

2010

The Financial Action Task Force and Global Administrative Law

James T. Gathii

Loyola University Chicago, School of Law, jgathii@luc.edu

Follow this and additional works at: <http://lawcommons.luc.edu/facpubs>



Part of the [Administrative Law Commons](#), and the [International Law Commons](#)

Recommended Citation

James T. Gathii, The Financial Action Task Force and Global Administrative Law, *J. Prof. Law* 197 (2010).

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Faculty Publications & Other Works by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

The Financial Action Task Force and Global Administrative Law

James Thuo Gathii*

Introduction

My paper will focus on the lawmaking power of the Financial Accounting Task Force, (“FATF”) as an international organization and how its work is now being consolidated by being incorporated within the G20's framework for global financial reform. FATF reform therefore constitutes an end run around governments and professional societies. Such an end runs around States to implement legal reforms to combat money laundering and terrorism raises several issues that are addressed in this paper.

FATF reforms to combat money laundering and terrorism have raised high level discussions within leading law societies, like the American Bar Association in the U.S. that is providing a push back to the FATF 40+9, as well as the October 2008 Lawyer Guidance. By contrast, such discussions around FATF money laundering and terrorism financing laws are conspicuously absent in developing countries, where FATF reforms are being promoted through well-funded aid programs and training of government officials, almost to the total exclusion of those to whom it applies in the private sector, including those in the real estate industry, the legal profession and accountants. This paper will contrast recent legislation in Kenya implementing the FATF's anti-money laundering standards with the continuing discussion within the American Bar Association and the fact that no State in the European Union has yet commenced even considering similar obligations on lawyers, the real estate industry or other gatekeepers subject to the FATF's anti-money laundering and anti-terrorism financing standards.

* Associate Dean for Research and Scholarship and Governor George E. Pataki Professor of International Commercial Law, Albany Law School.

FATF Background

The FATF is a 35-member organization established by the G7 in 1989 with a view to better addressing anti-money laundering initiatives worldwide. Its mandate was broadened in October 2001 to include “the fight against terrorist financing.”² In October 2008, the FATF’s mandate was widened again to include responses to “proliferation financing and vulnerabilities in new technologies which could destabilize the international financial system.”³ The FATF has issued 40+9 recommendations, 40 with regard to money laundering and 9 with regard to terrorist financing. The FATF has become the leading international standard setter on money laundering and anti-terrorist financing.⁴

The FATF has 33 member States, which set out its mandate,⁵ and it is housed within the Organization for Economic Cooperation and Development. It is not a permanent international institution since its current mandate is due to expire at the end of 2012. It is unlike typical international organizations that have a constituent charter. While it cannot therefore issue legally binding rules, its mandate to combat money laundering is tied to several very powerful international financial institutions like the International Monetary Fund (“IMF”) and the UN Security Council, and it has the backing of powerful governments like the United States, and

² See FATF/GAFI, *About the FATF*, available at http://www.fatf-gafi.org/pages/0,3417,en_32250379_32236836_1_1_1_1_1,00.html.

³ FATF, *Revised Mandate 2008-2012* (Apr. 12, 2008) available at <http://www.fatf-gafi.org/dataoecd/3/32/40433653.pdf>.

⁴ According to the FATF, the FATF “is recognised as the global standard setter on anti-money laundering and counter terrorist financing issues by the United Nations, the International Monetary Fund and the World Bank. For example, United Nations Security Council Resolution 1617 urged the international community to implement the FATF Standards. The endorsement of the FATF Standards by the Security Council is a very helpful factor in getting jurisdictions to effectively implement the Standards, especially for those few United Nations members that are not yet a member of the FATF or an FSRB,” President of FATF, *Briefing to the United Nations Security Council Committee* (New York, Oct. 26, 2009), at http://www.fatf-gafi.org/document/49/0,3343,en_32250379_32236879_43948849_1_1_1_1,00.html [hereinafter “*Briefing to UN Sec. Council*”].

