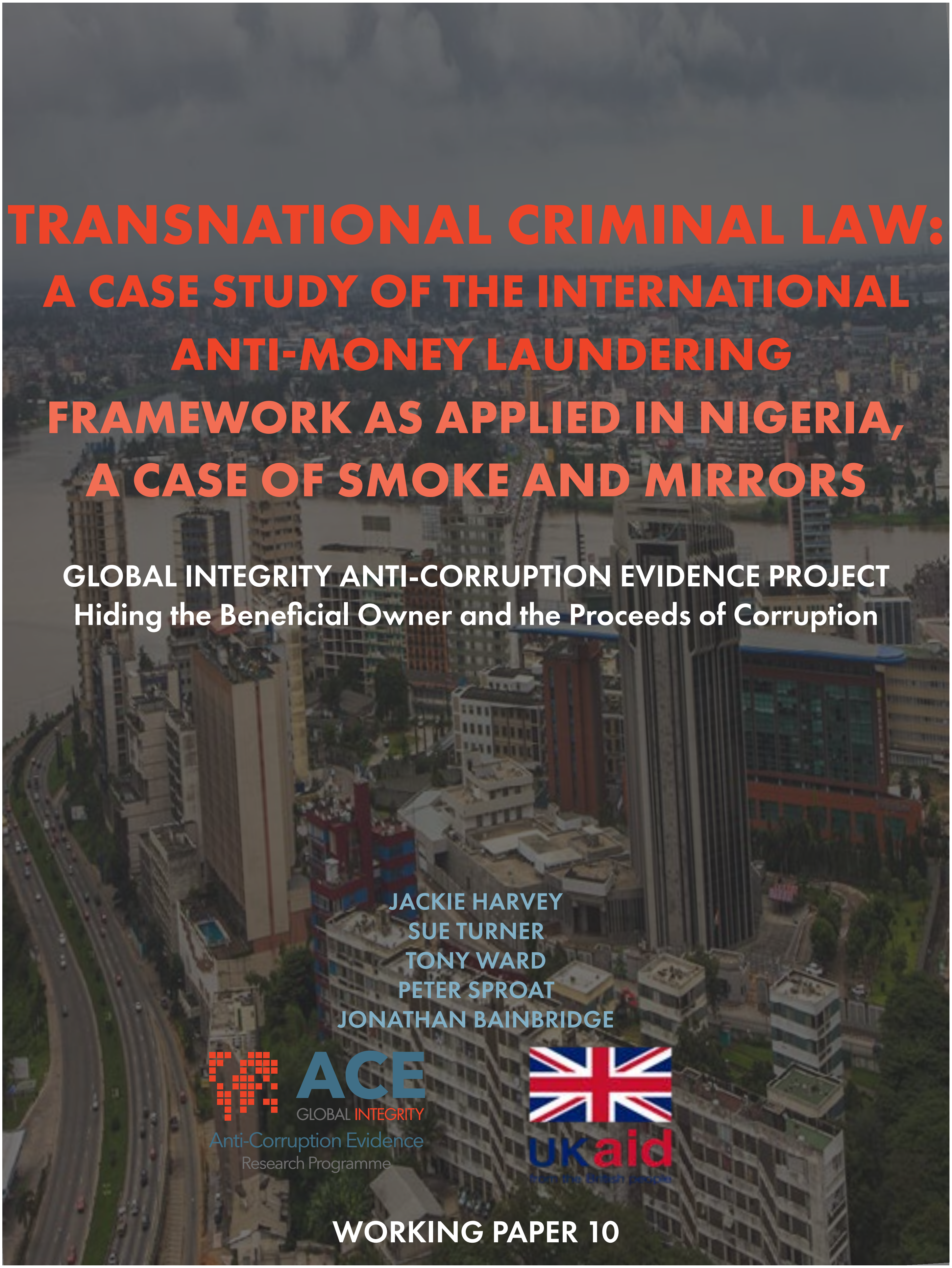

TRANSNATIONAL CRIMINAL LAW: A CASE STUDY OF THE INTERNATIONAL ANTI-MONEY LAUNDERING FRAMEWORK AS APPLIED IN NIGERIA, A CASE OF SMOKE AND MIRRORS

GLOBAL INTEGRITY ANTI-CORRUPTION EVIDENCE PROJECT
Hiding the Beneficial Owner and the Proceeds of Corruption

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WORKING PAPER 10

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[Note: Nigeria faced a recent review of its compliance with the international AML framework in its fourth-round mutual evaluation during September 2019 and currently awaits the publication of the mutual evaluation report (MER) from GIABA. The MER has been delayed as a consequence of the Covid-19 pandemic. Data from the MER will further

INTRODUCTION

This paper is based on a case study of the Anti-Money Laundering (AML) framework as applied in Nigeria and has arisen from a cross-disciplinary (comprising of a team of academics and practitioners) funded research project that considers beneficial ownership as part of the global fight against corruption and money laundering (the AC Project). The AC Project is focused on Nigeria, a country that whilst described as the "powerhouse" of West Africa (MER, 2008:9), is also evaluated as weak for transparency and accountability by Africa Integrity Indicators (https://www.africaintegrityindicators.org/data)[1]. The AC Project pays particular attention to the Financial Action Task Force (FATF) Recommendations, 24, 25 dealing with transparency and beneficial ownership of legal persons and arrangements, and 38 covering Mutual Legal Assistance, asset freezing and confiscation. In addition, countries are required to maintain and share accurate and up to date information regarding the legal and beneficial ownership of companies and trusts. This part of the AML framework forms a focus of our case study.

Our case study begins by locating the international AML framework promulgated by the FATF within the broader context of transnational criminal law. Within this overarching context, we use a visual timeline to illustrate the development of the AML framework within Nigeria. This timeline enables us to illustrate the complex and crowded domestic legislative landscape that has emerged in response to external recommendations, reports, evaluations and judgments from FATF and related bodies, or FATF-Style Regional Bodies (FSRBs), in our case, the Inter-Governmental Action Group against Money Laundering in West Africa (GIABA)[2]. We then proceed to contrast the apparent normative "success" of FATF as demonstrated by the timeline with evidence of the operational "success" of the Nigerian AML framework uncovered by the AC Project, in particular with regard to corruption and beneficial ownership.

