has led to legislative responses in Namibia and to the international co-operation highlighted in this chapter. These responses include the criminalisation of money laundering and measures to combat organised crime and racketeering and facilitate the tracing, seizure and confiscation of assets. The statutory powers of the FIC will widen the scope of prevention and enforcement measures to include non-bank financial institutions and other establishments that can potentially be abused for money laundering.

Money laundering is a new phenomenon for most state organs, including the police, prosecutors and the judiciary. As Namibia moves towards a comprehensive prevention and enforcement framework for combating money laundering and terrorist financing, technical assistance will be required to recruit and train personnel to staff the necessary institutions needed for training police personnel and prosecutors.

In this regard, and ahead of the promulgation of the Financial Intelligence Centre Act, the BoN and the United States Embassy announced a new technical assistance programme for the central bank.³⁵ Under this programme, the US Treasury Office of Technical Assistance (OTA) will assign an adviser to the Bank of Namibia to assist with the establishment of a Financial Intelligence Centre.

The importance of legislation to combat terrorism and the financing of terrorism in Namibia was underlined not by the events of 9/11 but by what happened on 2 August 1999, when a group of rebels carried out an abortive attempt to secede the Caprivi province from Namibia, in the process killing several civilians and members of the security forces. It is against the backdrop of the current trials of the alleged perpetrators of the violent uprising that issues of terrorism will be addressed.

The imminent staging of the football World Cup for the first time on the African continent raises the spectre of terrorist attacks before, during and after the tournament with consequences too ghastly to contemplate. Terrorism is therefore a real issue for Namibia and not a far-fetched threat.

Notes

- 1 *The Namibian*, 11 November 2004.
- 2 *The Namibian*, 3 October 2004.
- 3 These determinations were issued as General Notice No. 121 in *Government Gazette* No. 1899 published on 29 June 1998.
- 4 The countries that make up the CMA are South Africa, Namibia, Lesotho and Swaziland. "The South African Reserve Bank leads the way in setting monetary policy for the CMA countries," according to Tito Mboweni, the bank's governor in a talk at the Namibia Stock Exchange Scholar Investment Challenge dinner in Namibia. Quoted in *Informante*, 12 October 2006, p. 9.
- 5 Namibia Financial Institutions Supervisory Authority Act 2001 (Act 3 of 2001), known as NAMFISA.
- 6 NAMFISA, section 3.
- 7 Constitution of the Republic of Namibia, Article 91(f).
- 8 Stated by Tjekero Tweya, Deputy Minister of Finance, when he tabled the Bill in Parliament in September 2006.
- 9 Ibid.
- 10 Constitution of the Republic of Namibia, article 144.
- 11 Extradition Act 1996 (Act 11 of 1996) as amended.
- 12 International Co-operation and Mutual Legal Assistance Act 2000.
- 13 See the Minister of Justice and the Attorney General of Namibia's Statement to the High Level Segment of the 11th UN Congress on Crime Prevention and Criminal Justice, Thailand, 23 April 2005.
- 14 N\$1.00 = ZAR1.00.
- 15 *Namibian Economist*, 23 February 2001 and *The Namibian*, 21 February 2001.
- 16 *Vito Biggione v the State*, High Court of Namibia Case No. CA 15/2000 (unreported).
- 17 *The Age* 30 May 2004; *Studio Cataldi*, 29 May 2004.
- 18 Ibid.
- 19 *Windhoek*, July 2006.
- 20 *Hans Juergen Koch v the Minister of Justice & Others*, Case No. SA 13/2005.

- 21 <www.vietnamnet.com> September 2006.
- 22 FBI Crime Alert published on the Internet.
- 23 *The Namibian*, 28 September 2006, citing US authorities quoted by Associated Press and the *Wall Street Journal*.
- 24 Namibian authorities confirm that the money was transferred through the trust account of a Windhoek law firm, which prompted a report to the BoN and subsequent enquiries into the source and beneficial owner of the funds. The FBI were then alerted and its agents flew to Windhoek and were there from July working with Interpol to effect a provisional arrest. It was anticipated that the formal extradition request would be filed with Namibian authorities within 30 days of the arrest.
- 25 Evidence given during a presidential commission of enquiry in 2003.
- 26 Evidence heard during a Companies Act enquiry in the High Court of Namibia in 2005 to liquidate Namangol Investments and Avid Investments, which had been used to launder the money.
- 27 *The State v Emmanuel Mununga*, High Court of Namibia Case No. CC 8/2004.
- 28 *Ibid.*
- 29 *The Namibian*, 16 August 2005.
- 30 *The Namibian*, 7 September 2005.
- 31 *The Namibian*, 8 November 2005, 21 November 2005 and 15 December 2005.
- 32 *The Namibian*, 23 November 2006.
- 33 *The State v James Hyacinth Nangisa & Others*, High Court of Namibia Case No. CC 4/2002.
- 34 NAMDEB security department intelligence report, filed in the Windhoek District Labour Court, Case No. DLC 373/374//2002.
- 35 *Namibia Economist*, 27 October 2006.