⁵ The FATF is a Ministerial Level Committee.

international organizations like the European Union. As such, what we may call the soft law of the FATF is hardened by its direct incorporation in UN Security Council Resolutions or IMF conditionality.⁶ The links between the FATF and the Security Council are not surprising given that a major role of the FATF is the identification of money laundering and terrorist financing threats.⁷

The FATF therefore works closely with the Counter-Terrorism Committee as well as the 1267 Sanctions Committee of the Security Council, both of which have sweeping authority on counter-terrorism measures in the world today.⁸ To that end, the FATF has issued the IX Special Recommendations on Implementation of UN Resolutions against terrorist financing, which require jurisdictions to:

- Implement the United Nations Terrorist Financing Convention and United Nations Security Council Resolutions 1267 and 1373;
- Criminalize terrorist financing;
- Have systems in place for the freezing and confiscation of terrorist assets;
- Introduce reporting of terrorist financing related transaction;
- Have systems in place for extradition and mutual legal assistance in terrorist financing cases;
- Take measures to prevent the misuse of alternative remittance systems;
- Require banks to send information on the payee with each transfer;
- Ensure that non-profit organizations are not misused; and

⁶ See *supra* note 3 (showing the FATF is conscious of that the mandatory resolutions of the Security Council make the enforcement of its standards more likely than not). See also MARK POLLACK & GREGORY SHAFFER, WHEN COOPERATION FAILS: THE INTERNATIONAL LAW AND POLITICS OF GENETICALLY MODIFIED FOODS (2009) (discussing how soft law norms may become hardened by adoption by international organizations with the ability to enforce them such as the adoption of soft law norms of Codex Alimentarius into the hard law framework of WTO).

⁷ *Revised Mandate 2008-2012, supra* note 2, at 2.

⁸ According to the FATF, “[w]e place great importance on the relationship with the United Nations, in particular with your Committee (“CTC”) and its Executive Directorate (“CTED”), as well as with the 1267 Committee, the 1540 Committee and the Vienna based UNODC,” *Briefing to UN Sec. Council, supra* note 3. The 1267 Sanctions committee was established in 1999 to monitor compliance with sanctions imposed on the then Taliban controlled Afghanistan under Security Council Resolution 1267 of October, 1999. However, the initial flight bans and asset freezes imposed by that resolution to be monitored by the 1267 Sanctions Committee were expanded to include monitoring an arms embargo and asset freezes through Resolution 1333 of 2000. “In January 2002 the Council expanded the Committee’s domain further to permit it to examine states’ compliance with measures targeting the Taliban, Al Qaeda, or their supporters anywhere in the world (Resolution 1455),” Jose E. Alvarez, *International Organizations as Law-Makers*, 174-175 (2005)

- Have measures in place to detect cross border smuggling of cash.⁹

There is also UN Security Council Resolution 1617, which endorses the FATF's 40+9 Recommendations.¹⁰ In addition, a former President of the FATF opined that the FATF was “especially pleased with the United Security Resolution 1617 (2005)...[and that this resolution was] a major step toward effective global implementation of the [FATF's] Recommendations.”¹¹

As noted above, the original reason for the establishment of the FATF was the formulation of legal, financial and law enforcement polices to combat money laundering. This standard-setting role is ongoing as the FATF revises and clarifies these standards to allow for “the right balance between giving the required stability to the FATF standards, whilst allowing for the necessary flexibility to respond to the changing nature of the threats faced.”¹² This ongoing legislative process happens through the FATF interpretive and guidance notes to its 40+9 recommendations.¹³

To complement this standard-setting role, the FATF seeks to ensure effective compliance of its standards. It does so by recommending its anti-money laundering policies and laws to its members and non-members and by generating the “political will to bring about national legislative and regulatory reforms.”¹⁴ In this sense, the FATF sees itself as a policy-making

⁹ *Id.*

¹⁰ Resolution 1617 (S/RES/1617(2005) (29th July 2005) at para. 7 “strongly urges all Member States to implement the comprehensive international standards embodied in the Financial Action Task Force’s (FATF) Forty Recommendations on Money Laundering and the FATF Nine Special Recommendations on Terrorist Financing,” *id.* Some commentators have argued that such endorsement is tantamount to making the standards international law. Such a view is mistaken. See Kenneth S. Blazejewski, *The FATF And Its Institutional Partners: Improving the Effectiveness And Accountability of TransGovernmental Networks*, 22 TEMP. INT’L & COMP. L.J. 59 (2008).

¹¹ Kader Asmal, Foreword, *FATF Annual Report 2005-2006*.

¹² *Revised Mandate 2008-2012*, *supra* note 2, at 2.