"Success" remains an elusive concept, which may be viewed from many angles, and this prompts challenging questions about: the efficacy of the international AML framework; the role of the FATF; the nature of the "law" being propagated; the techniques employed by the FATF; and the potential impact of their decision-making and actions on those falling within their reach. We argue that the Nigerian AML framework forms part of an elaborate game of smoke and mirrors. This may not be deliberate obfuscation but rather results from the cumulative impact of autonomous actions of poorly resourced agencies. They give the appearance of compliance while disguising an opaque and complex legal and regulatory environment in which agencies compete for scarce resources and undermine each other's efforts, preferring not to share information in case they expose their own inefficiencies.

TRANSNATIONAL CRIMINAL LAW AND THE FINANCIAL ACTION TASK FORCE

Halliday, Levi and Reuter (2020: 51) argue that among transnational legal orders (TLOs), the AML regime is 'one of the most comprehensive, far-reaching, most deeply penetrating, and most punitive'. They suggest that it may be 'one instance of a class of TLOs not hitherto explored or well understood. Those singular properties may in fact be shared substantially by other TLOs directed at crime' (*ibid*: 80). The latter comment ignores the fact that TLOs directed at crime are the subject of a considerable body of scholarship under the description of 'Transnational criminal law (TCL)'. Neil Boister, who pioneered the study of TCL, defines it as involving 'the indirect suppression by international law through domestic penal law of criminal activities that have (i) actual or (ii) potential transboundary effects or (iii) transboundary moral impacts' (Boister 2015: 9-10). Although this definition refers only to *penal* law, Boister (2018) has accepted that it may be appropriate to include within the scope of TCL all legal measures aimed at suppressing transnational crime and purporting to comply with the relevant conventions. Particularly in the case of money-laundering, it would be arbitrary to distinguish between those banking regulations, asset recovery provisions, *etc* that were technically part of penal, civil or administrative law.

According to Boister (2018: 32), TCL constitutes 'a system of laws', but it is not 'a coherent legal order with a hierarchy of rules and an ultimate arbiter of the meaning of those rules'. In these respects it is unlike, for example, EU law, which clearly does comprise a hierarchical system of rules including a series of money laundering directives (EUR-Lex 2015), that respond to updates in the FATF Recommendations and are to be implemented by member states through domestic legislation. There is no global equivalent to the EU Directive: no detailed, legally binding code subject to adjudication by a court or other authoritative interpreter. This 'adjudication gap' appears to be the most distinctive feature which different forms of TCL have in common. Unlike many other TLOs discussed by Halliday and Shafer and other scholars using their framework, TCL derives its legal authority from formal instruments of international law. In the case of money laundering, Article 7(3) of the UNTOC Convention calls upon state parties 'to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering.' An 'Interpretive Note' to the Convention states that 'these words were understood' during negotiations to refer to FATF Recommendations as well as a number of regional bodies including the EU. UN Security Council Resolution 167 of 2005 also calls on states to follow FATF Recommendations (Boister 2018: 183). Unlike EU law or international criminal law, however, TCL lacks a formal, authoritative system of dispute resolution and legal interpretation. In this respect, the anti-money laundering legal order does resemble other TLOs concerned with crime. But even in comparison with other areas such as human trafficking and drugs control, FATF is remarkable for the way it combines an absence of formal institutionalisation with sweeping quasi-legislative and quasi-adjudicative powers. As Boister remarks, by comparison with other forms of TCL, FATF's technical standards amount to '"soft" transnational criminal law' of a 'remarkably independent and hard-edged' kind (Boister 2015b: 20).

FATF AND COERCIVE POWER

FATF does not even have legal personality, let alone the authority to issue binding directives. Strictly speaking, of course, it does not purport to do so; it merely issues policy recommendations. However, its 40 'Recommendations' are anything but voluntary (van Duyne, Harvey & Gelemerova, 2018). They, instead, allow it to exert coercive power specifically by means of Recommendation 21: "Financial institutions should give special attention to business relationships and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply the FATF Recommendations". This single recommendation exerts extensive control as it provides the justification for its 'lists'. FATF does not impose sanctions for the breach of its recommendations: it merely publishes its 'black list' of 'high-risk jurisdictions' (namely Iran and North Korea) and 'grey list' of countries subject to increased monitoring (FATF 2020a, b). While the 'black list' comes with a call on states to take countermeasures (set out in an Interpretive Note to FATF Recommendation 19: FATF 2012: 81), the 'grey list' merely 'encourages' member states 'to take into account the information presented' in the list 'in their risk analysis' (FATF 2020b). This results, for example, in countries being listed in 'Advisories' issued to the financial sector by the US Treasury.

Given the combination of the FATF's lack of legal standing, its limited membership, and its formidable clout, questions can certainly be raised about its legitimacy:

"The Recommendations are functionally equivalent to a binding transnational criminal law treaty, in that they bring about the domestic criminalisation and enforcement of certain conduct. The absence of State consent [on the part of non-members of FATF] to be subject to the Recommendations represents an issue of legitimacy because this non-binding instrument has significant ramifications at the domestic level (Rose, 2015: 39)"

In response, it might be argued that the majority of non-member states, including Nigeria, have in fact consented to the Recommendations through their membership of FSRBs such as GIABA. All FSRBs have to defer to the FATF's role as 'the only standard-setting body and the guardian and arbiter of the application of its standard' (FATF 2019: 1). In practice, however, governments of states that are not members of FATF may consider that they have little choice but to join their regional FSRB and accept the ready-made body of recommendations.

COMBINING INFRA-LAW AND COUNTER-LAW

Both Isobel Roele (2016) and Halliday (2020) see the FATF as exercising a type of disciplinary power, in Foucault's sense. Roele proposes the term 'disciplinary infra-law', which in strict Foucauldian terms is an oxymoron: for Foucault (1979: 222) 'infra-law' (*infra-droit*) is what disciplinary power, in the prisons, factories, etc., *appears* to be but in fact is not – that is, a 'more meticulous' extension of legal rules to an 'infinitesimal level' of individual conduct. The reality, according to Foucault, is that discipline is a 'counter-law' that *subverts* law's formal equality and constraints on power (*ibid*: 222-3). One of the ways it does this is that rather than make binary judgments of lawful/unlawful, it *grades* conduct according to the degree to which it conforms to the required standard and applies 'essentially corrective' measures to conduct that is deemed defective.(*ibid*: 178-80).