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CHAPTER 6 EVALUATION OF ANTI-MONEY LAUNDERING MECHANISMS IN MOZAMBIQUE, 2004 TO 2006

Benjamim Capito

Overview of money laundering typologies in Mozambique

Corruption, illicit drug trafficking and the transnational transportation of large amounts of foreign cash have been among the most significant phenomena linked to money laundering in the period 2004 to 2006.

Corruption

Corruption is considered one of the most critical money laundering predicate offences in Mozambique. It is not only a source of illicit proceeds that are subsequently laundered but also undermines the prosecution and punishment of other criminal offences, including money laundering.

In 2005 Transparency International ranked Mozambique the 97th most corrupt country out of the 159 countries that were ranked.¹ In 2006 no significant changes were noted and Mozambique was ranked the 99th most corrupt country out of 163.

The United States Agency for International Development (USAID) Corruption Assessment Report on Mozambique, dated 16 December 2005, identified several factors that facilitate the spread of corruption in a wide range of sectors and government functions. These are

- the merging of elite political and economic interests;
- a limited application of the rule of law and a corresponding sense of impunity because of the weakness and sometimes political manipulation of judicial institutions;

- alleged linkages between corruption and organised crime;
- lack of transparency and access to relevant governmental information;
- weak accountability mechanisms; and
- popular tolerance of corruption coupled with fear of retribution as evidenced by the fact that during the government-sponsored Governance and Corruption Survey in 2005, the most frequent answer when people were asked why they would not blow the whistle on corruption was “because there is no protection” for people who stand up to corrupt practices.²

The USAID report states that “the judiciary was identified by respondents to the 2005 corruption survey as well as many people the team interviewed, as one of the most problematic sectors in Mozambique”. The report says that corruption in the judicial sector manifests itself in the buying and selling of verdicts, the exertion of political control over judicial outcomes, ‘losing’ evidence or case files as directed or paid for, intimidation of witnesses, and freeing of key suspects. Political leaders, multinational firms and drug traffickers are seen as groups that have great or total influence over the state. Judges, prosecutors and the criminal investigation police are among key judicial actors susceptible to corruption.

In the period 2004 to 2006 many corruption cases were reported to be under investigation by the Anti-Corruption Unit or the Anti-Corruption Central Office but no significant cases have been prosecuted. One of the reported cases involved the Ministry of the Interior, where some officials from the Financial and Administration Department were reported to have manipulated information and obtained salaries claimed for non-existent policemen in 2004. This allegedly happened with the collusion of their superiors. Some of the people in this case have been linked to extensive wealth inconsistent with their normal income. The case was initially investigated by the Ministry of Finance auditors and the report was sent to the Anti-Corruption Central Office for additional investigation and eventual prosecution, which is where the matter still stands.

Another major case investigated in 2004 and 2005 was related to the former Minister of Education, who was accused of having used international donor

funds to provide scholarships to members of his family. He was interrogated by the Anti-Corruption Central Office but no decision to prosecute him was taken.

Recently the weekly magazine *Jornal Zambeze*³ reported on corruption involving the State Shares Management Agency (IGEPE). Two members of the board of the agency are alleged to have received US\$50,000 each from the Tanzanian company METL in order to benefit the company in an international bid in 2003 for the privatisation of the state’s 30% shareholding in the textile manufacturer Texmoque. The suspicion was based on phone call records of a conversation between one of the members of the IGEPE board and a representative of the winning company. The board denied the allegations at a media conference. The case has been reported to the Anti-Corruption Central Office for further investigation.