¹³ See FATF, The Interpretive Notes to the Special Recommendations (SR) on Terrorist Financing (TF), *available at* http://www.fatf-gafi.org/document/53/0,3343,en_32250379_32236947_34261877_1_1_1_1,00.html

¹⁴ *See About the FATF*, *supra* note 1.

body, which closely monitors the adoption of its standards and assists countries in implementing them. It also conducts reviews through what it calls a mutual evaluation process among its 35 members.¹⁵ For its associate members, which are primarily non-European Third World countries, the FATF has established FATF-Style Regional networks, which serve as platforms for a peer review process.¹⁶ Countries that do not meet FATF standards are designated as non-cooperative countries or territories for failure to adopt anti-money laundering laws or anti-terrorist financing laws or regulations consistent with its recommendations and policies. For example, in 2000, five Caribbean countries were blacklisted as non-cooperative countries.¹⁷

The FATF has established a new review mechanism, dubbed the International Co-operation Review Group (“ICRG”), based on the premise that a global commons approach to implementation of its standards is the more preferable method of seeking individual country compliance. According to the FATF, a global commons approach would ensure that compliance in one country is not undermined by non-compliance in another country.¹⁸ The success rate of adoption of FATF standards stands at only 25% as of its last review in September 2009.¹⁹

FATF Reforms as Global Administrative Law

¹⁵ India is said to be on the cusp of joining the FATF as a member, which would make it the 36th member.

¹⁶ These are the Asia Pacific group on Money Laundering; the Caribbean Financial Task Force; the Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism; the Financial Action Task Force on Money Laundering in South America and the Middle East and North Africa Financial Action Task Force. The FATF also has observer bodies and organizations such as the regional development banks. For more on this, see FATF, *Members and Observers*, available at http://www.fatf-gafi.org/pages/0,3417,en_32250379_32236869_1_1_1_1_1,00.html.

¹⁷ See Jason Ennis, *Cleaning Up the Beaches: The Caribbean Response to the FATF’s Review to Identify Non-Cooperative Countries or Territories*, 8 L. & BUS. REV. OF THE AM. 637 (2002).

¹⁸ *Briefing to UN Sec. Council*, *supra* note 3

¹⁹ According to the FATF “[a]s of early September 2009, 129 jurisdictions have been assessed by the FATF, by an FSRB, by the IMF or by the World Bank. Of these jurisdictions, 30 have sufficiently implemented the United Nations Terrorist Financing Convention and the United Nations Security Council Resolutions 1237 and 1373. 99 jurisdictions have not. Similarly, of the 129 jurisdictions assessed, only 21 had effective systems in place to freeze terrorist assets, 108 jurisdictions had not. The average compliance ratio for all IX Special Recommendations stands at 25%, which is slightly higher than the compliance with the two recommendations I just mentioned that are based on United Nations instruments,” *Briefing to the UN Sec. Council*, *supra* note 3.

A lot of the work of international organizations, (“IOs”), like the FATF, is very analogous to the work conducted by domestic administrative agencies. Thought of as administrative agencies, IOs affect not only States, but also non-State actors, including individuals and businesses. In fact, in the recent past, the study of international organizations has turned to the study of them as lawmakers.²⁰

Here are some ways in which IOs engage in standard-setting that amounts to Global Administrative Law. IOs like the FATF have changed the process by which international law is made – no longer is international law only made through diplomats representing States: now it is made by international civil servants working with relevant domestic agencies. Second, the content of international law has been changed by IOs since law-making now only partly involves tit-for-tat reciprocal concessions—now it also involves the development of standards, often non-binding, but with potential to harden into binding norms. IOs are therefore now making rules of international and domestic law—no longer are States the sole makers of rules of international law as international law has until recently been understood.

The FATF’s recommendations and lawyer guidance are forms of global administrative law. This is because the FATF acts as a domestic standard-setting or administrative agency in a variety of ways. First, it is staffed by groups of experts working with international civil servants and governmental representatives. Second, the standards formulated by IOs do not require domestic implementing legislation as is required for treaties as is for example required under Article II, Section 2, Clause 2, of the U.S. Constitution, even though the output of these International Organizations affects individuals and businesses. As such, IOs have the ability to formulate

²⁰ See, e.g., JOSE ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAWMAKERS (2005).

standards that may eventually become legally binding without requiring domestic incorporation through the procedures used to ratify treaties. This is because experts, rather than diplomats, formulate these standards. While expert driven decision-making does not necessarily imply domestic ratification procedures should be short-circuited, it is now the practice that IO-set standards are not subject to the typical domestic ratification processes to which treaties are subject.