The FATF's exercise of power might best be seen as deploying a *combination* of infra-law and counter-law. The element of infra-law is the specification, in much greater detail than the legal obligations imposed by international law, of the rules that nation-states ought to enforce in their own systems. The assessment of 'technical compliance' with these standards is a rule-based exercise and its outcome is relatively predictable: a state can ensure that it 'ticks the boxes' by enacting laws that conform to the technical standards. The first three rounds of mutual evaluation reports, including all the reports published to date on GIABA's evaluations of Nigeria, followed this model. In the fourth round, however, these technical evaluations are coupled with evaluations of 'effectiveness', which are to be conducted in a 'fundamentally different way'. The FATF's (2013) statement of its methodology uses all its typographic resources to emphasise the counter-legal character this phase of the assessment, '***The Core Issues should <u>not</u> be considered as a checklist of criteria,***' but rather by a 'flexible' application of the assessors' 'judgment and experience' (*ibid*, para 61). In the absence of any clear rules or methodological protocols to control this assessment, this confers great discretion on the assessors without any guarantee that it will be exercised in a consistent manner (van Duyne *et al*, 2018: 247-50).

One thing that is abundantly clear from the fourth-round evaluations to date is that states generally do much better in the ratings for 'technical compliance' than in those for 'effectiveness' (FATF 2020c). Judged by its own imprecise criteria, FATF appears to be failing; but it is characteristic of disciplinary power that it thrives on failure. Disciplinary techniques of surveillance, correction and punishment are persistently 'offered as [their] own remedy...the realization of the corrective project as the only means of overcoming the impossibility of implementing it' – as revealed by the very processes of surveillance and expert judgment on which disciplinary power depends (Foucault, 1979: 268).

At the time of writing (December 2020) the fourth-round evaluation of Nigeria has yet to be published, but we may expect it to follow the pattern of 'success' in ticking the boxes for technical compliance and 'failure' in achieving effectiveness.

Before considering the implementation and operation of the Nigerian AML framework, this section first illustrates how the internal developments of the Nigerian AML framework grow and develop in response to external pressures generated by the FATF regime, influenced by its priorities and recommendations and reinforced formally and continually by mutual evaluations and follow-ups.

THE NIGERIA AML TIMELINE

NIGERIA ANTI-MONEY LAUNDERING TIMELINE:

A Timeline of the Development of the Anti-Money Laundering Framework in Nigeria

- Convention
- Legislation (in force)
- Legislation (no longer in force)
- Agency
- Financial Action Task Force (FATF) / Inter-Governmental Action Group Against Money Laundering in West Africa (IAGAMLWA)

Securities & Exchange Commission (SEC)

1980-2000

1986
State Security Service
Defense Intelligence Agency
National Intelligence Agency

1988
Code of Conduct Bureau (CCB)

1989
National Drugs Law Enforcement Agency Act, 1989

1990
Companies Allied Matters Act 1990 Established Corporate Affairs Commission (CAC)

1991
Bars and Other Financial Institutions 1991

1995
Money Laundering Decree No. 3

1997
National Insurance Commission Act 1997 established National Insurance Commission (NACOM)

2000
Corrupt Practices & Other Related Offences Act 2000 established Independent Corrupt Practices etc. Commission (ICPR)

2000-2015

2002
Economic & Financial Crimes Commission (Establishment) Act 2002 establishes Economic & Financial Crimes Commission (EFCC)

2004
Economic and Financial Crimes Commission (Establishment) Act 2004 established Nigerian Financial Intelligence Limit (NFIL)
Money Laundering (Pohibition) Act 2004

2005
Special Control Limit Against Money Laundering (SCLAL)

2006
Advance Free Fraud and Other Fraud Related Offences Act 2006

2007
Nigeria Extractive Industry Transparency Initiative Act 2007
The Fiscal Responsibility Act 2007
Public Procurement Act 2007
Statistics 2007
Central Bank of Nigeria Act 2007
Federal Inland Revenue Services Act 2007

2008
AML/CT Inter Ministerial Committee (IMC)

2009
AML/CTC Regs issued by CBN

2010
AML/CTC Regs issued by SEC

2011
Assert Fortfeiture Limit
Terrorism (Prevention) Act 2011
Money Laundering (Prohibition) Act 2011

2012
Money Laundering (Prohibition) (Amendment) Act 2012

2013
Terrorism (Prevention) (Amendment) Act 2013
AML/CTF Regs issued by CBN, SEC and NACOM

Federal Ministry of Industry, Trade and Investment (Designation of non-Financial Institutions and other related Matters) Regs 2013

Terrorism Prevention (Freezing of International Terrorist Funds etc.) Regs 2013

2015-2020

2018
Nigerian Financial Intelligence Limit (NFIL) Act 2018

AML/CTF Regs Issues by CBN

2019
AML/CTF Regs Issued by CBN

01/01/1979

1989
Ratification of UN Convention Against Illicit Traffic in Narcotic Drugs & Psychotropic Substances

2001-2003
Ratification of UN Convention against Transactional Organized Crime
FATF designates Nigeria as a non-co-operative jurisdiction
Ratification of UN Convention for the Suppression of the Financing of Terrorism
Ratification of UN Convention against Corruption

2006-2008
FATF removes Nigeria from the list of non-co-operative jurisdictions
Nigeria on-site visit conducted by GIABA
Nigeria Mutual Evaluation Report issues by GIABA

2019-2020
Nigeria on-site visit conducted by GIABA
Nigeria Mutual Evaluation Report to be issues by GIABA

The timeline is a visual representation of the development of the AML framework in Nigeria, including significant national legislation and key agencies alongside international conventions and FATF and GIABA activities. The timeline represents a familiar pattern, with Nigeria's first foray into the anti-money laundering arena being made with the National Drugs Law Enforcement Agency Act of 1989, the same year in which FATF was established and the year Nigeria ratified the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, signalling its commitment to global anti-narcotics efforts. Subsequent significant enactments (the Money Laundering Decree No. 3 of 1995 (the "ML Decree 1995"); the Money Laundering (Prohibition) Acts of 2004 ("MLPA 2004") and 2011 ("MLPA 2011") as amended in 2012, together with the Terrorism (Prevention) Act 2011 ("TPA 2011"); and the Terrorism (Prevention) (Amendment) Act 2013 ("TPA 2013")) appear in response to new, updated FATF Recommendations. This is to be expected, as the Nigerian national legislature sought to meet the updated standards and respond, as required, to new underlying threats identified by FATF and to introduce strategies designed to combat that threat.