From these cases it can be concluded that corruption is still a major challenge in Mozambique to anti-money laundering investigation, prosecution and punishment owing to the very close link between the corruption of the law enforcers and money laundering. However, there is an expectation of change in this area based on the new government commitment to combating corruption. Among other measures, this commitment is reflected in the public sector reform programme, enhanced by the recent establishment of the High Authority for the Public Administration; the implementation of regulations to the Anti-Corruption Act, approved by Decree no. 22/2005 (22 June); and the allocation of significant human and material resources to the Anti-Corruption Central Office.

Illicit drug trafficking

During the first half of 2005 the media reported more than 10 cases of illicit drug trafficking, all of them involving Mozambican women returning from Brazil. They allegedly went to Brazil for a short visit or for shopping and were caught at Maputo and Beira airports with drugs stored in their stomachs.

The women were reported to be intermediaries whose task was to bring the drugs into the country and hand them to the owners, who are thought to be very wealthy people. The compensation for such a courier service is no more

than US\$1,000. The intermediaries are trained never to disclose the names of their principals. The questions that have not been answered are where the proceeds from such criminal offences are placed and how much money is involved. Building new houses for rental purposes, and purchasing and selling Japanese second-hand vehicles, seem to be some of the mechanisms for laundering the proceeds of the drug trade. Investigators consider the reported cases to be but a fraction of a huge business.

Foreign cash transportation

A phenomenon linked to money laundering that causes problems, particularly for the customs and excise authorities, is the transportation of large amounts of foreign cash (US dollars) outside the formal financial network.

In May 2005 the customs authorities at the airport of the northern town of Nampula challenged a Guinea-Conakry national who held a Kenyan passport. He had arrived from Thailand with US\$103,000 in his suitcase. The amount had not been declared to the authorities. Mozambican exchange regulations require foreign currency exceeding US\$5,000 to be declared to the customs and excise officials at the point of entry. The law does not stipulate any sanction for non-declaration except that the importer cannot export any undeclared foreign currency from Mozambique.

The money was confiscated and deposited in a branch of the central bank. After finding that there was no evidence of exchange law misdemeanour the case was reported to the provincial general prosecutor for investigation on suspicion of money laundering. During investigation the man claimed that he was a businessman living in Thailand, that the money had been earned from businesses in minerals and clothing, and that he had come to Mozambique to explore business prospects. After a few days the general prosecutor concluded that there was no evidence of money laundering and the money was returned to the man.

During the same period it was reported that a Mozambican truck driver with an amount of US\$400,000 had been apprehended by the South African police.

In neither case was the suspect able to give a satisfactory explanation for not using the services of a financial institution. In normal circumstances the men

should have used traveller's cheques, credit cards or wire transfers, as most visitors do when travelling in foreign countries. These and similar cases that are not officially reported support the inference that some of the cash may not be clean money, which is why it is kept away from financial institutions. Such cases call for more attention to, and monitoring of, transactions in the non-financial and informal sectors to prevent them being used to launder the proceeds of crime. Money laundering control mechanisms should apply across the board.

The anti-money laundering legal framework

Background

The enactment of legal provisions to prevent and combat money laundering in Mozambique dates back to 1997. In terms of article 41 of Law no. 3/97 (13 March), the laundering of the proceeds of illicit drug trafficking involves a sentence of between 8 and 20 years' imprisonment.

Law no. 7/2002 (5 February) extended money laundering punishment to other criminal offences. The law defined as predicate offences illicit drug trafficking, theft, robbery, fraud, the manufacture, importation and trading in arms and explosives, terrorism, extortion, corruption, speculation, and dealing in contraband. For financial institutions the law introduced 'know your customer', due diligence, and procedures for reporting suspicious transactions. These institutions were also expected to train staff to comply with the new obligations.

Both the new anti-money laundering law and the Banking Act no. 15/99 (1 November), as amended by Law no. 9/2004 (21 July), empower the central bank to monitor compliance by banking institutions with their legal obligations.