This kind of law-making by IOs like the FATF raises the specter of “agency capture” by special interest groups or particular governments. In the case of the FATF, the overwhelming presence of Western market oriented economies among its 35 members, as well as the exclusion of all but one African country among this core membership, means that the promulgation of the FATF’s agenda primarily, if not exclusively, reflects the priorities and interests of these countries. In essence, the FATF makes rules in an unrepresentative manner to the extent to which those integrally involved in designing the standards are its core 35 members, yet the IMF promotes the standards as universally applicable—to all countries whether they are members or not.²¹ Countries who are associate members of the FATF’s regional networks as well as those that have observer status within the FATF do not have the power to participate in formulating FATF recommendations or standards. Instead, these are handed down to them for their implementation. As such, they have to implement recommendations they had no role in formulating, or no notice of or opportunity to comment on as in modern administrative standard-setting agencies.²² This point is further fortified by virtue of the fact that the experts who participate in formulation of

²¹ IMF, A FACTSHEET: THE IMF AND THE FIGHT AGAINST MONEY LAUNDERING AND THE FINANCING OF TERRORISM (2007).

²² An excellent overview of the meetings of the FATF and the attendees primarily from European and American law societies primarily in European cities is, Kevin L. Shepherd, “Guardians at the Gate: The Gatekeeper Initiative and the Risk-Based Approach for Transactional Lawyers,” 43 Real Property, Trust and Estate Law Journal, 607 (2009) (Of the many FATF meetings at which its recommendations were being discussed, only a 2007 meeting in Berne, had representatives from a sub-Saharan African Country, see id. at note 135)

FATF standards are appointed and paid by these western countries.²³ In addition, these experts are accountable to institutions like the Security Council and the International Monetary Fund, which are dominated by these powerful western States.

The illegitimacy of international institutions like FATF, however, goes well beyond the democratic deficit and the opaque manner in which they operate. The authority of international institutions, and in particular international economic institutions like the World Bank and the International Monetary Fund (“IMF”), raises fundamental questions, not simply from the point of view of the participation of non-western countries in standard formulation, but of the unequal and imbalanced power exercised by the wealthy countries that control the agenda of these institutions. For example, it is arguable that the FATF, like the World Bank and IMF, has become an instrument of Western States to manage and control a vast array of economic and social realities in the overwhelming majority of developing countries,²⁴ which exercise little or no power over the agenda of these institutions.

Notably, while the participation of non-member states would give voice to constituencies that are not currently represented in the decision-making of international institutions, it is also crucial to promote additional mechanisms that would give such poor states control over decisions and policies of international institutions that affect them – such as those of the FATF. It is only by rejecting the inevitability of FATF-type driven law-making that there can be redefinition of the choices made in centers of power that are insensitive to the concerns of those without a voice within them. As FATF recommendations stand now, they are resulting in unequal consequences

²³ See IMF, Technical Assistance on AML/CTF, available at <http://www.imf.org/external/np/leg/amlcft/eng/aml3.htm#capabilities> (noting the IMF’s legal department provides technical assistance for compliance with FATF recommendations)

²⁴ Rajagopal Balakishnan, *From Resistance to Renewal: The Third World, Social Movements and the Expansion of International Institutions*, 41 HARV. INT’L L.J. 541 (2000).

for populations in the west and those outside the west. Those outside the west are being pressured to adopt binding legal rules embedding the FATF's recommendations, while for the most part their western counterparts are getting away with a risk- or standards-based approach to implementing FATF recommendations which come without the possibility of criminal or other penalties. As such, the differential impact of FATF recommendations on the basis of national and other differences must be explored.²⁵ Ultimately, procedural solutions to the problem of international institutional illegitimacy seldom address the formal inequality embedded in the system of weighted voting particularly in international financial institutions that is in turn a crucial linchpin in the crafting of projects of neo-liberal economic reformism.

It is important not to lose sight of the fact that the U.S. and the OECD countries often shift standard-setting from institutions like the WTO to forums where they can impose their preferences in a top-down fashion without giving less powerful countries the opportunity to participate in the formulation of such preferences. For example, the U.S. has recently shifted more towards bilateral and regional trade agreements as these give it more leverage, unlike at the WTO where developing countries have earnestly begun acting in concert against the policies of the most powerful countries. Another example is the shift of the Clinton Administration and OCED Countries away from the IMF and the WTO to an umbrella organization of the U.S. and the OCED, known as the Financial Stability Forum, to address what they referred to as predatory