The FATF 1st Report (1990) and subsequent iterations of the FATF Recommendations addressed an ever-expanding list of underlying threats, beginning with efforts to combat the international drugs trade, and subsequently responding to the threat of global terrorism, the proliferation of weapons of mass destruction and tax evasion, and now embracing perceived threats to the international financial system from virtual currencies, cyber-crime and human trafficking. The FATF Recommendations require that tools to tackle the perceived underlying threats be increased accordingly, relying on the criminalisation of money laundering and terrorist financing at a national level and expanding over time to require customer due diligence, increasing engagement between the public and private sector and, latterly, identification of beneficial owner to achieve maximum transparency (FATF, 2019c).

In response to such external stimuli, the enactments forming the foundation of the Nigerian anti-money laundering and counter-terrorist framework appear. The ML Decree 1995 criminalises money laundering in respect of drugs and drugs-related crimes, in this case "in fulfilment of the Vienna Convention requirement for national legislation" (Uche, 1998) as recommended by FATF. The Money Laundering Prohibition Act 2003 repeals the ML Decree 1995 and contains basic money laundering offences[3], still based upon the drugs-related predicate offences, and requires the identification of customers by financial institutions, record-keeping by such persons or institutions and, furthermore, reporting of specified transactions[4], but it is the MLPA 2004, in response to the FATF Recommendations of 2003, which expands the predicate offences to "all crimes"[5]. The MLPA 2011 repealed the MLPA 2004, with the aim of addressing its weaknesses, and, in response to a non-compliance assessment from GIABA[6] was amended in 2012 to address deficiencies in relation to customer due diligence measures (Esoimeme, 2017). However, significantly later than the expansion of the mandate of FATF to include terrorist offences, Nigeria enacted the TPA 2011 (amended by the TPA 2013). Prior to the enactment of these specific laws, the Economic and Financial Crimes Commission (Establishment) Act 2004 had criminalised terrorist financing, though its provisions were not deemed to be sufficiently comprehensive to meet the requirements of the FATF (SR1).

PREPARING FOR EVALUATION VISITS

As shown on the timeline, a flurry of relevant enactments appear in the run up to the 2007 on-site visit by GIABA, as the Nigeria anti-money laundering framework takes shape, settling down in the following years. Also in the years leading up to the 2007 mutual evaluation, the agencies which implement the anti-money laundering regime begin to appear: Nigeria's Independent Corrupt Practices and Other Related Offences Commission (ICPC) in 2000; the Economic and Financial Crimes Commission (EFCC) in 2002; the Nigerian Financial Intelligence Unit (NFIU) in 2004; and the Special Control Unit Against Money Laundering (SCUML) in 2005. The EFCC is mandated to enforce all economic and financial crimes laws in Nigeria and is the coordinating agency for the prevention and control of money laundering. Its responsibilities relate to investigating and prosecuting financial crimes, money laundering and confiscation. It is also mandated to collaborate with government bodies both within and outside Nigeria whose functions are wholly or in part analogous with those of the EFCC. The ICPC encompasses enforcement, prevention and educational measures, including investigating and prosecuting allegations of corrupt practices. It focusses on bribery, fraud, concealed financial interests in public contracts, misappropriation and illicit gift-giving. It has the right to access financial information relating to a suspected offence and its mandate could cross over with that of the EFCC [7] where, for example, there was a PEP charged with money laundering. SCUML is statutorily under the Federal Ministry of Industry, Trade and Investment but operationally domiciled within the EFCC who supply the majority of its staff. It is responsible for the collection of intelligence and implementation of AML/CFT measures within the Designated Non-Financial Institutions (DNFIs) Sector in Nigeria. The NFIU now, and when it was operationally part of the EFCC, disseminates intelligence reports to the EFCC and the ICPC. It was established as an independent body through the NFIU Act (2018) in fulfilment of the FATF Recommendation 29 which requires countries to establish a central authority for the receipt and analysis of suspicious transactions (STRs) and dissemination of financial intelligence to law enforcement and other relevant agencies.

Despite these efforts, Nigeria's mutual evaluation report of 2008, which awarded compliance ratings against the forty recommendations and nine special recommendations, rated Nigeria compliant against only two of the criteria, largely compliant against seven, partially compliant against 22 and non-compliant against 18. In sum, the evaluation suggested that while Nigeria had a comprehensive counter-terrorist finance framework it did have one for AML. However despite noting this and several anti-corruption laws, it suggested corruption (particularly grand corruption) was one of the most common predicate offences, and certain pubic officials were immune from prosecution. Unsurprisingly, the report noted the AML legislation was not effectively implemented and suggested further resource was needed generally, and in particular for large and complex cases. More specifically, the report identified a lack of statistics on AML investigations, prosecutions and convictions, and a lack of data / information relating to STRs. It also pointed to deficiencies within, financial institution procedures; weak controls within Designated Non Financial Institutions (DNFIs); and the lack of a company or central register of beneficial ownership.

The 2008 report also contained an action plan for improvement (the "Action Plan"). Over the following years, seven annual follow-up reports were issued by GIABA, evaluating the progress of Nigeria against the recommendations of the mutual evaluation report, focusing in particular on those areas to which a partially compliant or non-compliant rating had been awarded. From 2009 to 2015, resolutions to deficiencies identified by the mutual evaluation reports typically take the form of guidance circulars, training and legislative amendments as Nigeria works towards compliance with FATF standards which, in 2008, focused on technical compliance with the FATF Recommendations at that time[8] which could be demonstrated at least in part by the creation of the previously non-existent national AML framework. Notably in light of our study, the follow-up reports appear to show that concerns regarding beneficial ownership are adequately resolved.