Other relevant legal instruments on money laundering or activities related to money laundering are the following:

- Decree no. 37/2004 (8 September), which approves the anti-money laundering regulations and provides details on their implementation, including supervision authorities and due diligence and reporting procedures;

- Law no. 3/96 (4 January), the Exchange Law and its Regulation, approved by Notice no. 05/GGBM/96 (19 July), in terms of which the border movements (entrance and exit) of foreign currency, including wire transfers, are controlled;
- Circular no. 001/DSB/2003 (21 August), which guides banking institutions on the implementation of the anti-money laundering procedures and creates the necessary internal infrastructure for that purpose;
- the Anti-Corruption Act no. 6/2004 (17 June);
- Decree no. 22/2005, the Anti-Corruption Regulation; and
- Law no. 9/2002, the law on the state financial administration system, which focuses mainly on budget execution, public accounts and the treasury system.

In addition to domestic legislation, Mozambique has signed and ratified international legal instruments on money laundering, including the United Nations Convention Against Transnational Organised Crime; bilateral agreements on drugs with Brazil and Portugal; and Southern African Development Community (SADC) protocols and bilateral agreements on customs and excise and criminal investigation co-operation. Under the Banking Act, the Banking Supervision Department may co-operate with any foreign banking supervision authority to investigate suspicious transactions.

Deficiencies in anti-money laundering legislation

The picture given of the relevant anti-money laundering legislation shows that there is a comprehensive legal basis for preventing, investigating, prosecuting and punishing money laundering. Any impunity observed in money laundering cases cannot be attributed to the lack of basic legal instruments.

However, there are some deficiencies in the main legislation that tends to contribute to its ineffectiveness.

One of the concerns about Law no. 7/2002 (5 February) is that although it applies to non-banking financial institutions such as insurance companies,

casinos, pension funds, managing societies and public mailing services, it does not apply to entities such as lawyers, notaries and non-governmental organisations, which are, among others, also susceptible to money laundering. This opens a gap for unmonitored activities, some of which could amount to money laundering. Any revision of the law should take note of this loophole.

The second concern relates to the duty of financial institutions to abstain from proceeding with any suspicious transaction until a decision of the General Prosecutor is made, as stated in article 19 of the law. Although this measure seems to be adequate in some cases – for instance when the withdrawal or transfer of money is requested – it is not prudent or practical in situations where a customer wants to open a bank account or make a deposit, since in these cases the customer can permanently withdraw from the transaction and not come back for fear of being subjected to investigation. In such instances the financial institution should identify the customer, accept and receive the cash amount or open the bank account, and immediately take steps to report to the General Prosecutor for investigation. This could require a very effective investigation infrastructure. The law should therefore clearly indicate where the duty to abstain is applicable and where it is not.

The third concern relates to the competence of the banking supervision authority, in terms of article 38, section 1, to investigate and send to the court all information concerning non-compliance with the obligations stipulated in articles 10, 12 and 14 to 18 of the law. Section 38 overlooks the fact that not all financial institutions are under the supervision of the Banking Authority. There are also three other anti-money laundering supervisory authorities, namely the Insurance General Inspection, the Gambling General Inspection, and the Ministry of Finance. There is no integration of function between these authorities, and it is unclear how the Banking Authority can act in cases of misconduct detected by other supervisory authorities. This is another aspect that requires revision.

During the period 2004 to 2006, the following developments indicated progress with money laundering legislation:

- the adoption of the anti-money laundering regulation by means of Decree no. 37/2004 (8 September);

- the adoption of the Anti-Corruption Act no. 6/2004 (17 June);
- the adoption of Decree no. 22/2005, the Anti-Corruption Regulation; and
- the adoption by Cabinet of the Bill to establish the Financial Intelligence Unit. The Bill now awaits the final approval of Parliament.

Implementation of anti-money laundering law

Although legislation on money laundering in Mozambique is comprehensive, there is no evidence of significant progress in the implementation of the legislation during the period 2004 to 2006.

Before the approval of the anti-money laundering regulation by means of Decree no. 37/2004 (8 September), the lack of such regulation was very often alleged to be the main impediment to the implementation of the law. This explanation no longer holds water, given that the regulation has been in place since September 2004.

Evaluation of customer due diligence

Under the anti-money laundering Law no. 7/2002 (5 February), financial institutions are obliged to identify their customers and keep records of personal documents when entering into any transaction. The regulation approved by means of Decree no. 37/2004 (8 September) details the kind of documents acceptable for identification purposes in financial transactions and what a financial institution should do in the event of a customer refusing to identify himself.