²⁵ Para 108 of the lawyer guidance for examples singles out countries subject to sanctions and embargoes, those lacking in appropriate laws or identified by credible sources as being locations from which funds to support terrorist organizations or that have significant levels of corruption as representing a higher risk to AML/TF, see FATF, *RBA Guidance for Legal Professionals* at 5 (Oct. 23, 2008), available at http://www.google.com/url?sa=t&source=web&ct=res&cd=2&ved=0CBcQFjAB&url=http%3A%2F%2Fwww.fatf-gafi.org%2Fdataoecd%2F5%2F58%2F41584211.pdf&ei=VFbjS4aSLYWclgfct_3DAg&usq=AFOjCNERaKEAjlNA77MOYjo52h2UUq7A&sig2=XMTLG6RtDbX_1-qhdBI7fA Based on this, K Kevin L. Shepherd, "Guardians at the Gate: The Gatekeeper Initiative and the Risk-Based Approach for Transactional Lawyers," 43 *Real Property, Trust and Estate Law Journal*, 607, 652 (2009) concludes that an acquisition transaction with a business located in Zimbabwe would pose a "higher risk based on the geographical location of the business being acquired," id.

tax competition from tax havens created by small island states. Such alternative forums were consciously selected because they removed policy-making from the political process of global negotiations.²⁶ The FATF is unsurprisingly housed within the OECD. Without the kind of scrutiny that accompanies WTO initiatives, it then becomes possible to shield global lawmaking from the kind of accountability mechanisms that the global administrative law project proposes. Unsurprisingly, some developing countries have sought to move the monitoring of FATF recommendations from the FATF to the IMF. After all, these countries have a voice, albeit an extremely limited one, at the IMF as opposed to the FATF, where they have none. This is a little surprising because developing countries have been critical of the neo-liberal economic reforms of the IMF. In essence, by seeking to have reviews conducted through the IMF rather than through the much less transparent FATF process, developing countries were ineluctably helping to consolidate the very economic reform programs that they have consistently found objectionable. For these countries, the threat of being declared non-compliant by the FATF was enough to persuade them to prefer an IMF review.²⁷

In effect, AML and CFT as a priority agenda of the G20 may very well be a reflection of what Jose Alvarez has referred to hegemonic international law²⁸ – a set of rules that reflects the

²⁶ Dr. Jason Sharman, *Small States and Weapons of the Weak in the Global Governance of Tax and Financial Services*, Australasian Political Studies Association Conference, University of Tasmania, Hobart (2003), available at <http://www.utas.edu.au/government/APSA/JSharmanfinal.pdf>.

²⁷ See Statement of Pedro Malan, Minister of Finance of Brazil to the Third Meeting of the International Monetary and Finance Committee (April, 29, 2001) available at <http://www.imf.org/external/spring/2002/imfc/stm/eng/bra.htm> (arguing that Brazil “will continue to give strong support to the IMF's involvement in the fight against money-laundering and the financing of terrorism, in a manner that is consistent with the Fund's mandate and expertise and that respects the cooperative nature of our institution. We are pleased with the progress achieved so far in developing a methodology for assessing countries' efforts in combating money laundering and the financing of terrorism, and hope that it will lead to the approval of a ROSC in this area that is applied in a uniform, voluntary and cooperative way,” *id.*).

²⁸ Jose Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873, (2003). See also JAMES GATHII, *WAR, COMMERCE, AND INTERNATIONAL LAW*, 2010.

interests of the predominant players in the international financial system. In fact, AML and CFT have already been incorporated into the reform agenda of the international financial system as evidenced by the endorsement of the work of the FATF by the G20 at its September 2009 Pittsburgh meeting.²⁹

The attention given to the ongoing work of the FATF, as well as calls for the tightening of AML and CFT by the G20 in Pittsburgh does not fit well with the goal of alleviating poverty in poor countries, which was a primary purpose of the G20 meeting in Pittsburgh.³⁰

Arguably, the focus on measures such as AML and CFT takes away from addressing fundamental changes being proposed to regulate the international financial system and other ancillary reforms to address some of the root causes of the crisis, such as having taxes on cross-border financial flows to control speculative capital flows or financial reforms aimed at addressing the plight of poor economies that are bearing heavy costs of the financial crisis around issues of basic needs such as food.³¹

The Impact of FATF Recommendations on Financial Markets in Sub-Saharan Africa

Financial markets are perhaps the most open in terms of flow across national boundaries. Unlike trade in goods and services, for example, cross-border financial transactions have not typically been subject to national controls at the border. In fact, huge cross-border transactions happen

²⁹ See Progress Report of the Actions to Promote Financial Regulatory Reform Issued by the U.S. Chair of the Pittsburgh G-20 Summit- 25th September, 2010.(Particularly Item No. 40) *available at* <http://www.pittsburghsummit.gov/documents/organization/129866.pdf>