FIRST BLACK LISTING THEN GREY LISTING

The timeline highlights further external interventions in the development of Nigeria's AML apparatus in the form of mutual evaluation inspections (2007 and 2019) and Mutual Evaluation Reports (2008 and 2020) and the FATF designation of Nigeria as a non-co-operative jurisdiction in 2001 until its removal in 2006, the second-last country to be removed from the list, though Nigeria remained subject to monitoring by FATF in relation to its progress until June 2007 (FATF, 2007: 1). Notwithstanding this achievement, 2011 saw the inclusion of Nigeria in a list of countries deemed to have strategic deficiencies in their anti-money laundering and counter-terrorist regimes, though Nigeria until June 2007 (FATF, 2007: 1). Notwithstanding this achievement, 2011 saw the inclusion of Nigeria in a list of countries deemed to have strategic deficiencies in their anti-money laundering and counter-terrorist regimes, though Nigeria had produced an action plan for remedy including a "high-level political commitment to work with the FATF and GIABA to address its strategic AML/CFT deficiencies." FATF acknowledged Nigeria's efforts to "improve" its AML / CFT regime and the enactment of new legislation and called for Nigeria to work on "addressing its deficiencies" by responding to special recommendations (FATF, 2011). In October 2013, FATF's report of high risk and non-cooperative jurisdictions welcomed Nigeria's "significant progress in improving its AML / CTF regime" and recorded that Nigeria had "established the legal and regulatory framework to meet its commitments in its Action Plan regarding the strategic deficiencies that the FATF had identified in February 2010 " and therefore released Nigeria from ongoing monitoring (FATF, 2013, 8).

While Nigeria's anti-money laundering framework has developed at an uneven pace, in more recent years Nigeria has avoided designation as a non-co-operative jurisdiction or a country with strategic deficiencies in its framework. Yet despite having introduced legislation that is acceptable to the FATF, the question as to the effectiveness of the AML regime in practice remains. Or as Uche put it following the first specific AML legislation, the ML Decree 1995: "[d] espite stringent laws, it would be erroneous to expect the volume of the money laundering in the country to take a dive just because a decree has been promulgated. The fight against laundering will be a difficult one for several reasons, both structural and otherwise." It is to this that the paper now turns.

THE CHALLENGES OF EVALUATION

A major requirement for evaluating any country's performance against the FATF criteria is the availability of reliable data and statistics. This was highlighted by the FATF evaluators in 2008, who noted a general "lack of comprehensive statistics" (MEVAL Exec Summary: 7) and pronounced the statistics relating to anti-money laundering and counter-terrorist financing were "contradictory, not easily accessible and sometimes not available" (MEVAL Exec Summary p:15). Unfortunately, there is little sign that the availability of statistics has improved over recent years. We were told that compiling data for the Nigerian National Risk Assessment had been a challenge when it was last completed and that data was difficult to get in the format that was (a) requested; (b) could be used; and (c) was consistent. This was explained to us as arising out of a lack of trust – agencies thought they were being scrutinised and thus did not want to share their information. In criminal statistics, there are at least three separate variables that are reviewed: (a) cases; (b) (legal) persons; and (c) categories of offences, to which the AC Project must add: (d) the amount of money gained or recorded as damage or illegally acquired; and (e) beneficial ownership. These types of statistics are those that would normally contribute to the data examined as part of a mutual evaluation. The data is complex, and it is evident from data accessed that there is little consistency from year to year as to what data is captured and details vary considerably between agencies as to what is recorded. This makes it impossible to compile statistics that evaluate how well the AML system operates in practice.

The AC Project did find recent examples of grand corruption and in Nigeria anti-corruption practitioners suggest that corruption was still widespread. However rather than rely upon anecdotal evidence here we simply note the recent conclusions made by others, such as the World Justice Project's suggestion Nigeria deserved a score of 3.3/10 in its measurement of the absence of corruption in government. The factor considers three forms of corruption: bribery, improper influence by public or private interests, and misappropriation of public funds or other resources. These three forms of corruption were examined with respect to government officers in the executive branch, the judiciary, the military, police, and the legislature. In global terms this ranked Nigeria 109th of 128 countries. (World Justice Project, 2020). In contrast, a qualitative analysis of corruption was provided recently by Bertelsmann Stiftung's in its Country

Report on Nigeria. It suggested that while the large-scale looting of public funds had "decreased" in recent years, corruption was "a major issue" - presumably because it was "endemic" and there was "deep-rooted corruption in all aspects of life" (BTI 2020: 3, 7, 12, 27).

Unsurprisingly, similar analysis of Nigeria's AML regime exist. The Basel AML Index 2019 ranked Nigeria 12th in a list of countries "at risk of money laundering"[9] and the Commission of the European Union included Nigeria on a list of 23 jurisdictions with strategic deficiencies in their 2019 analysis of AML/CTF regimes[10]. More recently, the U.S. State Department which identified Nigeria as a "major money laundering country" in its most recent International Narcotics Control Strategy Report[11].

OPERATIONAL REALITY: EVIDENCE FROM THE AC PROJECT

Notwithstanding the implementation of the AML framework illustrated by the timeline, and meeting the requirements of the follow-up reports over subsequent years, the research undertaken as part of the AC Project reveals the operation of the AML framework in practice faces numerous enduring challenges. These arise as a result of agency overlap, data deficiency, resourcing and communication, and reporting.

THE AML FRAMEWORK IN PRACTICE

AGENCY OVERLAP

The AC Project sought data on, and attempted to engage with, a number of entities involved in the prevention, detection or recovery of assets from corruption. This list included the Nigerian Extractive Industries Transparency Initiative, the Bureau of Public Procurement, the Code of Conduct Bureau, the Nigerian Police Force, the Federal Inland Revenue Service, the Economic and Financial Crime Commission, the Independent Corrupt Practices and Other Related Offences Commission, the Nigerian Financial intelligence Unit, and Special Control Unit Against Money Laundering. In many cases, the agencies are formally mandated to interact with each other and together they constitute a congested and complex environment, producing what the UNODC (2019: 4) recently described as "a considerable risk of functional overlap" in a review of the implementation of the United Nations Convention on Corruption in Nigeria. In detail this country report suggested: "A critical challenge of the Nigerian Anti-corruption agenda is the location of anticorruption mandates in operationally diverse institutions who in their day to day activities have minimal cause to relate to each other. This leads to overlap, duplication of efforts and lack of synergy." (UNODC 2019: 16).

It appears that rather than focusing energies on addressing outstanding resourcing issues the preferred political response to problems within the AML framework was to set up new agencies. Unfortunately, despite the existence of a comprehensive AML framework, the existence of multiple players and agencies can be seen to hamper the efficiency of Nigeria's AML regime in practice, and the politicians' legislative preference for simply creating new agencies and adjusting the legislative framework accordingly is unlikely to significantly improve their performance of Nigeria's AML regime. Indeed, its overall effect is to distract from the various operational deficiencies that exist in the anti-corruption regime. One of the main deficiencies is resourcing, for while staffing data was not available, comments from practitioners in Nigeria indicated that this factor led to an inability to undertake the full range of investigative options . This appeared to be particularly true for SCUML.