The Banking Supervision Department confirms that all banking institutions are carrying out their customer identification obligations, which they seem to perceive as a way of preventing bank fraud. Concern persists with respect to compliance by foreign exchange bureaux as it has been noticed that they sometimes do not adhere to identification requirements, despite being subject to inspection and liable to sanctions should infringements come to light. This implies that the risk of detection is not perceived to be high.

In December 2005 the Council of Ministers introduced changes to anti-money laundering regulations relating to the documents that are acceptable for customer identification in financial transactions. Additional documents are now acceptable, including driving licences, military identification cards, election registration cards, refugee identification cards and social security identification cards. This change extends the penetration of financial services and facilities, including micro finance, to the rural sector, where access to some of the documents traditionally accepted is much more difficult. In order to counter the increased risk of fraud, financial institutions are encouraged in terms of the regulation to use maximum due diligence, including possibly requiring testimonials when accepting the new documents.

In the view of the present writer this change is positive, in that it adds value to the creation of an adequate infrastructure to control money laundering while drawing in transactions that would have remained in the informal sector and therefore beyond monitoring.

Evaluating the reporting of suspicious transactions and the response of law enforcement

Under anti-money laundering law, financial institutions are required to report suspicious transactions to the General Prosecutor for investigation, and to send copies of the reports to the supervisory authority. The regulations give details of the reporting procedures.

More than 15 suspicious transactions were reported to prosecutors in Nampula, Beira and Maputo in the period 2004 to 2006. The cases were reported by commercial banks and by customs and excise authorities. However, none of the reported cases has been prosecuted and no asset forfeiture in connection with money laundering has occurred. This creates a problem for commercial banks, which may well feel that they embarked on high-risk processes that did not yield tangible results. It is known that the state is not in a position to compensate any financial institution for loss of business.

There are several factors to which the lack of prosecution in money laundering cases can be attributed.

Corruption

As stated above, corruption prevents investigators, prosecutors and magistrates from competently discharging their obligation to follow up or adjudicate in money laundering cases. Money laundering is notoriously connected to bribery for the purpose of weakening or distorting criminal investigations and court decisions.

Prioritisation

As Mozambique is still a very poor country, the government concentrates on poverty reduction programmes rather than on solving other problems. In the context of poverty reduction, monitoring and enforcing anti-money laundering measures may even seem to be counter-productive since this action could undermine private sector investment initiatives if people constantly have to account for the resources under their control.

Training

Although action is being taken to train supervisory officers, magistrates, policemen and other key actors, this is still inadequate to meet the complexity of money laundering cases. The fact that there are no judicial structures specialising in economic crimes is a significant gap in combating money laundering.

Supervision to ensure compliance and sanctions in the event of non-compliance

A supervision system has been created to monitor compliance with anti-money laundering obligations. Under the anti-money laundering regulations there are four authorities that monitor compliance. These are:

- the Banking Supervision Department of the central bank;
- the Insurance Inspector-General;
- the Gambling Inspector-General; and
- the Ministry of Finance.

Financial institutions that do not comply with anti-money laundering law are liable to fines of between 150 and 538 times the minimum salary,⁴ suspension or revocation of a licence, and the disqualification of officials found guilty from occupying management positions for a period of 1 to 10 years.

The anti-money laundering regulations give details of the supervisory role and procedures of the monitoring authorities. The Banking Supervision Department seems to be the only regulatory authority that monitors the implementation of anti-money laundering measures through on-site supervision. This was seen in 2006, when many banks and bureaux de change were inspected. There is still no evidence of other regulatory bodies undertaking inspections to check on compliance with anti-money laundering obligations. To rectify this weakness will require a great deal of training.

Establishing a financial intelligence unit (FIU)

One of the significant gaps in Mozambique is the lack of an FIU. Money launderers are increasingly aware of the impact of the work of the controlling mechanisms of financial institutions and therefore opt to use non-formal institutions or to spread their activities among multiple institutions to prevent suspicions based on the frequency of transactions or the amounts involved. For this reason the establishment of an FIU in Mozambique appears to be of critical importance in the centralisation and cross-checking of customer transaction data.

On 11 July 2006 the Council of Ministers commended to Parliament a Bill to establish the Mozambique Financial Information Centre (Centro de Informação Financeira de Moçambique or CIFiM). The Bill is expected to be discussed in the forthcoming ordinary session of Parliament.