³⁰ On this see, Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System (21 September 2009) *available at* http://www.un.org/ga/econcrisissummit/docs/FinalReport_CoE.pdf

³¹ Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 EUR. J. INT'L L. 435, 439 (1997) (arguing that expert driven law making has a “narrow . . . vision of the role of the international community . . . the plight of a billion people or so living in poverty seems to become a domestic problem, or at least to have disappeared from the international agenda.”).

every day without any tax being levied on them. FATF recommendations are changing this norm of regulatory freedom for flow of international finance. Although the FATF has argued it does not intend to interfere with the flow of finance across national boundaries, the kind of laws being currently adopted in developing countries, particularly in Africa suggest otherwise.

The work of the FATF is changing the landscape in a variety of ways and Kenya's new law, The Proceeds of Crime and Anti-Money Laundering Act of 2009,³² which came into force on 1st of January, 2010 exemplifies this.

This new law

introduces a powerful new domestic agency, the Financial Reporting Center, whose primary obligation is assisting in the "identification of the proceeds of crime and the combating of money laundering."³³ As a result of public and parliamentary opposition, the new law excluded references to terrorism financing.³⁴

It also introduces financial surveillance and reporting³⁵ obligations for attorneys, accountants, real estate agents, dealers in precious metals, and casinos.³⁶ The new law provides that all cash transactions over US \$10,000 have to be reported to the Financial Reporting Center,³⁷ with no obligation to tip-off the client about the report. The new law defines the surveillance and

³² No. 9 (2009), KENYA GAZETTE SUPPLEMENT No. 87, *available at* http://www.kenyalaw.org/kenyalaw/klr_app/frames.php.

³³ § 24(1).

³⁴ Initial drafts of the new law were argued to have reintroduced an anti-terrorism bill that Parliament had previously rejected since they were perceived as introducing an anti-terrorism legislation that parliament had previously rejected.

³⁵ § 45(2) makes it an offence to fail to report suspicious transactions. Reports are to be filed with the Financial Reporting Center, a new institution created under the Proceeds of Crime and Anti-Money Laundering Act of 2009.

³⁶ *See* § 2 (defining the designated non-financial business or professionals).

³⁷ Art. 45(3).

reporting obligations as follows: “[a] reporting institution shall monitor on an ongoing basis all complex, unusual, suspicious, large or other transaction as may be specified in the regulations, whether completed or not, and shall pay attention to all unusual patterns of transactions, to insignificant but periodic patterns of transactions that have no apparent economic or lawful purpose.”³⁸ So, in Kenya, like we are increasingly seeing in developing countries, implementation of the FATF’s AML & CFT recommendations is taking a rules-based approach since violations come with severe penalties.³⁹ By contrast, in jurisdictions like the United States, the lawyer guidance is taking a risk-based approach with no potential legal penalties for violation. This differs substantially from the approach of the Eastern and Southern African Anti-Money Laundering Group, which in August 2009 entered into a Memorandum of Understanding that adopted lock, stock and barrel all FATF recommendations. This MOU could be construed as a treaty commitment to which of course these countries would be bound.

Kenya’s new law also potentially violates human rights – for example, the offence for possessing proceeds of a crime is made retroactive.⁴⁰ In addition, its extensive forfeiture or confiscation provisions are arguably in tension with the right to private property. Furthermore, the risk-based approach places importance on certain places in the world where transactions originate or are destined to. This raises the specter of profiling people based on geographical location or nationality.

³⁸ Art. 45(1).

³⁹ See FATF, *RBA Guidance for Legal Professionals* at 5 (Oct. 23, 2008), available at http://www.google.com/url?sa=t&source=web&ct=res&cd=2&ved=0CBcQFjAB&url=http%3A%2F%2Fwww.fatf-gafi.org%2Fdataoecd%2F5%2F58%2F41584211.pdf&ei=VFbjS4aSLYWclgct_3DAg&usg=AFQjCNERaKEAjvI NA77MOYjo52h2UUq7A&sig2=XMTLG6RtDbX_1-qhdBI7fA. (at para 7 noting that “For some countries, applying a rules-based system might be more appropriate,” id)

⁴⁰ See § 2 (defining “proceeds of crime”).