DATA DEFICIENCY

On the ground in 2019, the AC Project found widespread data deficiency and a reluctance to share information, which hampers AML and anti-corruption efforts in relation to beneficial ownership. For example, law enforcement informed us that:

"Land Registry data is scarce. Data is updated very slowly or changes in ownership are made but without land registry being informed. Ownership of properties can change several times and the original owner is still recorded on the records. The system in some cases is a cultural method of changing ownership without having to pay the land registration fee, and the legal fees, in other more sinister cases it is to hide the beneficial owner of the property. Sometimes the latter can include paying another to retain the ownership to disguise the beneficial owner".

Another suggested the *biggest problem is a disorganised system with no central database and those databases in existence are not up to date*, while SCUML noted they have no database of beneficial ownership, and their only data is from the legal owners registering the business. In terms of real estate, one representative acknowledged the vulnerability of the sector to laundering:

"[we] do not know about the affairs of the developers such as the numbers of the properties developed or the stock held by them. The organisation cannot even require prior registration with SCUML [there is] apparent lack of understanding over requirements or natural lack of compliance on behalf of Nigerians. Be aware that many of the developers are relatives of high profile politicians so without knowledge of volume of activity we cannot keep track of potential illegal activity".

The police commented that *the problem locally is that nominee directors are hiding the beneficial owners*. Similarly, ICPC are very aware of such activity, citing an example from procurement:

"Individuals ... sometimes set up their own companies and use fictitious names or family names and then they get this company to apply for a tender in the organisation and a bank account is also opened and they are the signatory to the account. So, the beneficial owner is the person who holds the funds and not the person applying for the tender by the company, thereby keeping their distance from the activity".

A bank internal auditor commented that *"it still happens that two salaries still accrue from different sources [they are] retained on payroll of a company due to favouritism and this is still happening"*. The auditor commented that they could see things happening in favour of those institutions but that in their opinion [the banks] did not want to share evidence (in apparent breach of the suspicious activity reporting requirement). The police noted that if they write to agencies such as the Securities Exchange Commission (SEC) or the Corporate Affairs Commission (CAC) for information, they *"never get the actual names only those of the legal and not beneficial owners"*.

Evidence from the AC Project supports the view that, while the institutional framework in Nigeria is "elaborate and extensive" the "lack of cooperation and coherent operations" between agencies inhibits their effectiveness (AU/ECA, no date: 35). Records are frequently out of date, and the same data is inconsistently reported by different agencies. Paper records also hinder data sharing, as is a tendency towards paper-based requests, which involve formal letters addressed to agency heads that are then delegated for response. Enquiries will elicit photocopied documents. One respondent commented that paper files were often "*lost*" on someone's desk, and when a request for information was followed up the location *"will be forgotten"*.

If part of the issue concerns what is to be shared, by whom, and to what end, then some progress may be made by the simple but much-neglected topic of record management, held by whom, in what format, and how accurate or robust (Cain *et al*. 2001).

RESOURCING AND COMMUNICATION

The AC Project identified several resourcing deficiencies which impact the operation of the AML framework by limiting the ability of agencies to undertake their responsibilities. Staffing data was not available from public resources, but comments from those spoken to on the ground in Nigeria indicated the lack of resources led to an inability to undertake the full range of responsibilities, in particular in relation to SCUML. It appears that new agencies may be set up in response to problems within the AML framework rather than focusing energies on addressing outstanding resourcing issues.

The absence of collaboration and coordination, and information sharing, between various agencies is longstanding, structural and cultural in organisational terms. These have diluted agencies' effectiveness in relation to the investigation, prosecution and recovery of the proceeds of corruption. None of the current issues are likely to be amenable to simple legislative fixes. Our timeline shows that much energy has already been invested in legislation.

REPORTING

The AML framework imposes reporting requirements on financial institutions in Nigeria. Reporting requirements are set out with respect to STRs (Suspicious Transaction Reports), CTRs (Currency Transaction Reports) and with special reporting for activity involving PEPs. The 2011 CBN regulations S.5.6 requires financial institutions to have 'appropriate policies, procedures and processes' to ensure that 'STR forms are filed in a timely manner as required by extant law and regulation, are complete and accurate, and that the narrative provides a sufficient description of the activity reported as well as the basis for filing'. The 2013 regulations, Part III, s.9 (1) sets out that financial institutions 'shall identify and file suspicious transaction reports to the NFIU, where funds, assets or property are suspected to have been derived from' a list of 23 predicate offences including corruption, bribery and tax crimes, and 'any other predicate offence' under the Money Laundering (Prohibition) Act, 2011 (as amended) and the Terrorism Prevention Act, 2011 (as amended). S.5.7 of the 2011 regulations sets out the requirements for reporting to the NFIU the Currency Transaction Reports (CTRs) 'for each transaction in cash (deposit, withdrawal, exchange or other payment or transfer)' of and above N5,000,000 (approximately US$13,000) for individuals and of and above N10,000,000 for companies. The regulations further state that 'all types of currency transactions are to be reported, there are no exempt persons'. This provision also enables multiple transactions within a single day to be aggregated. This reporting is irrespective of suspicion; reports are required even if the transaction is '*completely in line with business*' (former bank compliance officer).

It is difficult to obtain current information on the relative number of reports being generated. Data from the NFIU Activity Report (2015) is included in the table below. It may be that compliance with the CTR requirements is more easily achieved as simply hitting a *de minimus* limit will trigger a report. The former requires the bank to identify where funds, assets or property are suspected to have been derived from criminal activity. This is far more subjective and requires knowledge of normal patterns of banking that might be expected by categories of clients, countries involved, *etc*. enabling the flagging, in the first instance, of unusual account activity.