According to the Bill, the CIFiM is national body endowed with administrative autonomy, operating under the Council of Ministers. The functions of the CIFiM are

- to collect, centralise, process and analyse information relating to financial operations that are susceptible to money laundering acts and others determined by law; and

- to support the investigation of money laundering acts implemented by competent bodies.

In order to carry out its functions, the CIFIIM is authorised to

- exchange financial information or transmit it to other national authorities defined by law;
- co-operate, and co-ordinate its actions, with other national authorities engaged in the detection, prevention and suppression of money laundering; and
- request information from entities that are suspected of suspicious transactions.

According to article 3 of the Bill, whenever there are sufficient indications of money laundering, the director of the CIFIIM may, at the same time as sending the information to the competent bodies, order the suspension of the activities in question and seize assets involved subject to an order by a judge of the criminal court, to be made within 48 hours.

The CIFIIM's policies and strategies are defined by the Council of Ministers, on the recommendation of the CIFIIM Co-ordination Committee, which comprises

- the Prime Minister (chairman);
- the Minister of Finance;
- the Minister of the Interior;
- the Minister of Justice;
- the Attorney-General;
- the Governor of the Bank of Mozambique;
- the Director of the CIFIIM; and
- the Deputy Director of the CIFIIM.

The CIFIIM Co-ordination Committee has ordinary meetings twice a year and extraordinary meetings whenever convened by the chairman.

The success of the CIFIIM will depend primarily on the political will to fight corruption. If this will is not strong enough, the same constraints that work against money laundering investigation, prosecution and punishment will prevent the achievement of significant results by the unit.

Training and awareness

After having identified training as a key issue in the implementation of anti-money laundering mechanisms, the government of Mozambique and some international financial institutions agreed to undertake the training of financial institution supervisors under the multilateral Financial Sector Technical Assistance Project (FSTAP) from the last quarter of 2005. The programme includes training in the monitoring of money laundering and the investigation of financial offences.

Within the framework of training, awareness and sensitisation, two significant events took place in 2005. A workshop on 'Enforcement and implementation aspects of anti-money laundering legislation for criminal justice officials', organised by the legal department of the International Monetary Fund (IMF), was held in Maputo from 16 to 20 May 2005. In addition, a workshop organised by military officers, held in Maputo on 5 August 2005, addressed the impact of money laundering on the country's economy and the need to fight it.

In June 2006 a training course on anti-money laundering banking supervision, sponsored by the IMF, took place in Maputo.

Similar events are expected to take place in the near future.

Conclusions

The findings made in the course of preparing this chapter lead to certain conclusions and recommendations.

- Corruption is the main money laundering predicate offence since it is through corruption that many other predicate offences remain unpunished.

In fact, the corruption of criminal investigators, prosecutors and magistrates undermines any political efforts or legal measures to punish and discourage such criminal offences. The government's 2005 Report on Corruption in the Public Sector confirms this fact.

- Other significant predicate offences in Mozambique include drug trafficking, tax evasion, car theft, trafficking in human beings and homicide.
- At this stage the anti-money laundering framework in Mozambique can be considered as satisfactory in terms of the criminalisation of money laundering, and the imposition of preventive obligations such as due diligence, suspicious transaction reporting, non-compliance sanctioning and training.
- In line with the legal framework, banking institutions are substantially complying with anti-money laundering prevention mechanisms and obligations imposed on them.
- There is still no evidence of other regulatory bodies undertaking inspections aimed at anti-money laundering compliance. Lack of awareness and training appear to be the main constraints.
- The establishment of an FIU may be a crucial factor for the success of the money laundering investigative infrastructure in Mozambique.
- Law enforcement is still relatively weak. The efforts of financial institutions, particularly banks, in reporting suspicious transactions have not been followed by prosecutions up to now. Corruption and the lack of training of law enforcers are the two main reasons for this weakness.
- A strong and adequate response by law enforcement agencies in preventing money laundering in Mozambique depends on the government's commitment to combat corruption at all levels and promote adequate training for law enforcement agencies.

Notes

- 1 See <www.voanews.com/portuguese/2006-10-25-voa7.cfm>.
- 2 For a more detailed account of these factors see <www.usaid.gov/mz/anti_corruption_po.htm>.
- 3 *Jornal Zambeze*, 201, 27 July 2006.
- 4 The minimum salary is now equivalent to US\$40.00.