The new law also potentially violates attorney-client privilege. Section 18 provides that the provisions of the new law “override any obligation as to secrecy or other restriction on disclosure of information imposed by any other law or otherwise.”⁴¹ While the new law seeks to preserve attorney-client privilege in Section 19(1), it nevertheless authorizes warrantless inspections on the premises of reporting institutions, such as law firms, of their documents as may be ordered by the Director of the Financial Reporting Centre.⁴² In addition, the new law obliges lawyers and other professionals who have reporting obligations to give “all reasonable assistance” in connection with an inspection ordered by the Financial Reporting Centre;⁴³ comply with warrantless requests to appear before a Centre inspector⁴⁴ as well as to produce books or documents.⁴⁵ Failure to assist with inspections is an offence that is punishable by imprisonment for up to three years or fines of up to US \$15,000 or both.⁴⁶ The new law also eviscerates bank secrecy laws in Kenya since the warrantless inspections the Centre is empowered to undertake are not required to be narrowly tailored.

In addition, the scope of who is required to report is especially broad—it may, for example, catch an airline that sold a ticket to a passenger with links to groups designated or suspected to have links to suspects in criminal networks that airlines may have no way of knowing in advance. To further illustrate, section 46(1) requires reporting institutions to take reasonable measures to satisfy themselves:

⁴¹ § 18(1).

⁴² Art. 25(C). Such inspections are only required to be in writing. During an inspection, the inspectors are empowered to “ask any questions relating to such documents and take copies of the whole or any part of such documents.”

⁴³ Art. 36(1).

⁴⁴ Art. 36(1)(ii). Article 38((1) empowers the Financial Reporting Centre with power to seek a warrant to “enter any premises belonging to or in the possession or control of a reporting institution or any officer or employee thereof, and to search the premises and remove any document, material or other thing therein for the purposes of the Centre.”

⁴⁵ Art. 36(1)(iii).

⁴⁶ Art. 36(3)(a). Organizations such as law firms can be fined up to five times as much, *see* Art. 36(3)(a).

as to the true identity of any applicant seeking to enter a business relationship with it or to carry out a transaction or a series of transactions with it, by requiring the applicant to produce an official record reasonably capable of establishing the true identity of the applicant such as (a) in the case of an individual (i) a birth certificate; (ii) a national identity card; (iii) a driver's license; (iv) a passport; (v) any other official means of identification as may be prescribed.⁴⁷

In short, the new law introduces the following rules for Financial Institutions and Designated Non-Financial Business and Professions as well as Traders of all sorts to adopt customer identification programs, conduct customer due diligence, increase the scope of and quality of record keeping, and file suspicious activity reports or suspicious transaction reports. Notably, these requirements are already required under Section 352 of the United States Patriot Act, which goes further to require those subject to it to help in the fight against terrorism by adopting: (i) internal policies, procedures, and controls (ii) designation of AML compliance officers; (iii) ongoing employee training; (iv) independent audit functions to test AML program.⁴⁸ This is bound to be very expensive for the kind of enterprises found in countries like Kenya.

These kind of obligations: client due diligence; record keeping and the establishment of beneficial ownership are going to increase the cost of doing business and have been of concern to the American Bar Association given the costs they would impose on attorneys.⁴⁹

⁴⁷ Further, section 47 requires reporting institutions to establish and maintain not only records of all their transactions Section 47(a); but also the “name, physical and postal address and occupation (or where appropriate business or principal activity) of each person – (i) conducting the transaction section 47(3)(i); or (ii) on whose behalf the transaction is being conducted,” § 47(3)(a)(ii).

⁴⁸ See Section 352(a) of the USA Patriot Act, Act of 2001 (Public Law 107-56) amending Section 5318(h) of the Bank Secrecy Act to require every financial institution to establish anti-money laundering programs.

⁴⁹ See ABA Task Force on Gatekeeper Regulations and the Legal Profession: Comments on Gatekeeper Provisions of FATF Consultation Paper, April 3, 2003 (arguing that these due diligence requirements ‘appear extremely broad’ and their effect would be to “prevent the ability of much of the public to consult lawyers on financial transactions, including AML, because both clients and lawyers will fear potential adverse consequences for seeking or receiving advice on the surrounding financial transactions, including AML requirements. The combination of terms such as ‘suspicious,’ ‘reasonable grounds’, and ‘attempted’ create an unworkable degree of uncertainty for the legal profession and clients, particularly in light of criminal sanctions for, infractions and thereby will have an unacceptable ‘chilling effect’ on the attorney-client relationship,” id. at pp. 5-6 (available at <http://www.abanet.org/crimjust/taskforce/actions/gatekeeper.pdf>) Note also, ABA, Task Force on Gatekeeper

These developments are likely to be reproduced in many countries since they reflect the standard-setting goals of the FATF. The FATF has been very effective in developing countries like Kenya because its programs are tied to bilateral assistance programs of the United States Agency for International Development (USAID). Many developing countries welcome the kind of technical and capacity-building assistance that is promoted by bilateral aid agencies like USAID. Often the assistance comes through the designation or appointment of experts paid for on a temporary or permanent basis in target countries who work with designated staff from the government in drafting and pushing through legislative and policy changes. Governments without the capacity to engage in the merits and demerits of a broad array of such programs are only too happy to play to the tune of donors. Government officers who work on such programs have vested interests to support these programs since they come with perks, such as conference and travel per diems, which departmental budgets allocated by the government do not have.