TABLE CTRS/STRS OVER 3 YEARS

REPORT	2013	2014	2015
CTR	7,769,328	4,013,367	3,219,941
STR	3,180	2,180	1,978

While there is a reporting regime in place in which banks monitor account activity its effectiveness is not clear. Reporting requirements placed upon banks result in large numbers of CTRs and PEP transactions being reported, with very few STRs being generated, three banks are responsible for the majority of reports made. Outside of the formal banking sector, the designated non-financial institutions fall under the regulation of a single agency, SCUML which was established to meet FATF Recommendation 28 to monitor, supervise and regulate these groups. SCUML has very limited resources and faces a herculean task of monitoring a diverse and geographically dispersed range of some 22 different regulated sectors. SCUML shared with us the problems they face at an operational level with inadequacy of funding in light of geographic spread of the entities for which they have responsibility. They also seem to have issues with staff turnover and the need to constantly retrain staff to raise awareness of global money laundering trends. While ability to be able to risk assess DFNIs was '*very much work in progress*'. We were told that, in consequence they can only focus on AML awareness raising amongst the self-regulatory organisations.

Data deficiencies are also impacting on attempts to comply with Recommendations in relation to beneficial ownership. In 2016[12], Nigeria committed to implementation of a register of the beneficial ownership of company registrations, however, it has struggled to get the necessary legislation in place and the required Companies and Allied Matters Act (CAMA) was only passed in 2020. It is very likely that its first attempts at register creation will follow those of the NEITI. While the latter is to be applauded for having managed to produce an on-line register. Unfortunately, at present the NEITI register only reveals linked companies but not on who owns what, in other words its focus is on legal ownership rather than on the ultimate natural person owning a company.

One of the major issues from the perspective of law enforcement was that where available, records captured by the registries (land and companies) only contained information on legal ownership; going further to state that '*most of the owners of companies are not the BOs*'. That, very often, land registry records would not be updated[13] either to avoid fees or to deliberately disguise ownership. Currently, to comply with due diligence, banks appoint lawyers to undertake manual searches of the largely paper-based registry records maintained by CAC. The compliance officers noted that companies will supply certified copies of documents to the banks but that these still have to be verified with the CAC. ICPC were also very keen on the assistance that they saw as forthcoming from a registry of BO. For example, they thought a BO register would provide them with greater ability to trace assets. In particular, this would *'help them challenge 'fraudulent resignation' of government officials from companies where the other owners are family members thereby not reducing their influence although this arrangement has been used successfully in the past to help people escape punishment'*.

Our observation here is that information can be open but unless it is accurate, it is of little use. In this regard verification methodologies will be critical particularly where information is to be submitted or maintained through annual confirmation statements. Critical to the usefulness of the BO register will be the scope and reliability of the data. The challenge faced with the register of BO will not so much be around its creation but with the verification of supplied information and with the policing of compliance. The only enforcement tool available to the CAC under CAMA 2020 remains imposition of a fine.

SUCCESS

Beyond the establishment of the comprehensive AML framework, and in the context of the operational reality uncovered by the AC Project, the measurement of the success of Nigeria's anti-money laundering regime, including its operation and effectiveness, becomes complicated and can be viewed from several perspectives. The perspectives of the FATF, Nigeria and external third parties are considered below.

FATF

With its mutual evaluation reports and follow-ups, FATF presents a formal and ongoing judgment of success of AML regime. However, its criteria for assessment have changed periodically as the nature of each of the 40 Recommendations is widened or deepened.

The FATF acknowledges that there are a number of "Low Capacity Countries" which may face particular problems and need specific aid in terms of the "effective prioritisation and implementation of the FATF standards on money laundering and terrorist financing". (FATF 2008). The FATF set out criteria for determining a country to be 'low capacity': (i)Competing priorities for scare government resources; (ii)Severe lack of resources and skilled workforce to implement Government programmes; (iii)Overall weakness in legal institutions; (iv)Dominant informal sector and cash-based economy;(v)Poor documentation and data retention systems; and (vi)Very small financial sector (*ibid.* 4-5) Our research did not set out to test these criteria for Nigeria but our project has produced evidence to support (i); (iii), (iv) and (v). Nigeria's progress in meeting the FATF recommendations should be contextualised against these challenges.

While the existence of the low capacity country designation represents an acknowledgement of the varying capacity of jurisdictions to live up to FATF standards, it does not lead to tailored standards for either implementation or evaluation. While this rigidity seems on the one hand to uphold the widest application of FATF standards, it also undermines the nature of the evaluation, which must, by its nature, be tailored to local culture, customs and realities to be in any way useful, in particular where evaluation looks beneath the surface of the AML framework.

Despite the acknowledged variables, FATF has at least a strategy for measuring success in the form of its mutual evaluations. In Nigeria, as in other countries which are subject to follow-up visits, it is easy to see progress against the annual list of outstanding criteria yet to be ticked off. Each year, progress against these measures is recorded, with some criteria being met and others waiting for assessment in a subsequent year. This strategy is problematic, as it requires effort and resources to be focused on small areas and minutiae from a national perspective, while from the perspective of FATF the overall picture is obscured. The result is that, by marking individual items off a checklist, it is eventually possible to achieve full compliance, or to be commended for "significant progress" as in Nigeria in 2013. But the evidence from the AC Project suggests that there remain significant loopholes and problems, and it is difficult to see how useful an evaluation of the AML framework can be when it is predicated upon data which is unreliable and incomplete.

NIGERIA

The perspective of Nigeria in relation to the "success" of its AML framework is also difficult to fathom. Nigeria is naturally influenced significantly by the oversight of FATF, with energy and resources focused on meeting the criteria imposed. Meeting FATF standards by superficial compliance with its wishes is a straightforward target, as demonstrated by the timeline, but it is neither a complete nor a useful measure of success when operational problems remain and clear flaws in statistical information are present.

EXTERNAL THIRD PARTIES

Finally, there are third party jurisdictions who may or may not wish to enter into business and banking transactions with Nigeria. While they have the comfort of being able to rely on established FATF standards and methods, they also evaluate their own risks, and this can be seen in the existence of locally-designated high-risk jurisdictions which do not necessarily align with the countries blacklisted by FATF.

SMOKE AND MIRRORS

We used an illustrative timeline that represents the establishment of the AML apparatus in Nigeria, to show how the country has able to introduce legislation to meet FATF requirements in order to demonstrate the "success" of the Nigerian AML framework, particularly in advance of its two mutual evaluations (2007 and 2019[14]). The current FATF standards have separated "technical compliance" and "effectiveness" in their evaluations to prevent this type of game-playing and to prevent concealment of ineffectiveness of national measures. The technical compliance elements are undoubtedly easier to measure. Assessment of 'effectiveness' is far more subjective particularly when the measures of 'evidence' such as STRs/SARs, prosecutions, convictions, assets recovered are incomplete, or out of date. In consequence, we argue that much of this has been an elaborate game of smoke and mirrors. It being possible to achieve a relatively positive evaluation outcome because the reviewers operate on a presumption of regularity – compliance with the rules is the norm rather than the exception. Reviewers may, therefore fail to ask the right questions or sufficiently probe data deficiencies and out of date statistics.

Obviously, the immediate aim of the Recommendations is to make money-laundering harder, with the hope that in the long term and this might help to discourage organised criminal activity and, particularly in Nigeria, corruption. Unfortunately, the result in Nigeria, has been to create an opaque and complex regulatory environment in which agencies compete for scarce resource and undermine each other's efforts, preferring not to share information in case they expose their own inefficiencies. Such complexity has hindered this objective. In acknowledgement of the complexity surrounding the global framework and system of mutual evaluations, the FATF is itself considering how successful its approach has been. In a recent blog (ICIJ[15]) David Lewis noted that despite most countries having in place an extensive array of laws and regulations with which to tackle Money Laundering "they are rarely being used effectively, or to the extent that we would expect." He goes on to note last minute tidying up of activity in advance of a mutual evaluation in order to avoid possible 'listing'.

So, is FATF responsible for encouraging game-playing at national level to achieve a successful evaluation, or is FATF in fact part of the same game, recognising the imperfections and problems with the system, which have now become so extensive and central to global anti-money laundering efforts, around which an industry has flourished and policy is growing, that it is compelled to pursue, and must therefore remain convinced not only of its purpose but of its own success?

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[1] Date of access 21/12/20

[2] Membership of FATF currently numbers 39 countries and 9 associate members (http://www.fatf-gafi.org/about/membersandobservers/), of which GIABA (https://www.giaba.org/about-giaba/index_656.html) was established in December 1999 (http://www.fatf-gafi.org/pages/intergovernmentalactiongroupagainstmoneylaunderinginwestafricagiaba.html). Nigeria is one of 16 members of GIABA (The others are the Republic of Benin, Burkina Faso, the Republic of Cape Verde, the Republic of Cote D'Ivoire, the Republic of the Gambia, the Republic of Ghana, Guinea-Bissau, the Republic of Guinea, the Republic of Liberia, the Republic of Mali, the Republic of Niger, Sao Tome and Principe, the Republic of Senegal, the Republic of Sierra Leone, and the Tongolese Republic. See https://www.giaba.org/member-states/index_-1.html), whose remit is to strengthen the capacity of its member states in order to prevent and control money laundering and terrorist financing in the region.

[3] Money Laundering (Prohibition) Act No 7 of 2003, Section 14

[4] Money Laundering (Prohibition) Act No 7 of 2003, Sections 5, 7 and 8

[5] Though note the lengthy gap here, as it is the FATF Recommendations 1996 which require expansion to "serious offences", and by the 2003 iteration, the framework captured both money laundering and terrorist financing in its scope.

[6] The Inter-Governmental Action Group against Money Laundering in West Africa (GIABA) (2012), 'Fourth Follow Up Report: Mutual Evaluation Nigeria', Available at: http://www.giaba.org/media/f/823_4th%20FUR%20Nigeria%20-%20English.pdf (accessed 21/12/20)

[7] SCUML website, accessed 21/12/20

[8] Contained in the FATF Forty Recommendations 2003 (updated as of October 2004) and the FATF Nine Special Recommendations on Terrorist Financing 2001 (updated as of February 2008) (FATF, 2009).

[9] See p 2. The Basel AML Index does not measure the actual amount of money laundering or terrorist financing activity, but rather is designed to assess the risk of such activity International Centre for Asset Recovery. Basel AML Index: 8th edition: A country ranking and review of money laundering and terrorist financing risks around the world. (Basel Institute On Governance 2019) https://www.baselgovernance.org/sites/default/files/2019-10/Basel%20AML%20Index%208%20edition.pdf p2

[10] As part of its staged process the Commission assessed 54 countries and ultimately identified 23 jurisdictions with strategic deficiencies in their anti-money laundering and counter-terrorist financing regimes according to the following criteria from the methodology:
- o Insufficient criminal sanctions in place in case of money laundering or terrorist financing;
- o Insufficient application of customer due diligence requirements by financial institutions or non-financial;
- o intermediaries;
- o Low level of reporting of suspicious transactions by intermediaries;
- o Insufficient powers of competent authorities and low levels of sanctions in case of breaches;
- o Insufficient international cooperation with Member States;
- o Lack of transparency on the real owners of companies and trusts (the beneficial owners)
- o Insufficient implementation of targeted financial sanctions based on United Nations resolutions.

For more details see European Commission Press Release Anti-money laundering: Q & A on the EU list of high-risk third countries 13/02/19 https://ec.europa.eu/commission/presscorner/detail/en/MEMO_19_782 accessed 30/04/20. The Council of the European Union objected to this in early march and the Commission's work is being reconsidered. See Item Note from general Secretariat of the Council to Permanent Representatives Committee Council. 6964/1/19 REV 1 https://data.consilium.europa.eu/doc/document/ST-6964-2019-REV-1/en/pdf

[11] Mail & Guardian, 'Fat cats are rolling money in Malawi', 13 January 2004.
< https://mg.co.za/article/2004-01-13-fat-cats-are-rolling-in-money-malawi/?amp >
(accessed in January 2021).

[12] ACB Standing Orders require delivery of a prosecution docket to the DPP, if a prima facie case is believed to have been made out. This can be a long way short of evidence required to prove a case at trial.

[13] Also see 'Digitisation Imperatives for Nigerian Real Estate Registries', April 5, 2020 available at https://www.lexology.com/library/detail.aspx?g=50ff73a7-63c3-498a-a74a-df215cc3528d.

[14] We anticipate that the emphasis of the 2019 evaluation is likely to report on: data and statistics; controls within DNFIs; transparency; beneficial ownership; and FIU co-operation.

[15] Everyone is doing badly', anti-money laundering czar warns, 11th May,2020 https://www.icij.org/investigations/panama-papers/everyone-is-doing-badly-anti-money-laundering-czar-warns/ Accessed 21st May, 2020.