As a political matter, the capacity-building and technical assistance programs do not raise the impression of imposition, as do programs sponsored by international financial institutions like the IMF and World Bank.

Conclusions

Regulation and the Profession: Report to the House of Delegates, (Recommendation), Approved by the ABA House of Delegates in Deb. 2003 at Resolution 1 stating that the ABA “opposes any law or regulation that, while taking action to combat money laundering or terrorist financing, would compel lawyers to disclose confidential information to government officials or otherwise compromise the lawyer-client relationship or the independence of the bar,” id. available at <http://www.abanet.org/crimjust/taskforce/actions.html>

The FATF is gaining visibility as a standard-setting international organization. Its mandate is now formally incorporated in the agenda of the G20 as well as in the work of the IMF and the Security Council.

In the meantime, AML and CFT, particularly in poor countries, will be implemented in an ad hoc and lackluster manner given that poor countries like Kenya have themselves not been at the forefront of crafting the FATF's recommendations. The implementation of Kenya's new Anti-Money Laundering Law will depend on how much pressure the FATF and the countries and organizations that back it—like the IMF and the Security Council—are willing to put brakes on carrots Kenya receives from them or how ready they are to wield the stick over Kenya.

There will continue to be challenges to the FATF's expert-driven standard-setting where the standards are in tension with human rights standards for example. We have already seen such challenges to FATF-type standards in the British Court of Appeals⁵⁰ as well as in the European Court of Human Rights ("ECHR").⁵¹ This, however, is only a beginning—more is to come. Of course, professional groups like the ABA in conjunction with other national bar associations will not relent, hoping to give lawyers as much freedom from FATF- type restrictions on their work.

⁵⁰ Her Majesty's Treasury v Mohammed Jabar Ahmed and Others (2010) UKSC 2 & (2010) UKSC 5.

⁵¹ n Judgment of the European Court of Justice in Joined Cases C-402/05 P and C-415/05/P, Yassin Abdullah Kadi & Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities (September 3, 2008) found it had jurisdiction to review the lawfulness of a measure giving effect to a UN Security Council Resolution. The ECJ held that the European Union's regulation implementing the Security Council's 1267 Sanctions Committee authority to freeze the funds and other assets of listed persons infringed the rights to be heard and to effective judicial review since they involved no procedure for communicating evidence justifying the listing of the Appellants. The ECJ also held that the freezing of the Appellants assets was an unjustified restriction on their property. *But see* Swiss Federal Supreme Court case in *Nada v State Secretariat for Economic Affairs*, Bundesgericht [BGer] [Federal Court], November 14, 2007, 133 Entscheidungen des Schweizerischen Bundesgerichts [BGE] II 450-67 (Switzerland) (coming to the conclusion that Swiss Federal Council's decision pursuant to a decree to add Mr. Nada to be listed pursuant to the Security Council's 1267 Committee mandate which resulted in the freezing of his assets and banned him from traveling was required by Security Council decisions and that the guarantees Mr. Nada claimed were violated did not conflict with jus cogens norms which would have given the Court jurisdiction to annul the Swiss decree).

AML will continue to face challenges, as those interested in ML will seek new ways of disguising their ill-gotten gains—such as through Trade Based Money Laundering, physical movement of cash across national boundaries as well as purchases of real estate (e.g., the purchases of real estate with piracy ransom in Kenya that has led to a huge rise in real estate values there) and so on. The work of the FATF will therefore be a continuous process of catching up with crime.

On another note, the FATF's recommendations, such as those on mutual legal assistance and the adoption of common standards, whether rule- or risk-based are quickly eroding the traditional problems of conflicts of law and jurisdictions. That is a very interesting development given that conflicts in other areas reflect lack of uniform standards and often the projection of the norms of western states on non-western states. In short, IOs like the FATF are increasingly becoming the platform for projecting western norms less visibly than if this were done through IMF or World Bank conditionality.